Case No. 18-80176

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KELSEY CASCADIA ROSE JULIANA, *et al*.,
Plaintiffs-Appellees*,*
v.
UNITED STATES OF AMERICA, *et al*.,
Defendants-Appellants.

On Petition For Permission to Appeal from the United States District Court for the
District of Oregon (No. 6:15-cv-01517-AA)

OPPOSITION TO DEFENDANTS'
MOTION FOR LEAVE TO FILE REPLY

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OPPOSITION TO MOTION FOR LEAVE TO FILE REPLY

Plaintiffs oppose Defendants' Motion for Leave to File Reply. Fundamentally, Federal Rule of Appellate Procedure 5 does not allow for a reply brief in support of a petition for permission to appeal pursuant to 28 U.S.C. § 1292(b) and Defendants' reply brief does not raise issues that were not addressed in their original petition. Also, in seeking leave to file such a brief, Defendants' Motion for Leave does not comply with the requirements of Ninth Cir. R. 27 because counsel for Defendants again failed to consult opposing counsel before filing. Subsection (5) of the Advisory Committee Notes to Rule 27-1 explicitly requires that "[u]nless precluded by extreme time urgency, counsel are to make every attempt to contact opposing counsel before filing any motion and to either inform the Court of the position of opposing counsel or provide an explanation regarding the efforts made to obtain that position." Prior to filing the instant Motion for Leave, counsel for Defendants again failed to contact counsel for Plaintiffs and their Motion for Leave failed to set forth any evidence of any attempt to contact counsel for Plaintiffs. Declaration of Philip L. Gregory in Support of Opposition to Motion for Leave to File Reply ("Gregory Decl.") ¶ 2.

Not only is Defendants' proposed reply brief not contemplated by the rules and repetitive of arguments already asserted, Plaintiffs oppose this Motion for Leave, in large part, because counsel for Defendants have engaged in a pattern of

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miscommunicating with both this Court and counsel for Plaintiffs. This ongoing problem of misstatements is especially troubling given that a panel of this Court recently took counsel for Defendants to task for failing to provide proper notification in this very case: "Although we have not been so informed by the government, Chief Justice Roberts issued a temporary stay of the start of the trial . . . . We request that, in the future, the government promptly inform this Court of developments affecting its pending motions." Ninth Circuit Docket No. 18-72776, Dkt. 5.

Other misstatements by counsel for Defendants in this litigation include:

1. Ninth Circuit Docket No. 18-71928

On Thursday, July 5, 2018, Plaintiffs requested that counsel for Defendants "correct two inaccurate statements made to the Ninth Circuit in [Defendants] Petition For A Writ Of Mandamus And Emergency Motion For A Stay Of Discovery And Trial Under Circuit Rule 27-3." Dkt. 2. The inaccurate statements were:

"Regarding Circuit Rule 27-3(a)(1), the government notified both the Clerk and counsel for Real Parties in Interest (Plaintiffs) on Tuesday, July 3 of its intention to file this mandamus petition and emergency motion." (Page i.)

"Regarding Circuit Rule 27-3(a)(3)(iii), Plaintiffs' counsel were notified through e-mails sent on July 3 and July 4, and further through a telephone conference held on July 4, of the government's intended filing of this mandamus petition and emergency motion." (Page ii.)

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The reason for this request in July 2018 was that, contrary to the representation by counsel for Defendants to this Court, the government did not notify counsel for Real Parties in Interest (Plaintiffs) on Tuesday, July 3, of its intention to file that emergency motion. Gregory Decl. ¶ 4. Counsel for Real Parties did not receive any notice of the emergency motion until 7:40 p.m. on July 4. *Id*. To correct these misstatements, on July 5, counsel for Defendants filed Petitioners' Notice regarding their Circuit Rule 27-3 Certificate. *Id*.

2.   Ninth Circuit Docket No. 18-73014

As a second example, on November 5, 2018, counsel for Plaintiffs wrote counsel for Defendants to request that counsel again "correct two inaccurate statements made to the Ninth Circuit in your Petition For A Writ Of Mandamus And Emergency Motion For A Stay Of Discovery And Trial Under Circuit Rule 27-3" filed in Ninth Circuit Docket No. 18-73014. Gregory Decl. ¶ 5. The inaccurate statements were as follows:

"Regarding Circuit Rule 27-3(a)(1), the government notified the Clerk earlier today of its intention to file this mandamus petition and emergency motion. The government so notified counsel for Real Parties in Interest (Plaintiffs) on Sunday, November 4, 2018." (Page i.)

"Regarding Circuit Rule 27-3(a)(3)(iii), Plaintiffs' counsel were notified of this mandamus petition and emergency motion via an e-mail sent on Sunday, November 4." (Page iii.)

Contrary to the representations to this Court by counsel for Defendants, the government did not notify counsel for Real Parties in Interest (Plaintiffs) on Sunday, November 4, of its intention to file an emergency motion. Gregory Decl. ¶ 6. Counsel for Plaintiffs did not receive any notice of an emergency motion until Monday, November 5, at 1:04 p.m. *Id*. The November 4 email of counsel for Defendants omitted reference to an emergency motion: "Counsel: This is to inform you that the Defendants expect to file, as early as tomorrow morning, a petition for mandamus asking the Ninth Circuit for relief in accordance with the Supreme Court's November 2 order." *Id*. There is no mention of an emergency stay motion.

Counsel for Defendants failed to file a correction even though, on November 5, counsel for Plaintiffs wrote: "Plaintiffs are not aware of an emergency stay motion and are not aware of either the basis for or relief sought by such a motion." *Id*. ¶ 7.

3. Ninth Circuit Docket No. 18-73014

The Motion for Leave presents the third instance where counsel for Defendants failed to comply with the requirements of Ninth Cir. R. 27. Prior to filing the Motion for Leave, counsel for Defendants again failed to make any attempt to contact counsel for Plaintiffs and their Motion for Leave failed to set forth any

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evidence of any attempt to contact counsel for Plaintiffs. Gregory Decl. ¶ 2. Because a reply brief in these circumstances is not contemplated under Federal Rule of Appellate Procedure 5(b), Defendants were under no time urgency with respect to meeting and conferring with counsel for Plaintiffs about their motion.

For the foregoing reasons, Defendants' Motion for Leave should be denied. *See*, *e.g.*, *Brady v. Hegge*, 221 F.3d 1347 (9th Cir. 1997) (denying request for an injunction because of failure to comply with Rule 8).

DATED this 19th day of December, 2018, at Eugene, OR.

Respectfully submitted,

s/ Philip L. Gregory
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CERTIFICATE OF COMPLIANCE

I certify that this Opposition to Motion for Leave to File Reply contains 1,028 words, excluding the portions exempted by Federal Rules of Appellate Procedure 5(c) and 32(f) and Circuit Rule 5-2(b), which is less than the limit of 5,600 words established by Circuit Rules 5-2(b) and 32-3(2). The type size and type face comply with Federal Rule of Appellate Procedure 32(a)(5) and (6).

s/ Philip L. Gregory
Philip L. Gregory