

**STATE OF NEW MEXICO
COUNTY OF LEA
FIFTH JUDICIAL DISTRICT**

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

Plaintiffs,

v.

Cause No. D-506-CV-2022-00041

MAGGIE TOULOUSE OLIVER as New
Mexico Secretary of State, MICHELLE
LUJAN GRISHAM as Governor of New
Mexico, HOWIE MORALES as New Mexico
Lieutenant Governor and President of the
New Mexico Senate, MIMI STEWART as
President Pro Tempore of the New Mexico
Senate, and JAVIER MARTINEZ as Speaker
of the House of Representatives,

Defendants.

RESPONSE TO MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF

Proposed *amici* caption as an amicus brief what is really the combined report of three proposed experts that no party has offered. They cite no rule that allows for this, and the Legislative Defendants know of no rule that would. Proposed *amici*'s motion does not fit within either of the two recognized ways expert opinions outside those presented through the adversarial process end up before a trial court, and the Court therefore should deny the motion.

First, *amici* could have offered experts if they timely sought to intervene. That would have required them to satisfy the requirements of Rule 1-024 NMRA. If they had successfully intervened, they would have been subject to discovery as parties to the litigation, including full expert discovery. And by proving their interests justify intervention under Rule 1-024, proposed

amici would have established why the Court should allow them to present their own experts. Proposed *amici* could then have timely filed complete expert reports in accordance with the scheduling order and in full compliance with Federal Rule of Civil Procedure 26(a)(2)(B)(i)-(iv) as that order requires. *See* Scheduling Order entered July 24, 2023. Two of the proposed *amici* have certainly played central roles in litigation as parties where they concluded a map was the result of actionable partisan gerrymandering, including in the *Rucho* case itself. *See, e.g., Common Cause v. Rucho*, 318 F. Supp. 3d 777, 810 (M.D.N.C. 2018) (noting that the two cases resolved through the United States Supreme Court’s *Rucho* decision were filed by Common Cause and the League of Women Voters), in which they fully participated prior to the case being vacated and remanded. *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019). Here, proposed *amici* neither brought this case nor timely sought to intervene.

Second, Rule 11-706 allows district courts to enlist their own experts after notice and an opportunity for the parties to be heard on the issue, and then subjects any court-appointed expert to discovery and examination by the parties. Rule 11-706 experts are not normally used, however, and this Court did not take the extraordinary step of appointing one for this litigation. The Court will have the opportunity to consider the expertise and opinions of the parties’ expert witnesses and determine which best aid the court in reaching the correct result. As it stands today, that already will include what amounts to multiple redistricting statistics lessons pointing to conflicting conclusions. Adding three more professors preaching their own spin on the issues, and related statistical analysis outside what each party has identified and outside of party discovery, is more likely to confuse than clarify the issues.

That leads to the final, practical problem with proposed *amici*’s brief. They openly acknowledge that this is not a typical amicus brief when they contend they filed their motion “in

line with one of the earliest dates in the litigation schedule” in order to “to provide ample time for this Court’s consideration as well as for the parties to respond and *seek further follow up, if permissible and as availability allows.*” Proposed Amici Mot. at 8-9 (emphasis added). That dovetails with counsel for proposed *amici*’s explicit statement to undersigned counsel that they notified their clients that filing this proposed amicus brief may expose them to discovery obligations. Normal amicus briefs do not require discovery because they do not involve non-parties submitting specific expert opinions to courts in the guise of legal briefs. A true amicus brief would require only a legal brief in response. That is not what proposed *amici* are seeking to offer in this case.

Adding discovery from three experts sponsored by non-parties would be burdensome in any case, and it is particularly prejudicial here. The parties already are racing to complete discovery to meet the Court’s scheduling deadlines and comply with the October 6 deadline the New Mexico Supreme Court set for this Court to complete these proceedings. Plaintiffs have listed 120 witnesses they intend to call and subpoenaed more than 10 witnesses for depositions (many of whom may not properly be deposed under the legislative privilege established by the Speech and Debate Clause of the New Mexico Constitution). Plaintiffs have also designated their own expert. The Legislative Defendants have disclosed three experts and timely filed their reports on August 25. The parties now have just 2.5 weeks remaining to complete discovery. Adding the burden of securing discovery from three additional experts purporting to tell the Court how best to decide this case is unreasonable. The Legislative Defendants would be unfairly prejudiced if they had to let the opinions of proposed *amici*’s proposed experts go unaddressed, and there is not time to add complete discovery from those experts and have the parties’ experts respond to their opinions

before trial. It adds too much and offers no corresponding benefit that justifies such a substantial burden.

CONCLUSION

New Mexico court rules do not contemplate non-parties injecting additional experts into litigation, and proposed amici should not be allowed to do so by adding the opinions of three non-party experts in this case. They did not seek to timely intervene; the Court did not select any of their proffered experts as a Rule 11-706 expert; and there is neither a mechanism nor time for the parties to do the discovery necessary to vet and respond to proposed amici's experts before discovery closes and this case is tried. For the foregoing reasons, the Legislative Defendants ask that the Court deny proposed *amici*'s motion.

Respectfully submitted,

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Pursuant to Limited Entry of Appearance*

CERTIFICATE OF SERVICE

I hereby certify that on August 28, 2023, I caused the foregoing Response, along with this Certificate of Service, to be served and filed electronically through the Tyler Technologies Odyssey File & Serve electronic filing system, which caused all parties or counsel of record to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

PEIFER, HANSON, MULLINS & BAKER, P.A.

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