

06-1418

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SEAN HARRINGTON,

Plaintiff-Appellant,

v.

MADELINE WILSON, *et al.*,

Defendants-Appellees.

**REPLY IN SUPPORT OF MOTION FOR LEAVE
TO FILE BRIEF *AMICUS CURIAE***

Kenneth L. Smith, *pro se*, respectfully submits this Reply in support of his motion for leave to file a brief *amicus curiae* in the above-captioned matter:

I. “The Clock That Struck Thirteen” (Length of the Amicus Brief)

Fed. R. App. P. 29(d) states in pertinent part: “Except by the court's permission, an amicus brief may be no more than one-half the maximum length authorized by these rules for a party's principal brief.” The maximum length authorized by the rules for an appellant’s principal brief is 14,000 words. *Fed. R. App. P. 32(a)(7)-(B)(i)*. The amicus brief contains 6,935 words, and the certificate of compliance required by Fed. R. App. P. 32(a)(7)(C) was attached. As such, my brief complies with the Federal Rules, and quite obviously so.

Mindful as I am of Justice Frankfurter's famous aphorism about 'the clock that struck thirteen' -- if memory serves, it is even in the Practitioner's Guide! -- I note with a measure of astonishment that not one but **four** "licensed attorneys" would have opened their response with an objection so patently frivolous, no *pro se* litigant would have been clumsy enough to advance it.

II. The "Republican Manifesto?"

Speaking of clumsiness, I refuse to dignify the Appellees' scurrilous ad hominem attacks and use of pejoratives with a response ... apart from noting that they constitute a back-handed compliment. Evidently, they have no credible answer to the only question at issue here: whether the proposed amicus brief would be helpful to the Court in resolving the issues before it.

III. Evidently, Humpty Dumpty Was a Lawyer....

While I will forego the temptation to respond to Appellees' personal attacks, I must take umbrage at their assertion that "a rational attorney would not put himself or herself at risk under C.R.C.P. 11¹ of bringing this case." *Resp. at 5[sic]*. Simply put, if an attorney of the stature of Professor Chemerinsky evinces an interest in taking on your appeal, *Appellant's Mot. for Enlargement of Time at 2*, your case

¹ A "licensed attorney" really *should* be aware that we *are* in federal court.

probably isn't "frivolous" or "vexatious." Apparently, when the Appellees employ the phrase "rational attorney," it **really** means, "anyone who agrees with us."

Sean Harrington has raised cutting-edge issues that quite frankly, few attorneys would have had the skill or dedication to catch. For instance, the fact that a plaintiff won a \$370,000 jury award on a theory of law and facts substantially similar to the one he alleges in a courtroom right down the street, *Hall v. Hall-Stradley*, No. 94-cv-2865 (*Denver Dist. Ct. Feb. 6, 1987*), establishes conclusively that his suit is neither "frivolous" nor "vexatious." Moreover, it is doubtful that any one attorney in Colorado possesses the requisite expertise in family, civil rights, and ADA law to present his claims. Filing *in propria persona* was his only practical option.

IV. Stare Decisis ... or Stare Deceased?

Having thus dispensed with Appellees' objections with perhaps more solemnity than they deserve, we come to the real issue raised in the amicus brief: whether we as a society can tolerate a legal system where judges can shade and even fabricate facts and/or disregard the collective wisdom of Circuit precedent whenever they become inconvenient. I concur with Justice Story that no more alarming doctrine could be promulgated by an American court, and have endeavored to explain why. As the lower court decision in *Harrington v. Wilson* proves, this is not strictly an academic issue.

I will be the first to admit that the assessment of the present state of our courts as presented in the amicus brief is nothing short of brutal. Still, let us not forget who has been slinging the arrows: respected appellate judges like the late Richard Arnold, Robert Bork, Alex Kozinski, Roger Miner, and Laurence Silberman, luminaries from the past such as Justices Frankfurter, Hughes, Story, and the two Marshalls, and revered legal theoreticians such as Bacon, Blackstone, Lord Coke, and Llewellyn. Quotes from Thomas Jefferson, Judge Patricia Wald, and Chief Justice Maura Corrigan of the Michigan Supreme Court (among many others) were left on the cutting-room floor. And let us not forget the candid confession of Judge Kane. That the picture painted is not a pretty one is hardly the fault of the messenger.

If the notion of a judge deciding a case in which she has a substantial personal financial interest doesn't discomfit you, then you will have no quarrel with *Smith v. Mullarkey*, 121 P.3d 890 (Colo. 2005) (*per curiam*). If a district court judge's consistent refusal to follow the binding precedent of this Circuit doesn't concern you, then you will have no objections to *Harrington v. Wilson*, *Smith v. Mullarkey*, 67 Fed.Appx. 535 (10th Cir. Jun. 11, 2003), or any other appeal that is brought to your attention. If the ultimate lodestar determining whether a plaintiff ought to prevail in a lawsuit is your own considered opinion, then we may as well do away with the district courts, and resurrect the Tudors' Court of the Star Chamber.

CONCLUSION

As Judge Tjoflat of the Eleventh Circuit recently observed, “[I]f the people do not respect the judiciary ... [they] will resort to self-help.” *United States v. Gunby*, 112 F.3d 1493, 1502 (11th Cir. 1997). Every day, you either earn or squander our respect by the quality and consistency of your rulings. When we ordinary citizens can’t know what “the law” is because we can have no confidence that a judge will rule in a certain way on a given day, it erodes respect for all law; rulings like the one the district court issued in *Harrington v. Wilson*, if upheld, prove that we live not under the rule of law, but that of men. I ask the Panel to consider the broader policy implications of that development and thus, implore it to accept my amicus brief.

Submitted this 19th day of January, 2007,

____s/_____
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CERTIFICATE OF SERVICE

I hereby certify that on January 19, 2007, I served a copy of the foregoing upon all parties herein by depositing it in the United States Mail, postage prepaid, and addressed as follows:

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CERTIFICATE OF DIGITAL SUBMISSION

Pursuant to Emergency General Order 5 of this Court, I hereby certify that:

(1) all required privacy redactions (none applicable) have been made and, with the exception of those redactions, every document submitted in Digital Form or scanned PDF format is an exact copy of the written document filed with the Clerk;

(2) this digital submission has been scanned for viruses with the most recent version of a commercial virus scanning program (Norton Internet Security version 8.0, updated Jan. 19, 2007) and, according to the program, is free of viruses, and

(3) on January 19, 2007, I served an identical copy of the foregoing upon all parties herein via electronic mail, addressed as follows:

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