

The Honorable Richard A. Jones

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ABDIQAFAR WAGAFE, *et al.*,

Plaintiffs,

v.

JOSEPH R. BIDEN, President of the United
States, *et al.*,

Defendants.

No. 2:17-cv-00094-RAJ

**DEFENDANTS’ OPPOSITION TO THE
MOTION FOR LEAVE TO FILE AN
AMICUS CURIAE BRIEF IN SUPPORT
OF PLAINTIFFS’ OPPOSITION TO
DEFENDANTS’ CROSS MOTION FOR
SUMMARY JUDGMENT**

Defendants oppose the motion for leave to file a brief in support of Plaintiffs’ opposition to Defendants’ cross motion for summary judgment by proposed amici, Creating Law Enforcement Accountability & Responsibility, Asian Americans Advancing Justice–Asian Law Caucus, and the National Immigration Project of the National Lawyers Guild (collectively, “Amici”). When asked prior to amici’s filing, Defendants opposed the filing of the amicus brief at any time after June 11, 2021, only because the carefully-negotiated and court-approved schedule for summary judgment filings did not contemplate the submission of additional briefing in support of the plaintiffs’ motion. *See* Ex. (Email correspondence). Defendants offered to

1 consent to the filing if amici’s brief were filed early enough and consistent with applicable page
2 limits, but amici rejected both of the Defendants’ conditions, ultimately choosing to file a full
3 week into the compressed three-week period for Defendants’ last summary judgment cross-
4 motions filing. *See Ex.* Additionally, amici have bundled extensive citations into footnotes,
5 despite this Court’s direction against using footnotes to circumvent page restrictions. *See Dkt.*
6 No. 98, p. 4 n.2. Amici do not explain why they did not seek to file their brief within seven days
7 of Plaintiffs’ principal brief (*see Fed. R. App. P. 29(a)(6)*), filed on March 25, 2021, or at least
8 within 39-days following Defendants’ cross-motion for summary judgment on May 3, 2021.
9 Plaintiffs met the June 11th response deadline.

10 In any event, amici must show “why an amicus brief is desirable and why matters
11 asserted are relevant to the disposition of the case.” *See Fed. R. App. P. 29(a)(3)(B); Miller-*
12 *Wohl Co. v. Comm’r of Labor & Industry*, 694 F.2d 203, 204 (9th Cir. 1982) (purpose of amicus
13 is to serve for the benefit of the court in cases of general public interest). The proposed brief is
14 largely a reiteration of Plaintiffs’ arguments relying primarily, if not entirely, on unsworn, extra-
15 record materials; the alleged experiences of individuals with no demonstrated membership in the
16 subject classes of this lawsuit; and material that cannot be subject to cross-examination, much
17 less the discovery methods and proceedings of the last four years. Additionally, the brief focuses
18 on events and averments that pre-date CARRP, or relate to federal law enforcement agencies and
19 procedures that are neither under the Defendants’ control nor central to USCIS’ operation of
20 CARRP.

21 Amici rely principally on anecdotal evidence in support of Plaintiffs’ equal protection
22 claim and provide no scientific or expert evidence. They claim that “[t]he population caught in
23

1 CARRP’s crosshairs is overwhelmingly Muslim,” but the article cited (in footnote 15) does not
2 contain the quote. *See* Dkt. No. 555-1, p. 5, n.15. Amici also claim that “CARRP is a policy of
3 both religious and national-origin profiling in which ‘Muslim’ (and other markers indicating the
4 religious identity of an applicant) is used as a proxy for national security concern,” but the case
5 they cite does not address CARRP. *See id.* at p. 4-5, n. 17. Amici provide no attribution for the
6 statement that certain investigative factors are “used disproportionately against Muslims, Arabs,
7 South Asians, and other individuals from Middle Eastern countries,” or for the statement that
8 “USCIS has used and continues to use Muslim applicants’ connections or associations—no
9 matter how tenuous—as grounds for labeling them a “national security concern[.]” *See id.* at p.
10 7. The same holds true for the unsupported claim that USCIS’ provisions “target Muslims
11 hailing from or traveling to Muslim-majority countries for innocuous reasons, or donating to
12 Islamic charities with no ties to terrorism.” *See id.* at p. 8. The further reliance by amici on the
13 law review article by Dr. Nermeen Arastu is unfounded, as that report is not reliable expert
14 evidence under the standard in *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), Dkt.
15 No. 477, pp. 9-12, not in the least because she stated that she does not know whether any of the
16 cases in her sampling were subject to CARRP. *See* Dkt. No 477, pp. 10.

17 Rather than citing reliable or verifiable sources for their generalizations, amici provide
18 only anecdotal evidence regarding individuals they purport were subject to CARRP. *See* Dkt.
19 No. 555-1, pp. 6-8, 10-12. They provide no evidence that these individuals are class members or
20 that there is any basis on which to extrapolate class liability from the experiences of an
21 unscientific sample of individuals. *Cf. Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367 (2011)

1 (rejecting class liability based on “Trial by Formula”). Defendants are prejudiced by the last
2 minute and untested evidence.

3 In sum, Defendants are prejudiced by the proposed filing of the amicus brief. A
4 reiteration of Plaintiffs’ arguments will not aid the Court in its analysis of the cross motions for
5 summary judgment. Thus, the Court should deny the motion for leave to file an amicus brief.

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Dated: June 24, 2021

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Respectfully Submitted,

/s/ Jesse Busen
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Counsel for Defendants

EXHIBIT

From: [Gottlieb, Richard E.](#)
To: [Taranto, Leon B. \(CIV\)](#)
Cc: [Kipnis, Brian \(USAWAW\)](#); [Lee, Melissa](#); [Braga, Victoria M. \(CIV\)](#); [Jennie Pasquarella](#); [Heath Hyatt \(HHyatt@perkinscoie.com\)](#); [perkinscoie.com, ngellert](#); [sahmed@law.harvard.edu](#); [Harvey, Julia](#)
Subject: Re: Amicus in Wagafe v. Biden
Date: Thursday, June 10, 2021 9:20:52 PM
Attachments: [image001.png](#)

We'll note your objection at filing.

Richard Gottlieb

Partner

he/him/his

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On Jun 10, 2021, at 6:00 PM, Taranto, Leon B. (CIV)
<Leon.B.Taranto@usdoj.gov> wrote:

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Mr. Gottlieb,

Thanks for your voicemail message and email this afternoon.

Regarding the former, you inquired about the location of the “commentaries” to which we previously referred. The relevant commentary appears in the 2005 committee notes to FRAP 28.1, which state in relevant part:

For purposes of determining the maximum length of an amicus curiae's brief filed in a case involving a cross-appeal, Rule 29(d)'s reference to “the maximum length authorized by these rules for a party's principal brief” should be understood to refer to [FRAP 28.1] subdivision (e)'s limitations on the length of an appellant's principal brief.

This comment is relevant to show that, by analogy, even though the amici you represent seek to file in support of plaintiffs’ combined cross-opposition and reply brief, the combined nature of the brief should not enlarge the page limits on amici filings. Those limits, we believe, are further indicated by analogy to FRAP 29(a)(5), calling for amicus briefs to be half the size of a party’s principal brief without regard to enlargements provided for principal briefs, and to W.D. Wash Local Rule 7(e)(3), providing that the principal filing and opposition on summary judgment are limited to 24 pages.

While your email from last evening asserted that “the last Circuit Rule commentary on that section was abrogated in 2006,” it is not apparent what you were referring to. Although the relevant comment from 2005 refers to FRAP 29(d), and FRAP 29 was significantly revised in 2016, the text of former FRAP 29(d) remains fully intact and now appears as FRAP 29(a)(5). Thus, the 2005 comment to FRAP 28.1 remains relevant, to the extent that FRAP 29 provides an analogy for submitting amici briefs on cross-motions in district court.

Regarding your email from this afternoon, we agree that it would be to the court’s and parties’ benefit if we were able to come to an agreement regarding your submission of an amicus brief. To that end, we are willing to renew our counteroffer, particularly as you have made no further proposal, but that is the extent of our ability to not oppose any amicus filing after June 11.

Leon B. Taranto

Trial Attorney
Environmental Tort Litigation Section
Torts Branch, Civil Division
U.S. Dept. of Justice
[REDACTED]

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From: Gottlieb, Richard E. <RGottlieb@manatt.com>
Sent: Wednesday, June 9, 2021 5:54 PM
To: Taranto, Leon B. (CIV) <Leon.B.Taranto@usdoj.gov>
Cc: Kipnis, Brian (USAWAW) <BKipnis@usa.doj.gov>; Lee, Melissa <leeme@seattleu.edu>; Braga, Victoria M. (CIV) <Victoria.M.Braga@usdoj.gov>; Jennie Pasquarella <JPasquarella@aclusocal.org>; Heath Hyatt (HHyatt@perkinscoie.com) <HHyatt@perkinscoie.com>; perkinscoie.com, ngellert <ngellert@perkinscoie.com>; sahedmed@law.harvard.edu; Harvey, Julia <JHarvey@manatt.com>
Subject: RE: Amicus in Wagafe v. Biden

Mr. Taranto, we are disappointed to receive your counter-proposal, which is respectfully declined. Likewise, we do not consent to file our amicus before the applicable due date of June 18. Our compromise offer to do so was contingent upon your consent to the filing.

While we obviously intend to be concise, there is likewise no rational reason for us to agree, *in advance*, to a 12-page limitation when the Court has ample discretion in this regard, consistent with the very rule, FRAP 29(a)(5), cited by you. Further, Local Rule 7(e)(3) itself does not place any limit on *amicus* filings and we are unaware of *any* FRAP 28.1 commentary pertinent to this subject (to the contrary, the last Circuit Rule commentary on that section was abrogated in 2006).

We'll note your objections to the court.

Richard Gottlieb
Partner
he/him/his

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[<image001.png>](#)

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From: Taranto, Leon B. (CIV) <Leon.B.Taranto@usdoj.gov>
Sent: Wednesday, June 9, 2021 2:08 PM
To: Gottlieb, Richard E. <RGottlieb@manatt.com>
Cc: Kipnis, Brian (USAWAW) <Brian.Kipnis@usdoj.gov>; Lee, Melissa <leeme@seattleu.edu>; Braga, Victoria M. (CIV) <Victoria.M.Braga@usdoj.gov>; Jennie Pasquarella <JPasquarella@aclusocal.org>; Heath Hyatt (HHyatt@perkinscoie.com) <HHyatt@perkinscoie.com>; perkinscoie.com, ngellert <ngellert@perkinscoie.com>; sahmed@law.harvard.edu
Subject: RE: Amicus in Wagafe v. Biden

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Mr. Gottlieb – Timing is not the only remaining issue, as our consent was entirely conditioned on the deadline we set forth in our original counterproposal. We stand by and reiterate that offer, which preserves the Defendants’ reasonable ability to (1) respond in their remaining 20 pages of briefing, within the 21 day period previously agreed to by the parties and approved by the Court, to the Plaintiffs’ 40-page brief to be filed on June 11, and (2) at the same time, opt to address whatever might be contained in the amici filing. Alternatively, if amici will confirm that their brief is limited to 12 pages, consistent with FRAP 28.1 commentary, FRAP 29(a)(5), and local rule 7(e) (3), we are willing to meet you half-way within the June 11-18 period, and would consent to the filing of amici’s brief by no later than June 15. Otherwise, we do not consent to any amici brief submitted after June 11, and request that you make this clear to the Court when seeking leave to file your brief.

Leon B. Taranto
Trial Attorney
Environmental Tort Litigation Section
Torts Branch, Civil Division
U.S. Dept. of Justice


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From: Gottlieb, Richard E. <RGottlieb@manatt.com>
Sent: Tuesday, June 8, 2021 12:01 PM
To: Taranto, Leon B. (CIV) <Leon.B.Taranto@usdoj.gov>
Cc: Kipnis, Brian (USAWAW) <BKipnis@usa.doj.gov>; Lee, Melissa <leeme@seattleu.edu>; Braga, Victoria M. (CIV) <Victoria.M.Braga@usdoj.gov>; Jennie Pasquarella <JPasquarella@aclusocal.org>; Heath Hyatt (HHyatt@perkinscoie.com) <HHyatt@perkinscoie.com>; perkinscoie.com, ngellert <ngellert@perkinscoie.com>; sahmed@law.harvard.edu
Subject: RE: Amicus in Wagafe v. Biden

Mr. Taranto:

As you know, we represent the proposed amici. Our thanks for providing the defendants' consent to our request. As a result, the only issue is timing.

There is no provision in the Local Rules for the US District Court for the Western District of Washington that addresses the submission and timing of amicus filings. In the absence of such local rules, the amicus rules for the US Court of Appeals for the Ninth Circuit apply. *Skokomish Indian Tribe v. Goldmark*, 2013 WL 5720053 (W.D. Wash. Oct. 21, 2013) ("in the absence of its own local rule, this court will adhere to the Federal Rules of Appellate Procedure with respect to timing" of amicus filings). Under FRAP 29(a)(6):

"An amicus curiae must file its brief, accompanied by a motion for filing when necessary, no later than 7 days after the principal brief of the party being supported is filed. ... A court may grant leave for later filing, specifying the time within which an opposing party may answer."

Here, our proposed amicus brief would be filed in support of plaintiffs' opposition to defendants' motion for summary judgment, whose principal brief in opposition to summary judgment is being filed June 11. As a result, the amici would be entitled to Friday, June 18, in which to file their brief.

Notwithstanding the foregoing, it may be possible for us to complete the brief by June 16. Let us know by tomorrow COB Pacific Time whether defendants are amenable to that compromise. We will otherwise seek leave to file on the 18th, noting your timing objection.

Kindest regards.

Richard Gottlieb
Partner
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From: Taranto, Leon B. (CIV) <Leon.B.Taranto@usdoj.gov>

Sent: Monday, June 7, 2021 5:40 PM

To: Lee, Melissa <leeme@seattleu.edu>

Cc: Gottlieb, Richard E. <RGottlieb@manatt.com>; Kipnis, Brian (USAWAW)

<Brian.Kipnis@usdoj.gov>; Braga, Victoria M. (CIV) <Victoria.M.Braga@usdoj.gov>;

Jennie Pasquarella <JPasquarella@aclusocal.org>; Heath Hyatt

(<HHyatt@perkinscoie.com>) <HHyatt@perkinscoie.com>; perkinscoie.com, ngellert

<ngellert@perkinscoie.com>; <sahmed@law.harvard.edu>

Subject: RE: Amicus in Wagafe v. Biden

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Dear Ms. Lee,

Thanks for your message regarding the intended amici filing by CUNY CLEAR and other organizations, not named, that you represent as local counsel. Defendants consent to the filing, if it is filed by June 11, 2021. We will oppose any such filing thereafter, because there would be insufficient time for a response within the court-ordered briefing schedule. Please note, that Defendants' consent does not pertain to or alter the scope of any limitations on non-party or non-attorney access to filings and disclosures made in this case.

Sincerely,

Leon B. Taranto

Trial Attorney
Environmental Tort Litigation Section
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(202) 616-4231

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From: Lee, Melissa <leeme@seattleu.edu>
Sent: Thursday, June 3, 2021 4:22 PM
To: Kipnis, Brian (USAWAW) <BKipnis@usa.doj.gov>; Taranto, Leon B. (CIV) <Leon.B.Taranto@usdoj.gov>; Braga, Victoria M. (CIV) <Victoria.M.Braga@usdoj.gov>; Jennie Pasquarella <JPasquarella@aclusocal.org>; Heath Hyatt <HHyatt@perkinscoie.com> <HHyatt@perkinscoie.com>; perkinscoie.com, ngellert <ngellert@perkinscoie.com>; sahmed@law.harvard.edu
Cc: Gottlieb, Richard E. <RGottlieb@manatt.com>
Subject: Amicus in Wagafe v. Biden

Dear Counsel,

I am writing to introduce myself and my colleague, Richard Gottlieb from Manatt Phelps & Phillips LLP. Richard and his firm have been retained to represent CUNY CLEAR (Creating Law Enforcement Accountability and Responsibility), and other organizations to submit an amicus curiae brief in support of the Plaintiffs in *Wagafe v. Biden*, and I am serving as local counsel. We plan to file the amicus brief in support of plaintiffs' opposition to defendants' motion for summary judgment on or before June 18, and are writing to counsel to ask whether you will take a position as to our client's anticipated motion for leave to file as amicus curiae. Please respond to this email at your earliest convenience, but no later than June 14, to indicate whether you consent, oppose, or take no position as to this filing.

Thank you for your consideration,

Melissa Lee (she/her)
Assistant Director | Staff Attorney

Korematsu Center for Law and Equality

SEATTLE UNIVERSITY SCHOOL OF LAW

 | law.seattleu.edu

// AT THE HEART OF LAW

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(206) 398-4131, and permanently delete this email and any copies or printouts thereof.

CERTIFICATE OF SERVICE

I hereby certify that on June 24, 2021, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ Jesse Busen
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