IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	Nos. 10-2487 and 10-3580
	)	
vs.	)	
	)	
SHOLOM RUBASHKIN,	)	
	)	
Defendant.	)	

GOVERNMENT'S RESISTANCE TO MOTIONS FOR LEAVE TO FILE AMICUS CURIAE BRIEFS

The United States resists the motions of the Washington Legal Foundation, et al. (Entry No. 3743162), American Civil Liberties Union of Iowa (Entry No. 3743169), and National Association of Criminal Defense Lawyers (Entry No. 3744356) for leave to file amicus curiae briefs. Neither the interests of the proposed amici curiae nor the tendered briefs are sufficiently distinct from those of defendant to warrant the filing of 44 additional pages[1] of briefing on behalf of defendant.

[1]The three tendered briefs are 17, 16, and 11 pages respectively.

1. Legal Standard for Filing a Brief as Amici Curiae

Amicus curiae briefs by non-governmental entities are permissible only with the consent of the parties or leave of court. Fed. R. App. P. 29(a). Motions for leave must state: (1) the movant's interest, (2) why the brief is desirable, and (3) why the issues raised are relevant to the case's disposition. Fed. R. App. P. 29(b).

Courts do not "grant rote permission" to file amicus briefs. *Voices for Choices v. Illinois Bell Telephone Co.*, 339 F.3d 542, 544 (7th Cir. 2003). Rather, permission to file "is a matter of 'judicial grace.'" Id. (quoting *Nat'l Org. for Women v. Scheidler,* 223 F.3d 615, 616 (7th Cir. 2000)). In the Seventh Circuit Court of Appeals, judges "deny permission to file an amicus brief that essentially duplicates a party's brief." Id. Additionally, permission to file an amicus brief is granted only when (1) one party is inadequately represented, (2) "the would-be amicus has a direct interest in another case" that may be impacted by the decision in the instant case, or (3) "the amicus has a unique perspective, or information, that can assist the court of appeals beyond what the parties are able to do." *Nat'l Org. for Women,* 223 F.3d at 617. The justification for this policy is that:

> [J]udges have heavy caseloads and therefore need to minimize extraneous reading; amicus briefs, often solicited by parties, may be used to make an end run around court-imposed limitations on the length of parties' briefs; the time and other resources required for the preparation and study of, and response to, amicus briefs drive up the cost of litigation; and the filing of an amicus brief is often an attempt to inject interest group politics into the federal appeals process.

Voices for Choices, 339 F.3d at 544.[2] Cf. *Neonatology Assocs. v. Commissioner*, 293 F.3d 128, 132 (3d Cir. 2002) (favoring a less-restrictive approach to granting leave to file).[3] Courts of Appeals have also expressed concern over amicus briefs

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[2]Although not controlling, Supreme Court Rule 37(1) is instructive in setting out the conflicting salutary or unseemly role of an amicus brief:

> An *amicus curiae* brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court. An *amicus curiae* brief that does not serve this purpose burdens the Court, and its filing is not favored.

[3]The Third Circuit's less restrictive approach is based, in part, upon the notion that "the time required for skeptical scrutiny of proposed amicus briefs may equal, if not exceed, the time that would have been needed to study the briefs at the merits stage if leave had been granted." *Neonatology Assocs.,* 293 F.3d at 133. While this approach might have practical appeal at the front-end of a particular case, it would seem to encourage more, and less meritorious, amicus filings in future cases. Moreover, as in this case, an "open door" policy of accepting amicus briefs could require the opposing party to commit resources to respond to arguments so lacking in merit that they were deliberately passed up by the other party's lawyers. See footnote 4, below (despite defendant's lawyers' editing the NACDL's proposed amicus brief, argument was not included in defendant's opening brief). It also can require the expenditure of the opposing party's resources to re-address issues the primary litigant is capable of raising and has raised.

funded and prepared by one of the parties. See *Glassroth v. Moore*, 347 F.3d 916, 919 (11th Cir. 2003) (Court was "loathe to" encourage the practice of counsel for a party doing amicus work).

2. Leave to File Should Be Denied

The proposed amici curiae do not have interests sufficiently distinct from defendant's to warrant additional briefing in support of defendant. Regarding its interest, the National Association of Criminal Defense Lawyers (NACDL) notes "NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of justice." (NACDL Brief p. 1). While the second portion of the NACDL's mission would not seem to be pertinent here, the first and third portions appear to be substantially aligned with defendant's and the government's interests. Similarly, regarding its interest in this matter, the Washington Legal Foundation (WLF) notes it regularly appears in courts to "address issues of great importance related to the U.S. Sentencing Commission and the Federal Sentencing Guidelines, and to oppose the application of the Guidelines in cases that would result in the imposition of excessively harsh prison sentences." (WLF Motion p. 2). This, too, seems substantially in line with

the arguments defendant makes. Although the American Civil Liberties Union of Iowa (ACLU-I) states its interest is in this case is to "expose the constitutional magnitude of the *ex parte* communications" alleged to have occurred in this case, as discussed below, its tendered brief consists almost entirely of a case-specific argument on the law of recusal – already fully addressed in defendant's opening brief.

Nor would the tendered briefs substantially aid the Court. Defendant's interests are well represented in this matter. Six attorneys from five law firms have filed appearances for defendant, and his attorneys have filed a 100-page brief on his behalf. In large part, the proposed amicus briefs are mere extensions of that brief.[4]

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[4]Counsel for defendant appears to have had some involvement in the preparation of at least one of the briefs.

On December 21, 2010, appellate counsel telephoned the undersigned regarding "coordinating" the filing of amicus briefs in this matter and asked for the government's consent to the filing of such briefs. The undersigned withheld such consent and asked that the actual writers of any such proposed briefs contact the undersigned to discuss the government's position.

On December 27, 2010, the undersigned was contacted by counsel for the NACDL seeking consent to file an amicus brief on behalf of the NACDL. During a follow-up conversation on January 3, 2011, counsel for the NACDL acknowledged sending drafts of the brief to appellate counsel for defendant who had done some

The brief tendered on behalf of the ACLU-I purports to be different from defendant's main brief in that it advocates for the application of a due process standard in addition to a statutory standard. (ACLU-I Brief p. 2). However, apart from citing a general constitutional standard from *Caperton v. Massey Coal Co.,* 129 S.Ct. 2252, 2257 (2009) (regarding constitutional implications where there is a high probability of actual bias), the brief simply argues the alleged facts without even attempting to demonstrate how they might fit into the cited standard. The brief is little more than an expansion of defendant's opening brief.

The brief tendered by the WLF does not even attempt to distinguish itself in any meaningful way from defendant's opening brief. Rather, like defendant's brief, it attacks the district court's loss calculation, consideration of purported mitigating factors, and ultimate sentence on case-specific bases. The brief merely expands the arguments in defendant's brief and does not add significant value to this appeal.

In large part, the brief tendered by the NACDL contains arguments sufficiently advanced in defendant's main brief. The brief also relies, in part, upon

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editing and made some "small suggestions." The government did not consent to the filing of the brief.

28 U.S.C. § 144, a statute with no application in this case. Were there sufficient merit to the argument advanced by the NACDL, it could have been advanced by defendant's cadre of attorneys.[5] In any event, the brief does not substantially add to the arguments asserted in defendant's main brief and would not materially aid the Court.

In essence, there is an attempt to inject interest group politics into this case. The mere fact three other interest groups re-iterate arguments defendant raises does not add to the merits of defendant's claims and does not aid the resolution of defendant's claims. Rather, the almost 50% addition to an already extensive and overlength brief "unduly burdens the Court" and the government without being of "considerable help to the Court." Sup. Ct. R. 37(1)

3. Conclusion

For the above reasons, the government objects to the filing of the proposed amicus curiae briefs by the Washington Legal Foundation, et al. (Entry No. 3743162), American Civil Liberties Union of Iowa (Entry No. 3743169), and

[5]Defendant's attorneys were undoubtedly made aware of the argument when they edited the NACDL's brief.

National Association of Criminal Defense Lawyers (Entry No. 3744356). Those briefs should not be filed.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that I electronically served a copy of the foregoing document to which this certificate is attached to the parties or attorneys of record, shown below, on January 19, 2011.

UNITED STATES ATTORNEY

BY: s/ S. Van Weelden

COPIES TO: Counsel of Record