

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NATIONAL MEAT ASSOCIATION,
Defendant-Intervenor – Appellant

v.

UNITED STATES DEPARTMENT OF
AGRICULTURE, Animal And Plant
Health Inspection Service, et al.

Defendants – Appellees,

and

RANCHERS CATTLEMEN ACTION
LEGAL FUND UNITED
STOCKGROWERS OF AMERICA,

Plaintiff – Appellee.

Appeal from D.C. No.
CV-05-06-BLG,
District of Montana, Billings

**RANCHERS CATTLEMEN
ACTION LEGAL FUND
UNITED STOCKGROWERS
OF AMERICA’S MOTION TO
STRIKE AMICUS BRIEFS**

Pursuant to Fed. R. App. P. Rule 29 and Ninth Circuit Rules 28-1 and 29-1, Plaintiff-Appellee Ranchers Cattlemen Action Legal Fund United Stockgrowers of America (“R-CALF USA”) respectfully moves this Court to strike the proposed *amicus curiae* briefs submitted in support of appellant the National Meat Association (“NMA”) by Easterday Ranches, Inc. (“Easterday”), Pioneer, Inc.

("Pioneer"), and the American Meat Institute and the North American Meat Processors ("AMI/NAMP"). Circuit Rule 28-1 allows the Court to strike briefs that fail to comply with the Federal Rules of Appellate Procedure and this Circuit's rules. Since proposed *amici* have failed to follow the letter and spirit of the rules, the simplest resolution would be for this Court to strike all three *amicus* briefs since there is so much duplication among all three briefs and between the *amicus* briefs and the brief of NMA. This would put the burden where it should be, on the proposed *amici*. If the *amicus* briefs are allowed, R-CALF USA requests that the *amici* (or some of them) be directed to file a single brief, and that R-CALF USA be allowed to submit a supplemental brief in response.

I. The Proposed Amicus Briefs Are Duplicative.

The traditional role of an *amicus curiae* is to assist the court with a case in which there is general public interest, to supplement the work of counsel and to draw the court's attention to law not previously raised. *Miller-Wohl Co., Inc. v. Commissioner of Labor*, 694 F.2d 203, 204 (9th Cir. 1982). Federal Rule of Appellate Procedure 29 sets forth parameters for filing an *amicus* brief and "is designed to limit the scope and volume of filings: '[A]n *amicus* brief is supplemental It should treat only matter not adequately addressed by a party.'" *Abu-Jamal v. Horn*, 2000 WL 1100784 at *5 (E.D. Pa. 2000) (Aug. 7,

2000) (quoting Fed. R. App. P. 29(d) Adv. Comm. Notes to 1998 Amend.). Circuit

Rule 29-1 also serves to ensure that the scope of *amicus* briefs is constrained:

The filing of multiple amici curiae briefs raising the same points in support of one party is disfavored. Prospective amici are encouraged to file a joint brief. Movants are reminded that the court will review the amicus curiae brief in conjunction with the briefs submitted by the parties, so that amici briefs should not repeat arguments or factual statements made by the parties.

Amici who wish to join in the arguments or factual statements of a party or other amici are encouraged to file and serve on all parties a short letter so stating in lieu of a brief. The letter shall be provided in an original and three copies.

Circuit Advisory Committee Note to Rule 29-1.

NMA's arguments in its opening brief boil down to assertions that there is a shortage of U.S. cattle, that NMA's members need access to cheap Canadian cattle to meet demand and to compete effectively with imports of inexpensive Canadian beef, and that the District Court should have recognized those economic interests and given more weight to them and should have deferred to USDA's scientific judgments. *See, e.g.*, NMA Brief at 5-6, 11, 14-15, 17. Each of the proposed *amicus* briefs makes similar arguments. *See, e.g.*, Easterday Brief at 9 ("Cattle feeders [like Easterday] need a safe, economic supply of cattle. Also, they need access to competitive packing markets. Re-establishing the availability of safe Canadian cattle is important to both needs."); 10 ("Where a significant supply source (i.e. Canadian cattle) is taken off the market, supplies are artificially

constrained.”); 15-16 (arguing the District Court should have deferred to USDA’s judgments); Pioneer Brief at 3 (the Preliminary Injunction “forces Pioneer and similarly situated feedlots and cattle feeders to pay higher prices for light feeder cattle due to the unavailability of Canadian cattle.”); 8 (“the District Court did not give deference to the USDA Rule or give the USDA’s Rule a presumption of validity”). AMI/NAMP Brief at 3 (“those who process cattle and beef into product – members of NMA, AMI and NAMP – have a critical interest in assuring that the North American markets operate efficiently, without unnecessary import restrictions unsupported by sound science.”)

Thus, the arguments made in the proposed *amicus* briefs do not significantly expand upon those issues and arguments already raised in NMA’s opening brief, and therefore they would not substantially assist the court. *See Ryan v. Commodity Futures Trading Commission*, 125 F.3d 1062, 1063 (7th Cir. 1997) (“The vast majority of *amicus curiae* briefs are filed by allies of litigants and duplicate the arguments made in the litigant’s briefs, in effect merely extending the length of the litigant’s brief. Such *amicus* briefs should not be allowed. They are an abuse.”); *Abu-Jamal*, 2000 WL 1100784 at *4 (“To the extent that *amici* seek to amplify a claim already presented by petitioner . . . the burden on the court and the parties in terms of additional pages filed and time required to resolve the issues presented likely would outweigh the nominal analytical contribution.”).

Since all three *amicus* briefs duplicate much of the argument made in NMA's brief, and each of the *amicus* briefs duplicates all or parts of the other *amicus* briefs, this Court should exercise its discretion and strike all three *amicus* briefs pursuant to Circuit Rule 28-1. Alternatively, the *amici* should be ordered to file a single brief that does not simply re-state the arguments in NMA's brief.

II. There Are Additional Grounds for Striking All Three Amicus Briefs.

An additional ground for striking two of the three *amicus* briefs is that they relate almost entirely to NMA's attempt to appeal the District Court's grant of a preliminary injunction, an issue over which this Court has no jurisdiction, for the reasons stated in R-CALF USA's Answering Brief. Easterday's brief contains only two full pages of argument about why NMA should have been allowed to intervene, which add no substantive arguments to the debate, while 13 pages of its brief supports NMA's claim that NMA was wrongfully denied intervention.¹ Pioneer's brief does not address the denial of NMA's motion to intervene substantively at all. Since Easterday's and Pioneer's briefs deal almost totally with an issue NMA had no standing to raise, they should be stricken.

¹ Easterday's brief also attaches a report prepared for AMI, among others, and a "Special Report" by an employee of the National Cattlemen's Beef Association. Neither of these were part of the Administrative Record, both are self-serving, and Easterday does not even argue why the Court can rely on statements contained therein. For those reasons, at a minimum the two attachments to the Easterday proposed *amicus* brief should be stricken.

There are additional grounds for striking the proposed brief of AMI/NAMP, as well. AMI/NAMP acted inconsistently with Fed. R. App. P. 29(a), under which an *amicus* brief will be accepted only by order of the Court unless the *amicus* states that all of the parties have been contacted and have consented to the filing of the *amicus* brief. AMI/NAMP's Motion for Leave To File Brief for *Amici Curiae* makes no mention of even having tried to obtain the consent of R-CALF USA or USDA, and undersigned counsel is aware of no attempt AMI/NAMP made to do so. This is inconsistent with at least the spirit of Fed. R. App. P. 29(a).

Also, AMI/NAMP did not file its brief until on or after March 30, 2005. This was more than seven days after filing of the brief of NMA, the party AMI/NAMP is supporting, and therefore did not meet the seven-day deadline in Fed. R. App. P. 29. (AMI/NAMP might argue that the deadline was more than seven calendar days, but the obvious intent of the Court's March 11, 2005 scheduling order, requiring R-CALF USA's Answering Brief to be filed and served by overnight mail only seven days after NMA's brief was required to be filed and served by overnight mail, is that any *amicus* briefs would have had to have been filed by overnight mail on or before March 28, 2005.

III. Conclusion.

For the reasons set forth above, R-CALF USA respectfully requests that this Court strike the proposed *amicus curiae* briefs of AMI/NAMP, Easterday, and

Pioneer. If the Court decides to accept *amicus* briefs from these entities, R-CALF USA respectfully requests that the Court strike the briefs as filed and order the filing of a single *amicus* brief by these entities, or a simple letter saying that they support NMA's claims about the financial interests of other segments of the American cattle and beef industry, consistent with the Advisory Committee Note to Circuit Rule 29-1, and that it be limited to support for NMA's appeal of the District Court's decision not to allow NMA to intervene in the case below, not NMA's unauthorized attempt to appeal the District Court's issuance of the Preliminary Injunction. *See also, e.g., Golden Eagle Ins. Co. v. Travelers Companies*, 103 F.3d 750, 752 n.2 (9th Cir. 1996) (overruled on other grounds by *Government Employees Ins. Co. v. Dizol*, 133 F.3d 1220 (9th Cir. 1998)) (*amici* filed short letter joining in arguments of party).

Additionally, if the Court decides to accept an *amicus* brief or briefs in support of NMA, R-CALF USA asks that it be provided at least seven days to file a short supplemental brief addressing any arguments made by the *amici*. Since, due to the expedited briefing schedule for this case, the *amicus* briefs were filed at approximately the same time as (or, in the case of AMI/NAMP, after), R-CALF USA's brief, R-CALF USA did not have the opportunity to respond to the arguments of *amici* that ordinarily is provided by the timing for *amicus* briefs under Fed. R. App. P. 29.

Dated: April 2, 2005

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on the 2nd day of April 2005, I have served a copy of the foregoing Motion to Strike Amicus Briefs by Federal Express upon:

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