In the United States Court of Appeals
for the Third Circuit

William Drummond, et al.,	)	No. 20-1722
	)	
Plaintiffs-Appellants,	)	
	)	
v.	)	
	)	
Township of Robinson, et al.,	)	
	)	
Defendants-Appellees.	)	
_____	)	

APPELLANTS' RESPONSE IN OPPOSITION TO MOTION OF AMICI CURIAE GIFFORDS, ET AL., TO EXPAND AND DIVIDE ARGUMENT

SUMMARY OF ARGUMENT

This Court should deny the Giffords Amicis' extraordinary motion to enlarge argument in this case to thirty minutes per side, and take half that much time for themselves, over the parties' objections.

The motion should be denied for three reasons, each of which is dispositive. First, the desired time for argument—one hour—is well out of all proportion to the simple matter before the Court. Second, Rule 29 does not sanction an involuntary division of argument with amici absent extraordinary circumstances. Giffords Amici cite no such circumstances.

Perhaps most importantly, the Giffords brief failed to meet Rule 29's desirability and relevance requirements. As Giffords Amici's motion concedes, the brief advances not only new arguments on appeal, but new facts contained nowhere in the record. Giffords Amici re-argue the previous appeal in this case, and assert other claims that are clearly foreclosed by precedent. They repeatedly present dissents as precedent. And they even seek to taint Plaintiff Drummond's character by harping on his uncle's criminal record, a matter which has no legitimate relationship to this dispute. Defendants, properly, never mentioned the matter.

Contrary to Giffords Amici's suggestion here, Plaintiffs consented to their filing of an amicus brief—as Amici previously noted. *See* Motion, Dkt. 36-1, at 5.[1] On reflection, Plaintiffs regret that error. There is no need to compound the error by spending an hour of the Court's and counsels' time discussing this type of material.

[1]Giffords Amici did not bother seeking Plaintiffs' consent for this motion.

ARGUMENT

I. EXPANSION OF TIME IS UNWARRANTED.

Giffords' request to have this case argued for an hour supports Plaintiffs' position that the District Court gave the matter too short a shrift. Yet a full hour's worth of argument time is normally reserved for en banc cases, not for simple cases like this one.

The decision under review issued without reargument in the District Court, and followed a short, unpublished order of this Court also issued without hearing argument. There is nothing on the District Court's docket between this Court's earlier mandate and the second dismissal being appealed. This is obviously not a one-hour case.

II. NO EXTRAORDINARY CIRCUMSTANCES WARRANT THE DIVISION OF TIME OVER THE DEFENDANTS' OPPOSITION.

It is far from guaranteed that this appeal will yield a precedential opinion. The previous appeal in this case did not, and nothing has changed since then. The general background understanding that every appeal might theoretically impact the law's course is insufficient to allow outsiders to divide oral argument against the parties' wishes.

Rule 29 previously stated that amici could participate in oral argument "only for extraordinary reasons." This was Rule 29's "only major caveat." *Am. Coll. of Obstetricians & Gynecologists, Pa. Section* v. *Thornburgh*, 699 F.2d 644, 646 (3d Cir. 1983) (Higginbotham, J., dissenting). As Defendants aptly note, this language was deleted "to reflect more accurately the current practice in which it is not unusual for a court to permit an amicus to argue *when a party is willing to share its argument time with the amicus*." Notes of Advisory Comm. on 1998 Amendments to Fed. R. App. P. 29, Subdivision (g) (emphasis added). "The Committee does not intend, however, to suggest that in other instances an amicus will be permitted to argue absent extraordinary circumstances." *Id.*

The parties disagree as to how the case should be decided, but they agree that it is their case that should be decided. Plaintiffs thus endorse Defendants' opposition to the division of their argument time. No extraordinary circumstances warrant overriding Defendants' interest in their argument time, and the parties' mutual interest in focusing the Court's attention on the issues actually being litigated.

None of the reasons Giffords Amici offer for involuntary division are extraordinary, or even rational. First, Giffords Amici note that they alone argue that the challenge does not pass *Marrzarella*'s first step. Giffords Mot., Dkt. 52, at 2. Of course there is *a reason* why Defendants do not press that argument: that was their argument in the previous appeal, and it lost.

This Court's previous opinion in this case could not have been more clear on this point: "A time, place, and manner test is not an appropriate means to determine, at Step One, whether a burden has been placed on Second Amendment rights . . . ." Opinion, No. 19-1394, at 4-5.

Law of the case, end of story.

With arguments about potential alternatives excised from the analysis, Plaintiffs' challenge to the regulation of gun clubs passes Step One because the regulation of gun clubs "imposes a burden on conduct falling within the scope of the Second Amendment's guarantee." *United States* v. *Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010). Defendants never claimed otherwise, and could not have raised such arguments for the first time on appeal. Amici cannot raise new arguments either.

It would be extraordinary to grant amici argument time, over their ostensibly supported party's objection, to argue a point this Court rejected in the previous appeal without argument, or to raise frivolous new arguments on appeal.

Giffords Amici next claim that their "important factual context" was unaddressed in the parties' main briefs, "and only in Appellants' reply brief because *amici* raised it." Giffords Mot., Dkt. 52, at 2. If by "important factual context" Amici mean Drummond's uncle's criminal record, Plaintiffs again object that this discussion is not just utterly irrelevant, but inappropriate. Even if Drummond had a criminal record—and he does not—the challenged regulations have nothing to do with a range operator's criminal history.

Of course, amici often bring to a court's attention background, non-adjudicative factual presentations. To the extent Giffords Amici would have done so, that would not have been extraordinary.

Similarly, Giffords Amici offer that they raised other arguments addressed only in Plaintiffs' reply. But that is hardly extraordinary either. It is quite normal, inherent in Rule 29(a)(6)'s design. "The

opposing party will have sufficient time to review arguments made by the amicus and address them in the party's responsive pleading." Notes of Advisory Comm. on 1998 Amendments to Fed. R. App. P. 29, Subdivision (e).

Against Defendants' opposition, argument should not be divided for the "extraordinary" reason that Amici offered material to which the opposing party responded. That circumstance describes nearly all amicus briefs. To the extent that Giffords' *material* is itself extraordinary, it is not extraordinary in a manner suggesting that Giffords' participation at argument would be constructive.

III. AS GIFFORDS' BRIEF FAILS RULE 29'S REQUIREMENTS OF DESIRABILITY AND RELEVANCE, IT DOES NOT MERIT SEPARATE ARGUMENT TIME.

Motions for leave to file amici briefs must state "the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case." Fed. R. App. P. 29(a)(3)(B). The "requirements of . . . desirability and . . . relevance" are thus "implicit." *Neonatology Assocs., P.A.* v. *Comm'r*, 293 F.3d 128, 131 (3d Cir. 2002) (Alito, J.).

> The criterion of desirability . . . is open-ended, but a broad reading is prudent. The decision whether to grant leave to file must be made at a relatively early stage of the appeal. It is often difficult at that point to tell with any accuracy if a proposed amicus filing will be helpful.

Id. at 132.

Moreover, as shown by Plaintiffs' consent to the pro se Goldfarb brief, they are reluctant to begrudge anyone an opportunity to file amicus curiae briefs, even when the substance of these briefs is expected to be off-topic. To the very limited extent that Plaintiffs would ever seek to act as gatekeepers, they would rather police what is offered on "their side" than interfere with the opposition's right to present whatever views it wishes. Plaintiffs assumed that Giffords would present a reasoned, mainstream argument within the ordinary bounds of Fed. R. App. 29 that would aid this Court's resolution of the case.

But there are limits. And Giffords Amici have exceeded them. It may be too late to prevent this filing, but the Giffords brief's lack of merit makes this already unusual motion even more "disfavored." Giffords Mot., Dkt. 52, at 2.

First, there is nothing "desirable" about dredging up the wholly irrelevant matter of Mr. Freund's criminal history, coupling it with the

outrageous claim that all of the gun club's commercial activities were illegal, Giffords Br. 6, and suggesting that Defendants' regulation is somehow tied to "fraud, theft, and illegal firearms trafficking," *id.* at 4. Defendants never even hinted at this legislative purpose, found nowhere in the record. Character attacks on the parties' relatives have no place in this litigation.

In this regard, Plaintiffs continue to take issue with Giffords' selective quotation of their brief. When Plaintiffs wrote that Drummond "formed GPGC LLC for the purpose of operating GPGC much as his grandfather and uncle had," Appellants' Br. 9 (citing JA64-65, ¶¶29-32), they plainly referenced the club's long history of lawful activities. *Cf.* Appellants' Br. 7; JA61, ¶¶14-16. Giffords Amici quote this sentence of Plaintiffs' brief using ellipsis to delete mention of Drummond's grandfather, in the context of offering that Drummond intends to operate a criminal enterprise. Giffords Br., at 5. That is unfair.

Also objectionable is Giffords Amicis' repeated citation to dissenting opinions as though they are precedential, and without noting that they are dissents. One would have imagined that upon seeing that pointed out

in Plaintiffs' Reply Brief, at 14, 19, Giffords Amici would have sought to file an errata and apologized for the oversights. Instead, they seek to expand argument to a full hour so that they may amplify these and other errors.

The Giffords brief is replete with other serious problems. As noted supra and in the motion to expand and divide argument, it largely raises arguments not raised by the Defendants, Giffords Mot., Dkt. 52, at 2, meaning, new arguments on appeal. Again, as noted supra, one of these arguments—that available alternatives impact the Step One burden under a substantial burden test—was precisely the subject of the previous appeal.

Giffords Amici's claim that facial challenges are subject to a heightened pleading standard that burdens plaintiffs with disproving constitutionality is not only wrong as a general matter, Reply Br. 17-18, it also conflicts with *Marzzarella*, which burdens plaintiffs with only a Step One showing. "[T]he two-step *Marzzarella* framework controls *all* Second Amendment challenges." *Binderup* v. *Atty. Gen'l*, 836 F.3d 336, 356 (3d Cir. 2016) (en banc) (emphasis added). There is no facial

challenge exception to *Marzzarella*: "In *United States v. Marzzarella* we adopted a framework for deciding *facial* and as-applied Second Amendment challenges." *Id.* at 339 (emphasis added). Giffords Amici also do not tell the full story with respect to this Court's facial challenge standards. Like the Supreme Court, this Court has accepted the "plainly legitimate sweep" test, *see* Reply Br. 15-16, not that the precise test matters given the allegations, *id.* at 16.

Plaintiffs' reply brief more fully covers the defects in Giffords' arguments. For purposes of this opposition, it is enough to note that Giffords Amici have raised what appears to be a character attack, misrepresented precedent, sought to reargue the previous appeal, and otherwise failed to argue within the limits of what is actually before the Court. Their brief proved to be neither desirable nor relevant. It does not justify their extraordinary request to expand argument to a full hour and divide time over the parties' objections.

CONCLUSION

The motion should be denied.

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Respectfully submitted,

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/s/ Alan Gura
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Dated: October 16, 2020

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/s/ Alan Gura
Alan Gura