

THE COMMITTEE TO RECALL
ROBERT MENENDEZ FROM THE
OFFICE OF U.S. SENATOR,

Plaintiff-Respondent,
v.

NINA MITCHELL WELLS, ESQ.,
SECRETARY OF STATE, and
ROBERT F. GILES, DIRECTOR OF
THE DIVISION OF ELECTIONS,

Defendants-Respondents,

and

UNITED STATES SENATOR ROBERT
MENENDEZ,

Indispensable Party -
Petitioner.

SUPREME COURT OF NEW JERSEY
DOCKET NO.: 065,803

On Appeal From:
SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO.: A-2254-09T1

Civil Action

Sat Below:
HON. EDWIN H. STERN, P.J.A.D.
HON. RONALD B. GRAVES, J.A.D.
HON. JACK M. SABATINO, J.A.D.

BRIEF ON BEHALF OF PETITIONER U.S. SENATOR ROBERT MENENDEZ IN
OPPOSITION TO THE MOTION OF CONSERVATIVE LEGAL DEFENSE AND
EDUCATION FUND, ET AL. FOR LEAVE TO PARTICIPATE AS AMICI CURIAE

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RULES

<u>R. 1:13-9</u>	2, 3, 4, 5, 6
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STATEMENT OF OPPOSITION TO THE MOTION

Petitioner, U.S. Senator Robert Menendez opposes the eleventh-hour motion of Conservative Legal Defense and Education Fund and the other the outside organizations ("Applicants") for leave to appear as amici curiae in this case (the "Motion"). Their Motion, which comes after the final deadline for even supplemental briefs to be submitted to the Court, violates Rule 1:13-9, is untimely, and is prejudicial to the parties. Furthermore, Applicants' participation as amici curiae would not be of any assistance to the Court. The current parties are all adequately represented by counsel, the outside "education" groups do not profess to have a connection to New Jersey, and they do not offer any particular expertise or novel insight on the same constitutional issues that have already been presented to the Court, including by another amicus curiae with the same perspective. The Court should accordingly deny Applicants' Motion.

LEGAL ARGUMENT

POINT I

THE COURT SHOULD DENY APPLICANTS' LAST
MINUTE AMICUS CURIAE APPLICATION BECAUSE IT
IS UNTIMELY, UNHELPFUL TO THE COURT, AND
WILL CAUSE PREJUDICE TO THE PARTIES

Rule 1:13-9 governs amicus curiae applications and states that a court only grants an entity's request to participate as amicus curiae:

if it is satisfied under all the circumstances that the motion is timely, the applicant's participation will assist in the resolution of an issue of public importance, and no party to the litigation will be unduly prejudiced thereby.

R. 1:13-9. Here, the Applicants' Motion fails under each prong of this standard.

A. The Applicants' Motion Is Untimely.

This case was accepted for appeal by the Appellate Division on January 14, 2010, which then established a briefing schedule and set oral argument for March 2, 2010. (PETa17). That was the time to move to appear as an amicus curiae, as did the amicus curiae already appearing in this case. (See Application of The American Civil Rights Union for Leave to Appear as Amicus Curiae, filed February 3, 2010). Furthermore, even in proceedings before this Court, all briefs were required to be submitted by May 10, 2010. (See Court's Order on Petition for Certification, April 27, 2010) (ordering that "the parties and

amicus curiae may file supplemental briefs ... on or before Monday May 10, 2010." (emphasis added)). Despite having more than adequate opportunity to move to appear, the Applicants instead waited until after this deadline to ask to be heard. Rule 1:13-9 was adopted "to encourage amici to enter the proceedings at as early a stage as possible[" Pressler, Current New Jersey Court Rules, Comment on R. 1:13-9 (emphasis added). The Applicants have offered no explanation or justification for such delay, and the Motion should therefore be denied as untimely.

B. The Applicants' Participation Will Not Assist in the Court's Resolution of this Matter.

Applicants' Motion should further be denied because they have no expertise or connection to the issues in this case, and because they address issues that have already been briefed extensively by Senator Menendez, Plaintiff, Defendants, and the amicus curiae already supporting Plaintiff's positions, who are all adequately represented by counsel.

An amicus brief should be allowed because it would be helpful to the Court in the following circumstances:

"[W]hen a party is not represented competently or is not represented at all, when the amicus has an interest in some other case that may be affected by the decision in the present case ... or when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.

Pfizer, Inc. v. Division of Taxation, 23 N.J. Tax. 421, 423-24 (June 1, 2007) (quoting Ryan v. Commodity Futures Trading Commission, 125 F.3d 1062, 1063 (7th Cir. 1997)). None of these factors are satisfied here.

There is no allegation that any of the parties are not adequately represented in this case. See Casey v. Male, 63 N.J. 255, 260 (Cty. Ct. 1960) (noting that amicus curiae petitions are denied "where the parties were adequately represented by counsel and the public interest adequately protected.") Furthermore, the Appellate Division permitted the American Civil Rights Union to appear as amicus curiae to address the constitutional issues in this case. Applicants only seek to address these same issues from the same perspective. (See Motion at 3-4). Surely the Court's review of numerous duplicative submissions will not "assist in the resolution" of this appeal. R. 1:13-9.

Furthermore, as indicated by the scant information about the Applicants in their Motion, they do not appear to have any connection to New Jersey or the interests of the public in the state, or any demonstrated expertise on constitutional issues concerning federal elections. It is hard to imagine what "unique information or perspective" self-proclaimed "public education" groups, including entities like the Gun Owners Foundation, U.S. Border Control Foundation, and the American

Coalition for Competitive Trade, could offer to the Court. (See Motion at 2-3).

Finally, rather than appearing as "friends of the Court," it is clear that Applicants are seeking to appear "in support of" the Plaintiff. (See, e.g., Cover of Applicants' Brief). "Where a petitioner's attitude toward the litigation is patently partisan, he should not be allowed to appear as amicus curiae." Casey, supra, 63 N.J. Super. at 259. Applicants only seek to repeat the same one-sided positions of the Plaintiff and ACRU, and thus will not help the Court in an "advisory role."

C. The Applicants' Participation at this Late Stage in The Proceedings Will Prejudice the Parties.

Finally, the Applicants motion should be denied because, contrary to R. 1:13-9, Senator Menendez will be unduly prejudiced. Given the Applicants' eleventh-hour filing and the fact that briefing on this matter has already been completed and oral argument is less than two weeks away, Senator Menendez does not have adequate time to investigate or respond to Applicants' specific arguments.

However, if the Court does grant Applicants' Motion to appear as amici curiae, then Senator Menendez should be permitted a reasonable amount of time to file a response to the merits of their brief. Granting Senator at least five days to file a response would not alleviate the prejudice created by

allowing Applicants' Motion, but would be a minimum procedure towards establishing fair proceedings..

Similarly, if the Applicants' Motion is granted, they should not be permitted to present oral argument. Applicants have not made such a request and when an "amicus desire[s] any additional participation, such as leave to orally argue, leave from the court in which the appeal is pending is required to be sought." Pressler, Current New Jersey Court Rules, Comment on R. 1:13-9 (emphasis added). However, if the Court does allow Applicants to appear and for some reason does permit them to present oral argument, then counsel for Senator Menendez should be given an equal amount of additional time.

CONCLUSION

For the above reasons, Petitioner Senator Menendez respectfully requests that this Court deny Applicants' Motion for Leave to Appear as Amici Curiae.

Respectfully submitted,

GENOVA, BURNS & GIAN TOMASI
Attorney for Petitioner

BY: 

Angelo J. Genova

Dated: May 12, 2010