

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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In Re, Kellogg, Brown And Root, Inc.,  
*et al.*,

Petitioners,

On Petition for a Writ of Mandamus  
to the U.S. District Court for the  
District of Columbia, No. 1:05cv1276

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No. 14-5319

**REPLY IN SUPPORT OF CROSS-MOTION FOR AFFIRMATIVE RELIEF  
AND RESPONSE TO KBR's ALTERNATIVE REQUEST FOR RELIEF IF  
RELATOR'S CROSS-MOTION IS GRANTED**

Respondent Harry Barko, plaintiff-relator below (hereinafter, "Barko"), hereby submits his reply in support of his cross-motion, dated February 11, 2015, for affirmative relief seeking the right to file a response to the brief of amici curiae if leave to file is granted, and for the Court to invite or appoint amicus curiae to represent the District Judge in support of his rulings that are the subject of the petition for writ of mandamus and to oppose the issuance of the writ. On February 18, 2015, Petitioner Kellogg, Brown & Root, Inc. ("KBR") filed an opposition to Barko's cross motion and alternative request for relief (for additional briefing by KBR) if Barko's cross-motion is granted. This combined reply and response includes Barko's opposition to KBR's alternate request for relief.

Barko made two requests, in the alternative, if the Chamber of Commerce USA's and other amici groups' motion for leave to file an amici curiae brief is granted. Barko asked this court: (1) to invite amicus curiae to represent the District Judge in opposition to KBR's petition; and (2) grant Barko 21 days from the date of the order granting proposed amici's motion for leave in which to file a response to the amici curiae's brief. KBR opposes both requests.

KBR's opposition without merit. First, in this second mandamus proceeding, KBR has personally attacked the fairness of Judge Gwin and accused him of judicial bias warranting reassignment. While Barko has done his best to defend the District Judge and the Court has the district court's opinions at issue, KBR's direct personal challenge of Judge Gwin's impartiality calls out for a court-appointed amicus curiae to defend the District Judge's decisions, both substantively as a matter of law but also to address accusations of judicial bias and the negative impact to his reputation that could result from KBR's filings and if reassignment were to be granted. FRAP 21(b)'s authority to appoint an amicus curiae to represent and support District Judge Gwin in this proceeding is not limited to situations where the respondent does not oppose issuance of mandamus relief or does not have sufficient perspective on the issue. *See* FRAP 21(b)(4) (permitting the court of appeals to invite an amicus curiae to address the petition on behalf of the trial court judge); FRAP 21, Notes of Advisory Committee on

1996 amendments, Note to Subdivision (b) (“Because it is ordinarily undesirable to place the trial court judge, even temporarily, in an adversarial posture with a litigant, the rule permits a court of appeals to invite an amicus curiae to provide a response to the petition.”). Indeed, if the request to appoint an amicus curiae to represent or support the District Judge is denied because Barko can adequately represent the district court, then there is no reason to permit the untimely request of the amici to file an amici curiae brief in support of KBR’s position because KBR’s counsel has already covered the points raised by the untimely amici brief of the Chamber of Commerce, USA and other groups. The same reasoning must be equally applied to both sides. Out of fairness, if the Chamber of Commerce, USA, et al. is permitted to file a late-filed amici curiae brief, which will require this Court to alter the briefing schedule on KBR’s petition for mandamus and delay these proceedings, there is no reason why an amicus curiae should not be appointed to respond to the petition, particularly where KBR has called for the reassignment of the district judge due to alleged judicial bias.

Second, KBR opposes Barko’s right to file a response if leave is granted to file the proposed amici brief. KBR’s argument is frivolous as it ignores FRAP 29(e), which provides that the Court should grant Barko the right to respond to a late-filed amicus brief. *See* FRAP 29(e) (“A court may grant leave for later filing, specifying the time within which *an opposing party* may answer.”) (emphasis

added). KBR makes the unique argument, not supported by the FRAP, that Barko should be denied the right to respond to the untimely *proposed* amici brief because Barko should have filed a response seven days after the proposed amici brief was lodged. There is no support in the rules for KBR's position. Barko should not be required to devote time to addressing untimely proposed filings lodged by non-parties who failed to even follow the rules to timely seek leave to file the proposed amici brief.

Additionally, Barko opposes KBR's request for additional briefing in response to the amici brief that was late-filed by the Chamber of Commerce, USA, et al.<sup>1</sup> KBR has already addressed the issues raised by the proposed amici brief in its petition for writ of mandamus and reply. In fact, in its recent reply KBR specifically cited to and extensively addressed the proposed amici brief arguments. *See* KBR Reply In Support of Petition for Writ of Mandamus, etc., pp. 1, 17-19 (Feb. 23, 2015). What KBR and the proposed amici are really seeking is to exceed KBR's page limits through proposed amici's untimely motion for leave to file an amici brief 30 days after it was due. Where, as here, the proposed amici are closely aligned with counsel for KBR such tactics should be denied. In fact, KBR's counsel of record in this case, Vinson & Elkins, LLP, have frequently

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<sup>1</sup> Barko would not oppose KBR filing a response to an amicus curiae brief on behalf of or in support of the District Judge, if the Court appoints amicus curiae to support the District Judge in this mandamus proceeding.

represented the Chamber of Commerce, USA in numerous cases. *See, e.g., Horne v. U.S. Dept. of Agriculture*, No. 14-275 (Supreme Court) (Amicus Brief filed Oct. 2014); *U.S. ex rel. Shea v. Cellco Partnership*, No. 12-71333 (D.C. Cir. Decided April 11, 2014); *American Fuel & Petrochemical Manuf. Assn. v. Corey*, No. 13-1149 (9<sup>th</sup> Cir. Amicus filed on April 18, 2014); *Torres v. SGE Management LLC*, No. 14-900004 (5<sup>th</sup> Cir. Amicus filed on Feb. 3, 2014); *Rocky Mountain Farmers Union v. Corey*, Nos. 13-1148, 13-1149 (Supreme Court); *Rocky Mountain Farmers Union v. Goldstene*, Nos. 12-15131 & 12-15135 (9<sup>th</sup> Cir. Amicus Filed on Aug. 13, 2012). *Also see*, Addendum, pp. A-1 to A-4 for a copy of cover pages of some of these amicus briefs listing KBR's counsel as representing the Chamber of Commerce, USA.

Given the unquestionably close connection between counsel for KBR and the proposed amici Chamber of Commerce USA<sup>2</sup>, KBR's request to be granted yet another brief to further respond based on amici's proposed brief, if late leave is granted to file that amici brief, is an attempt by KBR to increase its briefing beyond the 69 pages KBR has already submitted in support of its position.

Moreover, FRAP 29(e) only provides for an "opposing party" (*i.e.*, Barko) to file a response to a late filed amicus brief. KBR is not the "opposing party" and

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<sup>2</sup> Also, given that close connection between KBR's counsel and the proposed amicus curiae Chamber of Commerce USA, it is difficult to understand the failure of the Chamber and other proposed amici to timely seek leave to file a proposed amici, and to timely seek an extension of that deadline if more time was needed.

has already addressed the proposed amici's arguments in its reply brief. There is no support in the rules for yet another brief from KBR on the same issues raised by the proposed amici supporting KBR.

### CONCLUSION

For the foregoing reasons, Barko's requests for alternative relief should be granted if the Court grants the proposed amici's untimely motion for leave. Of course, if leave to file the proposed amici brief is denied it is not necessary for the Court to consider any of these alternative requests for relief.

Respectfully submitted,

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February 25, 2015

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing opposition and cross motion was served on this 25th day of February, 2015, electronically via the Court's ECF system on all counsel who have appeared in this action, and upon:

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By: /s/ David K. Colapinto  
David K. Colapinto



**ADDENDUM**

No. 14-275

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**In the Supreme Court of the United States**

MARVIN D. HORNE, ET AL., PETITIONERS

v.

UNITED STATES DEPARTMENT OF AGRICULTURE

*ON PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

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**BRIEF FOR THE CHAMBER OF COMMERCE OF  
THE UNITED STATES OF AMERICA AS AMICUS  
CURIAE IN SUPPORT OF PETITIONERS**

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Nos. 13-1148, 13-1149

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**In the Supreme Court of the United States**

ROCKY MOUNTAIN FARMERS UNION, ET AL., PETITIONERS

v.

RICHARD W. COREY, IN HIS OFFICIAL  
CAPACITY AS EXECUTIVE OFFICER OF THE  
CALIFORNIA AIR RESOURCES BOARD, ET AL.

AMERICAN FUEL & PETROCHEMICAL  
MANUFACTURERS ASSOCIATION, ET AL., PETITIONERS

v.

RICHARD W. COREY, IN HIS OFFICIAL  
CAPACITY AS EXECUTIVE OFFICER OF THE  
CALIFORNIA AIR RESOURCES BOARD, ET AL.

*ON PETITIONS FOR WRITS OF CERTIORARI  
TO THE UNITED STATES  
COURT OF APPEALS FOR THE NINTH CIRCUIT*

**BRIEF FOR THE CHAMBER OF COMMERCE OF  
THE UNITED STATES OF AMERICA AND THE  
AMERICAN PETROLEUM INSTITUTE  
AS AMICI CURIAE IN SUPPORT OF PETITIONERS**

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**United States Court of Appeals**  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Argued November 26, 2013

Decided April 11, 2014

No. 12-7133

UNITED STATES OF AMERICA, EX REL. STEPHEN M. SHEA,  
APPELLANT

v.

CELLCO PARTNERSHIP, DOING BUSINESS AS VERIZON  
WIRELESS, ET AL.,  
APPELLEES

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Appeal from the United States District Court  
for the District of Columbia  
(No. 1:09-cv-01050)

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*Christopher Mead* argued the cause for appellant. With him  
on the briefs was *Mark London*.

*Seth P. Waxman* argued the cause for appellees. On the  
brief were *Randolph D. Moss* and *Brian M. Boynton*.

*John P. Elwood*, *Eric A. White*, *Rachel L. Brand*, and *Steven  
P. Lehotsky* were on the brief for *amicus curiae* The Chamber of  
Commerce of the United States of America in support of  
appellees.

Before: SRINIVASAN, *Circuit Judge*, and EDWARDS and  
SENTELLE, *Senior Circuit Judges*.

No. 14-90004

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

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JUAN RAMON TORRES; EUGENE ROBISON, *Plaintiffs-Respondents*,

v.

SGE MANAGEMENT, LLC, *et al.*, *Defendants-Petitioners*.

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On Petition for Permission to Appeal from the United States District Court for the  
Southern District of Texas, Houston Division, Case No. 4:09-CV-02056

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**BRIEF OF AMICI CURIAE DIRECT SELLING ASSOCIATION, THE  
CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA,  
AND NATIONAL ENERGY MARKETERS ASSOCIATION IN SUPPORT  
OF DEFENDANTS' PETITION FOR PERMISSION TO APPEAL  
PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 23(f)**

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