

FILED
5th JUDICIAL DISTRICT COURT
Lea County
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NELDA CUELLAR
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**STATE OF NEW MEXICO
COUNTY OF LEA
FIFTH JUDICIAL DISTRICT COURT**

REPUBLICAN PARTY OF NEW MEXICO;
DAVID GALLEGOS; TIMOTHY JENNINGS;
DINAH VARGAS; MANUEL GONZALES,
JR.; BOBBY KIMBO; DEANN KIMBRO; and
PEARL GARGIA,

Plaintiffs,

v.

MAGGIE TOULOUSE OLIVER, in her
official capacity as New Mexico Secretary of
State; MICHELLE LUJAN GRISHAM, in her
official capacity as Governor of New Mexico;
HOWIE MORALES, in his official capacity as
New Mexico Lieutenant Governor and
President of the New Mexico Senate; MIMI
STEWART, in her official capacity as
President Pro Tempore of the New Mexico
Senate; and JAVIER MARTÍNEZ, in his
official capacity as Speaker of the New Mexico
House of Representatives,

Defendants.

No. D-506-CV-2022-00041
(The Honorable Fred Van Soelen, District
Court Judge)

**REPLY IN SUPPORT OF MOTION FOR LEAVE TO FILE *AMICI*
CURIAE BRIEF IN SUPPORT OF NEITHER PARTY**

To adjudicate Plaintiffs’ partisan gerrymandering claim, the Court will be called to consider quantitative analyses and evidence that are likely to be technical and demanding. *See, e.g.*, Expert Report of Sean P. Trende (Aug. 11, 2023); Expert Report of Jowei Chen, Ph.D. (Aug. 25, 2023); Expert Report of Brian Sanderoff (Aug. 25, 2023); Decl. & Expert Report of Kimball W. Brace (Aug. 25, 2023). Based on their national experience in the field, proposed *amici* seek to offer the Court a nonpartisan and impartial *amici* brief to assist the Court in weighing the quantitative evidence. The Court has the discretion to accept it for filing. *Cf. N.M. Oncology & Hematology Consultants, Ltd. v. Presbyterian Healthcare Servs.*, 994 F.3d 1166, 1176 (10th Cir. 2021) (granting a motion for leave to file *amici* brief where *amici* provided briefing “that is relevant to the disposition of the case” and “more information about the Defendants’ practices” and rejecting parties’ opposition that *amici* relied on extra-record evidence); *Richardson v. Flores*, 979 F.3d 1102, 1106 (5th Cir. 2020) (granting a motion to file an *amici* brief and explaining that a court may allow *amici* briefs in the court’s discretion).

Even though proposed *amici* offer a brief in support of no party, certain legislators—although it is unclear which ones and whether they are in fact parties—oppose proposed *amici*’s Motion for Leave to File *Amici Curiae* Brief in Support of Neither Party (Aug. 14, 2023) (“Mot.”).¹ The arguments made on behalf of some legislators are not grounds for the Court to categorically reject proposed *amici*’s brief in support of neither party.

¹ It is unclear whether the response is filed by the *Non-Party* Citizen Legislators (as it would appear from counsels’ signature block) or the Legislative Defendants. *See* Resp. to Mot. for Leave to File *Amici Curiae* Br., at 4–5, (Aug. 28, 2023) (“Resp.”) (noting the representation of the “Non-Party Citizen Legislators” and omitting Mr. Mark T. Baker as counsel). If the *Non-Party* Legislative Defendants filed the “response,” then the Court should strike it and grant proposed *amici*’s motion. *See* Rule 1-007.1(D) NMRA (“If a party fails to file a response within the prescribed time period the court may rule with or without a hearing.”) (emphasis added). The *Non-Party* Citizen Legislators have not intervened as party defendants; rather, counsel for the *Non-Party* Citizen Legislators (who are also counsel for the Legislative Defendants) entered an

First, the legislators say proposed *amici* should have sought and obtained intervention under Rule 1-024 NMRA before offering the Court an impartial description of the quantitative analyses that may be used in this case. Proposed *amici*, however, disclaim any interest in the outcome of this litigation. *See* Mot. at 8. They seek only to assist the Court in weighing the evidence to adjudicate the claims, wherever they lead. Accordingly, an application for intervention would have been inappropriate. *See* Rule 1-024(A) NMRA (requiring an applicant for intervention as of right to have “an interest” related to “the disposition of the action”); Rule 1-024(B) (requiring an applicant for permissive intervention to have a “claim”). Where a proposed *amicus*’s objective is to share its knowledge and experience, courts indicate a motion for leave to file an *amicus* brief is the proper procedure, and not a motion to intervene. *See, e.g., Richardson*, 979 F.3d at 1106 (“To the extent Movants want their voices heard, however, the proper procedure is to move to appear as amici curiae, and not to move to intervene.”); *ACLU of New Mexico v. Santillanes*, No. CV 05-1136, 2006 WL 8444081, at *2 (D.N.M. July 12, 2006) (same). Observing proper procedure, proposed *amici* do not seek to be parties; they seek to file a brief as a friend of the Court.

Second, the legislators ignore the bulk of proposed *amici*’s brief and instead focus on the proposed *amici*’s illustrative examples of various analyses, which the legislators incorrectly characterize as a disguised expert report. *See* Resp. at 2. The legislators overlook that proposed

appearance under Rule 1-089(A) NMRA “for the limited purpose of representing them in connection with subpoenas duces tecum and notices of deposition with attendant subpoenas seeking discovery that implicates Article IV, Section 13 of the New Mexico Constitution.” *See* Limited Entry of Appearance on Behalf of the Non-Party Citizen Legislators, at 1 (Aug. 7, 2023). Proposed *amici*’s submissions have nothing to do with either the subpoenas to the *Non-Party* Citizen Legislators or the Speech or Debate Clause of the New Mexico Constitution. Because it is unclear from their own filing who the respondents are, proposed *amici* will refer to the respondents as “the legislators.”

amici expressly say they neither offered evidence nor “endorse[d] any particular methodology.”

See Br. of *Amici Curiae* at 1–2, n.1, conditionally filed as Ex. A to Mot. (Aug. 14, 2023).

Accepting *amicus* briefs that seek to assist the Court in evaluating a party’s expert testimony is not unusual in New Mexico courts. See, e.g., *State v. Alberico*, 1993-NMSC-047, ¶ 25, 116

N.M. 156 (considering *amici* arguments regarding the admissibility and evaluation of expert testimony); *Morris v. Brandenburg*, 2015-NMCA-100, ¶ 120 (Vanzi, J., dissenting) (similar).

The same is true for federal courts. See, e.g., *Silverstein v. Fed. Bureau of Prisons*, 559 F. App’x 739, 758 (10th Cir. 2014) (considering *amici* arguments in conjunction with expert testimony).

Indeed, such *amicus* briefs are particularly common in the context of redistricting litigation. Courts, including the U.S. Supreme Court, allow *amicus* briefs that both offer descriptions of quantitative methods and provide analyses addressed to the underlying case. See, e.g., Br. of Jowei Chen, et al., *Allen v. Milligan*, Nos. 21-1086 & 21-1087, 2022 WL 2873376 (U.S. July 18, 2022); Br. of Computational Redistricting Experts, *Allen v. Milligan*, Nos. 21-1086 & 21-1087, 2022 WL 2873387 (U.S. July 18, 2022); Br. for Amicus Curiae Eric S. Lander at 9–21, *Rucho v. Common Cause*, Nos. 18-422 & 18-726, 2019 WL 1125806 (U.S. Mar. 7, 2019); Br. of Mathematicians, *Rucho v. Common Cause*, Nos. 18-422 & 18-726, 2019 WL 1294683 (U.S. Mar. 8, 2019). And the Justices have explicitly relied on such *amicus* briefs, including Justice Kagan in the opinion that sets forth the applicable standard for this case. See, e.g., *Rucho v. Common Cause*, 139 S. Ct. 2484, 2517–19 (2019) (Kagan, J., dissenting) (citing redistricting expert *amicus* briefs); *Allen v. Milligan*, 143 S. Ct. 1487, 1509, 1513 (2023) (same).

Third, in criticizing the proposed *amici*’s brief, the legislators point out that proposed *amici* filed their motion very early under the Court’s scheduling order ““to provide ample time for this Court’s consideration”” and allow the possibility for ““further follow up, if permissible

and as availability allows.” Resp. at 3 (quoting Mot. at 8). Given the accelerated calendar, proposed *amici* recognized that a brief filed as early as possible would be more likely to assist the Court—the very purpose of the brief. The legislators read too much into the reference to follow up and exaggerate counsels’ *ex parte* communications discussing the possibility that a deposition could occur. *See id.* Such representations were provided out of prudence, in awareness of Rule 1-045 NMRA and Rule 11-706 NMRA and the Court’s discretion. Contrary to the legislators’ implication, undersigned counsels’ passing observation that discovery was possible depending on the parties’ positions and the Court’s needs as the litigation proceeds is not eyebrow-raising; nor does it furnish a basis to deny proposed *amici*’s motion.

Moreover, no party has sought discovery from the proposed *amici*. Because discovery from proposed *amici* here is unwanted or unnecessary, as is the norm for *amicus* briefs in redistricting litigation and beyond, the proposed brief stands on its own without the need for more. The Court should simply accept proposed *amici*’s brief and consider it as a tool when weighing and navigating the record evidence.

Last, the legislators point to the demandingness of this litigation, citing the Plaintiffs’ subpoenas and taking the opportunity to advert to their own Speech or Debate defense. *See* Resp. at 3. Notwithstanding ongoing discovery disputes between the Plaintiffs and the legislators concerning legislative privilege, the Court soon will have to consider the redistricting plan at issue and, thus, the quantitative evidence that directly bears on each part of the three-part test the New Mexico Supreme Court adopted. The legislators call the quantitative evidence the parties will introduce as “multiple redistricting statistics lessons pointing to conflicting conclusions” and proposed *amici*’s presentation as “spin.” Resp. at 2. Yet, the quantitative evidence presented in partisan-gerrymander cases can be illuminating if not decisive of a

plaintiff's vote-dilution claim. *See, e.g., Rucho*, 139 S. Ct. at 2517–19 (Kagan, J., dissenting) (discussing the “evidence-based, data-based, statistics-based” conclusions of the district courts below). Proposed *amici* offer the Court a brief in support of neither party with a view only to aid the Court in its consideration and weighing of that evidence. The Court has the discretion to make use of proposed *amici*'s submission.

CONCLUSION

For the foregoing reasons and the reasons presented in their motion, the proposed *amici* respectfully request that the Court grant their motion to file an *amici* brief in support of neither party.

Respectfully submitted: September 12, 2023

/s/ Jeremy Farris

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CERTIFICATE OF SERVICE

I certify that on September 12, 2023, I filed the foregoing electronically through the Court's Odyssey File & Serve system, which caused counsel of record to be served by electronic means, as more fully reflected on the Notification of Service.

/s/ Jeremy Farris
Counsel for *Amici Curiae*