

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

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ISOBEL BERRY CULP & DAVID CULP,)
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Petitioners-Appellants,)
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v.) Docket No. 22-1789
)
COMMISSIONER OF INTERNAL REVENUE,)
)
Respondent-Appellee.)
)
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**APPELLANTS’ RESPONSE TO APPELLEE’S MOTION TO STRIKE THE
BRIEF OF AMICUS CURIAE**

Pursuant to Federal Rule of Appellate Procedure 27 and Local Appellate Rule 27.4, appellants object to the granting of appellee’s motion to strike the brief of amicus curiae and, in response, show as follows:

The appellee (hereinafter, “the government”) argues that the brief violates FRAP 29 in that it does not support the brief that the appellants (hereinafter, “the Culp”) will file and that the amicus brief should be filed after the Culp file their opening brief (which is currently due very shortly, on June 27, 2022).

There is simply no requirement in FRAP 29 that an amicus brief be filed after the opening brief of a party who the amicus supports. And such a rule would make no sense in most cases involving pro se taxpayers, as in this case.

The Culps have been in contact with the attorneys for the amicus and were aware of what the amicus planned to argue. The Culps, although themselves attorneys, are not tax procedure specialists. The Culps represent themselves in this case pro se.

The Culps had not planned to set forth in their brief an extensive discussion of 26 U.S.C. § 7459(d) or its legislative history or the research done by the amicus into refund suits, Tax Court dismissals orders, and orders to show cause set forth in part I.C. of the amicus brief (running from pp. 10-19). The Culps are not experts in that area.

The Culps had also not planned to set forth in their brief the arguments in part II. of the amicus brief (at pp. 21-22) pointing out of how especially protective of often-unrepresented middle- and low-income taxpayers the deficiency procedures are compared to what constitutional procedural due process requires. These are matters much better known to Ms. Olson – who was the IRS National Taxpayer Advocate from 2001-2019, before she became the Executive Director of the amicus – and Professor Fogg.

The Culps had also not planned to set forth in their briefs an estimate of how many taxpayers each year might seek equitable tolling in deficiency cases (discussed at pp. 25-26 of the amicus brief) – a subject on which the Culps are not competent to make an educated estimate.

Thus, while there may be some overlap in the discussion of *Boechler, P.C. v. Commissioner*, 212 L. Ed. 2d 524 (2022), between the Culps’ brief and the amicus’ brief, at least half of the amicus’ brief discusses matters that the Culps do not plan to discuss in their opening brief.

The Culps’ brief is also required to make further legal arguments not set forth in the amicus brief, such as why equitable tolling should be allowed in their case and why this Court should not follow rulings in other courts holding that a notice of deficiency that is not received during the 90-day period still is valid to cut off taxpayers’ rights to petition the Tax Court under 26 U.S.C. § 6213(a) after the end of the 90-day period if equitable tolling can be allowed.

The purposes of FRAP 29 will be met in this case because the amicus brief will not simply provide repetitious arguments with respect to the Culps’ opening brief.

Next, Committee Comments to Local Third Circuit Rule 27.4 concerning motions for summary action state: “The filing of a motion for summary action does not stay the regular briefing schedule set forth in FRAP 31(a).” The Court has ordered that the Culps’ brief must be filed no later than June 27, 2022. Under FRAP 29(a)(6), an amicus brief on the merits must be filed “no later than 7 days after the principal brief of the party being supported is filed” – which would be no later than July 5, 2022 in this case. The amicus brief was filed after the Court set a

merits briefing schedule and before the deadline set by FRAP 29(a)(6). That should be enough to hold that the amicus brief was timely filed.

Next, the government argues that a merits amicus brief, when filed while a motion for summary affirmance is pending, is limited to 2,600 words, not the 6,500 words normally accorded to merits amicus briefs. The government gets to this argument by mixing two Federal Rules of Appellate Procedure that are not intended to be mixed in this way. There are three things wrong with the government's argument:

First, FRAP 27 on motions precludes parties (and presumably amicus) from filing briefs along with their motions and responses. FRAP 27(a)(2)(C)(i) states: "A separate brief supporting or responding to a motion must not be filed."

Second, what the amicus filed is not in fact, and does not purport to be, a response to statements made in the government's motion for summary affirmance. The amicus brief does not in any way quote the motion for summary affirmance or directly respond to it. The amicus brief responds to what the government has argued in prior cases and what the courts have previously said in those cases. The Culps will file their own response to the motion for summary affirmance.

Third, FRAP 29's word-length rules apply to merits amicus "briefs". FRAP 29(a)(5) states: "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.” FRAP 27(d)(2)(A) states that “a motion or response to a motion produced using a computer must not exceed 5,200 words”. There are no word limits on an amicus brief in FRAP 27 because no amicus “brief” is permitted by that rule, only motions and responses.

Finally, as supported by the affidavit of Professor Fogg filed herewith, the amicus obtained consent by email to file this brief at 2:42 pm on June 10, 2022, after (1) a phone call between Professor Fogg, counsel for amicus, and Mr. Rosenberg, counsel for the government, in the morning of that day and (2) by emailing to both counsel for the government at 12:11 pm a near-final draft of the brief (at almost 6,500 words) for their review. In the phone call, Professor Fogg specifically told Mr. Rosenberg that this brief was not a brief in response to the motion for summary affirmance, but was an amicus brief for the case in chief. During the discussion with Mr. Rosenberg, and during the email exchange with Ms. Oppenheimer (the other counsel for the government), neither Professor Fogg nor Mr. Smith (another counsel for the amicus who became a part of the email chain) discussed the exact time the amicus brief would be filed.

CONCLUSION

The motion to strike the amicus brief should be denied.

Respectfully submitted,

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Dated: June 14, 2022

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME
LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE
REQUIREMENTS**

1. This response complies with the type-volume limitations of Federal Rule of Appellate Procedure 27(d)(2)(A) because this response contains 1,089 words.

2. This response complies with Federal Rule of Appellate Procedure 27(d)(1)(E), the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5), and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this response has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman 14-point font.

Dated: June 14, 2022

Respectfully submitted,

s/Carlton M. Smith
Carlton M. Smith
Counsel for Amicus

CERTIFICATE OF BAR MEMBERSHIP

I hereby certify that all counsel for amicus are members of the bar of the United States Court of Appeals for the Third Circuit.

Dated: June 14, 2022

Respectfully submitted,

s/Carlton M. Smith

Carlton M. Smith

Counsel for Amicus

CERTIFICATE OF SERVICE

This is to certify that a copy of this response was served on counsel for the appellee, Joan I. Oppenheimer and Isaac B. Rosenberg, Esqs., by filing it with the CM/ECF system, of which they are members.

This is also to certify that a copy of this response was served on appellants on June 14, 2022, by mailing the same in a postage-paid wrapper addressed to them at Berry & Culp, 7000 Crittenden Street, Philadelphia, PA 19119 and by e-mailing a copy of this response to them the same day.

Dated: June 14, 2022

Respectfully submitted,

s/ Carlton M. Smith
Carlton M. Smith
Counsel for Amicus
David Culp
Appellant