

UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

CALEB BARNETT, et al

\*

*Plaintiffs-Appellees*

\*

vs

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Civil Nos: 23-1793, 23-1825,  
23-1826, 23-1827, 23-1828

KWAME RAOUL, et al.,

\*

*Defendants-Appellants*

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**Motion for Reconsideration of the Denial of Leave to File an Amicus Brief**

John Cutonilli files this motion for reconsideration of the denial of leave to file an amicus curiae brief in Support of Plaintiffs-Appellees in accordance with Federal Rules of Appellate Procedures 27. On 23 June the Court denied Cutonilli's motion for leave to file an amicus brief without explanation. See Doc 76.

Cutonilli requests that the Court reevaluate its denial order as this order does not follow established 7<sup>th</sup> circuit precedent on allowing amicus briefs. According to its *Practitioner's Handbook for Appeals* "the court looks at whether the brief will assist the judges by presenting ideas, arguments, theories, insights, facts, or data that are not found in the briefs of the parties." It further cites *Voices for Choices v.*

*Illinois Bell Telephone Co.*, 339 F.3d 542, 544-45 (7th Cir. 2003) (Posner, J., in chambers) as the relevant precedent on the issue. Both sources reiterate that the policy of the court is to not grant rote permission to file an amicus brief. The Court does grant permission in three circumstances; (1) a party is not adequately represented; or (2) when the would-be amicus has a direct interest in another case, and the case in which he seeks permission to file an amicus curiae brief may, by operation of stare decisis or res judicata, materially affect that interest; or (3) when the amicus has a unique perspective, or information, that can assist the court of appeals beyond what the parties are able to do. See also *National Organization for Women v. Scheidler*, 223 F.3d 615 (7th Cir. 2000).

Cutonilli has addressed two out of the three criteria to grant permission to file an amicus brief in his motion for leave. Criterion 2 was satisfied by his direct interest in the *Kolbe v. Hogan*, 849 F.3d 114 (4th Cir. 2017). Illinois directly cites this precedent (IL brief pg 30) and adopts its main reasoning as part of its argument (Argument II.A.3 pg 28). Cook County and Chicago also adopt similar reasoning in their arguments (Cook County: Argument II.C pg 45; Chicago: Arguments I.B pg 20 and I.B.2 pg 25). Criterion 3 was satisfied with paragraph 3 of his motion for leave, which lists all the unique perspectives and information that can assist the court beyond what the parties have done.

Cutonilli has not suggested that criterion 1 was satisfied. Cutonilli has no doubt that all parties are adequately represented. Each side is more than capable of winning with the arguments that have been presented as evidenced by each side winning several of the court cases under review. The problem is that different courts have reached different conclusions based on essentially the same arguments. This indicates that there may be areas of each sides arguments that may benefit from additional “ideas, arguments, theories, insights, facts, or data that are not found in the briefs of the parties.” Cutonilli has provided additional information not found in the other briefs (see paragraph 3 of his motion for leave) that may be helpful to the Court in resolving the Constitutionality of the issue in question. This information is essentially a paraphrase of the arguments in his brief.

A review of the opinions from the Lower Courts show that the Courts differ in how they interpret the key phrases “dangerous and unusual” and “in common use.” Cutonilli used the historical understanding test, cited in *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. \_\_\_\_ (2022), on many of same historical cases cited in some of the parties’ briefs. He cited different sections of these cases, however, bringing additional insight into what these phrases may mean. This is why the brief “provides historical insight into how the key phrases, ‘dangerous and unusual’ and ‘in common use,’ relate to societal biases that carry forward into this case.”

Expanding on what “in common use” means, the brief “provides examples of the commonly accepted uses of ‘assault weapons,’ a term defined in Illinois law and large capacity ammunition feeding devices or magazines (‘LCMs’).”

Given the focus that Bruen places on historical understanding, it seems prudent to understand the history and precedent of how public safety was achieved. This is why the brief “demonstrates through references to history and precedent, that the people themselves provide public safety.”

While Bruen introduces a new test, it does not provide insight into why the intermediate scrutiny process, as it was applied to Second Amendment cases, may be faulty. This is why the brief “provides insight into errors that invalidate the scrutiny process used in Friedman.”

One of the precedents Kolbe established is that “weapons that are most useful in military service” do not have Second Amendment protection. All the defendants have adopted this argument into their own arguments. This is why the brief “demonstrates that ‘weapons that are most useful in military service’ is not a Second Amendment disqualifier.”

Illinois advances a theory that LCMs are not actually arms (Argument II.A.1 pg 17). While the plaintiffs have provided some flaws in that theory, Cutonilli

provides additional flaws in that theory. This is why the brief “demonstrates flaws under Illinois’s theory of ‘arms’.”

Illinois has stated that “studies examining ‘armed citizen’ incidents have confirmed, ‘the average number of shots fired in self-defense was 2.2 and 2.1, respectively.’” Cutonilli has provided some of the raw data to demonstrate why those numbers are not appropriate to use. This is why the brief “provides clarification of some data about shots fired in self-defense.” It should be noted that Cutonilli has provided the same data in his amicus brief in the *Duncan v. Bonta*, 19 F.4th 1087 (9th Cir. 2021) case.

In addition to the historical understanding, Bruen also requires courts to determine if regulations are consistent with the Second Amendment text. This is why the brief “also offers additional textual and history-based interpretation of the text of the Second Amendment.”

The Court should recognize that precedent in criterion 2 works both ways. Preventing the spread of an erroneous precedent into another circuit between circuits is an important consideration because it creates a split among circuits. This split is one of the criteria that the Supreme Court uses in determining whether to review the case on Certiorari (See Supreme Court rule 10(a)). Any erroneous precedent can effectively be overruled by the Supreme Court.

In conclusion, the Court's denial order does not follow established 7<sup>th</sup> circuit precedent on allowing amicus briefs. Cutonilli has met two of the three criteria for granting an amicus brief. The Court should rescind its denial order and grant Cutonilli's motion for leave to file an amicus brief (Doc 74) because Cutonilli has complied with established 7<sup>th</sup> circuit precedent on the matter. The brief will assist the judges by presenting ideas, arguments, theories, insights, facts, or data that are not found in the briefs of the parties.

Respectfully submitted,

/s/ John Cutonilli

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26 June 2023

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, amicus John Cutonilli certifies that the amicus is not a publicly held corporation, that the amicus does not have a parent corporation, and that no publicly held corporation owns 10 percent or more of amicus's stock.

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## CERTIFICATE OF COMPLIANCE

1. This motion complies with type-volume limitation of Fed. R. App. P.

27(d)(2)(A) because the motion contains 1143 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This motion complies with the typeface requirements of Fed. R. App. P.

32(a)(5), and the type style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman type.

Dated: 26 June 2023

/s/ John Cutonilli

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### CERTIFICATE OF SERVICE

I hereby certify that on 26 June 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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