

No. 17-55901

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

CYNTHIA CARDARELLI PAINTER, an individual, and on behalf of
other members of the general public similarly situated,
Plaintiff-Appellant,

v.

BLUE DIAMOND GROWERS,
Defendant-Appellee.

**MOTION OF THE GOOD FOOD INSTITUTE
FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE
IN SUPPORT OF DEFENDANT-APPELLEE**

The Good Food Institute (GFI) respectfully moves this Court under Fed. R. App. P. 29(a)(3) for leave to file the accompanying brief as amicus curiae in support of defendant-appellee Blue Diamond. As required by Circuit Rule 29-3, GFI endeavored to obtain the consent of all parties to the filing of the proposed brief. Blue Diamond consents to its filing; Painter does not consent and has indicated that an opposition to this motion will likely be filed.

GFI is an independent, non-profit organization devoted to creating a healthy, humane, and sustainable food supply. Through research, education, and advocacy, GFI promotes the development and adoption of new, innovative foods, including plant-based foods. A significant part of GFI's work addresses regulatory issues confronting newly developed foods, with the significant overall objective of ensuring clarity in food labeling.¹ In support of this mission, GFI has, for example, submitted a citizen petition to FDA requesting that the agency explicitly codify its practice of allowing innovative foods to bear simple, clear names that consumers understand, such as gluten-free bread, veggie burgers, and indeed, almond milk.² The petition has attracted more than one hundred comments, including a comment from plaintiff-appellant Painter³ connecting the petition's subject matter to the case before this Court and to similar lawsuits. Additionally, GFI has opposed congressional proposals to prohibit the use of dairy terms on the labels

¹ For more information on GFI's mission and activities, see www.gfi.org.

² See Citizen Petition from The Good Food Institute, *available at* www.regulations.gov/docket?D=FDA-2017-P-1298-0001.

³ See Comment from Capstone Law, at 1 n.1 (noting representative capacity for Painter and existence of other lawsuits), *available at* www.regulations.gov/document?D=FDA-2017-P-1298-0120.

of plant-based foods and beverages. Through these activities, GFI has developed significant expertise in the subject matter of this case.

I. GFI’S PROPOSED BRIEF SATISFIES THE CRITERIA FOR PERMITTING AN AMICUS BRIEF UNDER RULE 29.

The criteria set forth in Rule 29(a)(3) are met if a putative amicus has “a sufficient ‘interest’ in the case and [its] brief is ‘desirable’ and discusses matters that are ‘relevant to the disposition of the case.’” *Neonatology Associates, P.A. v. C.I.R.*, 293 F.3d 128, 129 (3d Cir. 2002) (Alito, J.) (quoting rule). In applying the criteria, “a broad reading is prudent” and “it is preferable to err on the side of granting leave.” *Id.* at 132–33. “Even when the other side refuses to consent to an amicus filing, most courts of appeals freely grant leave to file, provided the brief is timely and well-reasoned.” Michael E. Tigar & Jane B. Tigar, *FEDERAL APPEALS—JURISDICTION AND PRACTICE* 181 (3d ed. 1999) (quoted approvingly in *Neonatology Associates*, 293 F.3d at 133). Rule 29’s standard is met where an amicus with an interest related to the case files a brief that “alerts the [Court] to possible implications of the appeal,” making it both “relevant and desirable.” *Id.* (internal quotation marks omitted). Furthermore, “[e]ven when a party is very well represented, an amicus may provide important assistance to the

court,” having “particular expertise not possessed by any party to the case,” or by maintaining a position outside the “emphasis [of] a party intent on winning a particular case.” *Id.* at 132. Denying motions for leave to file an amicus brief in these instances only works to “deprive the court of valuable assistance.” *Id.*

GFI’s interest is to advance a broad legal perspective, which is not represented by the parties, on the future implications of this Court’s decision for the clear labeling of new and existing alternative food products, including some that may compete with Blue Diamond’s almond milk. In particular, GFI’s proposed brief describes how Painter’s argument would apply equally to a wide variety of products, including soy milk, coconut milk, goat milk, rice noodles, rye bread, gluten-free spaghetti, veggie bacon, and many more — requiring each of these products to be labeled “imitation.” *See Proposed Brief at 26–30, 32–34.*

Further, none of GFI’s arguments “inject new issues” or irrelevant matters into this case, *Neonatology Associates*, 293 F.3d at 133. Rather, each of GFI’s arguments is directed to the core issue in this case — interpreting the law’s imitation provision and FDA’s regulation

thereunder. GFI not only alerts the Court to the possible implications of its decision in this case, but GFI also demonstrates the absurd results that flow from Painter’s interpretation of the law and regulation.

Nor does the fact that GFI takes a position strongly in Blue Diamond’s favor provide a basis for denying leave to file; this Court has stated there is “no rule that amici must be totally disinterested.”

Funbus Systems v. Cal. Pub. Util. Comm’n, 801 F.2d 1120, 1125 (9th Cir. 1986) (citation omitted). Indeed, such a rule would conflict with Rule 29’s requirement that an amicus have an “interest” in the case. And under “the fundamental assumption of our adversary system,” “an amicus who makes a strong but responsible presentation in support of a party can truly serve as the court’s friend.” *Neonatology Associates*, 293 F.3d at 131.

Finally, GFI’s proposed brief raises several specific and “relevant” legal arguments not adequately addressed by either party in this litigation. First, GFI identifies and explains the statutory provisions governing “imitation” labeling and express preemption in this case — provisions that neither party cites or discusses. Proposed Brief at 13–14. Second, GFI notes relevant portions of FDA regulations and

regulatory history that neither party analyzes. Proposed Brief at 18–19, 20, 31–32. Third, GFI presents a distinct analysis focusing on the element of “resemblance,” which adds significantly to Blue Diamond’s analysis focusing on the element of “substitution.” Proposed Brief at 21–26. Fourth, GFI provides a highly detailed description of the absurd results that flow from Painter’s reading of the regulation (including its application to several other foods), which significantly supplements Blue Diamond’s brief analysis of this issue. *Compare* Proposed Brief at 26–35 *with* Blue Diamond Brief at 40–42. Finally, GFI presents one more argument not addressed by either party — that a narrow reading of the law and regulation properly avoids serious constitutional questions. Proposed Brief at 35–42. In these highly specific ways, GFI’s proposed brief supplies additional “relevant matter” that would be of “considerable help to the Court.” *See* Fed. R. App. P. 29 Advisory Comm. note (b) to 1998 Amendments (“An *amicus curiae* brief which brings relevant matter to the attention of the Court that has not already been brought to its attention by the parties is of considerable help to the Court”) (quoting U.S. Sup. Ct. R. 37.1).

For the above-stated reasons, GFI respectfully requests that the Court grant this motion for leave to file as amicus curiae, and order that the proposed brief be filed.

Dated: March 9, 2018

Respectfully submitted,

s/ Nigel Barrella

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CERTIFICATE OF SERVICE

I hereby certify that on March 9, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system.

I certify that all participants in this case are registered CM/ECF users and will be served by the appellate CM/ECF system.

Dated: March 9, 2018

s/ Nigel Barrella
Nigel A. Barrella

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