IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JULIE CONTRERAS, IRVIN FUENTES, ABRAHAM MARTINEZ, IRENE PADILLA, and ROSE TORRES

Plaintiffs,

v.

ILLINOIS STATE BOARD OF ELECTIONS, CHARLES W. SCHOLZ, IAN K. LINNABARY, WILLIAM J. CADIGAN, LAURA K. DONAHUE, WILLIAM R. HAINE, WILLIAM M. MCGUFFAGE, KATHERINE S. O'BRIEN, and CASANDRA B. WATSON in their official capacities as members of the Illinois State Board of Elections, DON HARMON, in his official capacity as President of the Illinois Senate, and THE OFFICE OF THE PRESIDENT OF THE ILLINOIS SENATE, EMANUEL CHRISTOPHER WELCH, in his official capacity as Speaker of the Illinois House of Representatives, and the OFFICE OF THE SPEAKER OF THE ILLINOIS HOUSE OF REPRESENTATIVES,

Defendants.

Case No. 1:21-cv-03139

Circuit Judge Michael B. Brennan
Chief District Judge Jon E. DeGuilio
District Judge Robert M. Dow, Jr.

Three-Judge Court
Pursuant to 28 U.S.C. § 2284(a)

DEFENDANTS' OPPOSITION TO NAACP'S MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS

Defendants Don Harmon, in his official capacity as President of the Illinois Senate, the Office of the President of the Illinois Senate, Emanuel "Chris" Welch, in his official capacity as Speaker of the Illinois House of Representatives, and the Office of the Speaker of the Illinois House of Representatives (collectively, "Defendants") hereby submit this Opposition to the NAACP Legal Defense and Educational Fund, Inc., Chicago Westside Branch NAACP, and NAACP Chicago Southside (collectively, "NAACP") Motion for Leave to File Brief as Amici Curiae in Support of Plaintiffs (Dkt. 142) (the "Motion"). The Motion should be denied as a last-minute attempt to inject new issues into this already-complex litigation, which is not a proper role of an amicus. The NAACP's attempt to join the action in this nature is also untimely, which not only prejudices Defendants but also threatens to up-end the course of the proceedings.

BACKGROUND

This case began on June 10, 2021, with the initial *Contreras* complaint, which addressed alleged deficiencies in H.B. 2777 (the "June Map"). *See* Dkt. 1. Over the next two months the parties engaged in discovery and submitted briefing on motions to dismiss and motions for summary judgment. After the Census Bureau released the official census data on August 12, 2021, the Illinois General Assembly began the process of amending the June Map. The amendment was passed as S.B. 927 on August 31, 2021 and signed into law on September 23, 2021 (the "September Map"). Following a status conference with the three-judge panel on September 1, 2021 all parties began discovery with respect to the September Map.

On October 1, Plaintiffs amended the complaint to include new allegations about the September Map, *see* Dkt. 98, as did the plaintiffs in the related *McConchie* action. On October 19, 2021, the Court ruled on the parties' dispositive motions, concluding that the June Map was invalid, but that the September Map would be the starting point for the "remedial phase" of the

litigation. *See generally* Dkt. 117. That same day, the East St. Louis NAACP plaintiffs initiated a new action making claims related to the September Map. *East St. Louis Branch NAACP v. Ill. State Bd. of Elections, et al.*, No. 21-CV-05512. Acknowledging they were joining the action at a late stage—mid-discovery and post-dispositive motions—the East St. Louis NAACP plaintiffs agreed to follow the existing case schedule.

The Court's order on the dispositive motions ordered all plaintiffs to submit proposed revisions to the September Map on November 8, 2021. Pursuant to the Parties' extension agreement, Plaintiffs filed their submissions on November 10, 2021. Dkt. 135. Defendants' responsive submissions to all three sets of plaintiffs are due on November 24, 2021. On November 18, 2021, the NAACP filed a motion seeking leave to file a brief as amicus curiae.

LEGAL STANDARD

Amicus briefs are distinctly "uncommon" in trial court proceedings. *McCarthy v. Fuller*, 2012 WL 1067863 *1 (S.D. Ind. March 29, 2012). The privilege of being heard as an amicus is recognized as resting within the discretion of the court, which may grant or refuse leave depending on whether it finds the proffered information timely, useful, or otherwise. *National Organization for Women, Inc. v. Scheidler, et al*., 223 F.3d 615, 616 (7th Cir. 2000) (citing 3A C.J.S. Amicus Curiae § 3). "A district court must keep in mind the differences between the trial and appellate court forums in determining whether it is appropriate to allow an amicus curiae to participate." *Club v. Fed. Emergency Mgmt. Agency*, 2007 WL 3472851, at *1 (S.D.Tex. Nov. 14, 2007). Because a district court resolves fact issues, an *amicus* "who argues facts should rarely be welcomed." *Id.* (citing *Strasser v. Dooley*, 432 F.2d 567, 569 (1st Cir. 1970)); *see also Leigh v. Engle*, 535 F. Supp. 418, 422 (N.D. Ill. 1982) (noting that at the trial level, where issues of fact and law predominate, *amicus* briefs are generally inappropriate, as they "inject[] an element of unfairness into the proceedings") (motion denied).

When district courts entertain such requests, they turn to federal appellate court principles used to evaluate amicus curiae status under Federal Rule of Appellate Procedure 29. *See, e.g., McCarthy*, 2012 WL 1067863, at *1. To this end, the Seventh Circuit has held that an amicus brief should only be permitted in cases "in which [1] a party [to the existing case] is inadequately represented; or [2] in which the would-be amicus has a direct interest in another case that may be materially affected by a decision in this case; or [3] in which the amicus has a unique perspective or specific information that can assist the court beyond what the parties can provide." *Voices for Choices, et al. v. Ill. Bell Telephone Co.*, 339 F.3d 542, 545 (7th Cir. 2003). "An amicus cannot" however, "initiate, create, extend, or enlarge issues." *United States v. Michigan*, 940 F.2d 143, 165 (6th Cir. 1991) (denying leave to file an amicus brief).

ARGUMENT

A. Amici Cannot Raise New Claims or Seek New Relief

The NAACP seeks to pervert the function of an amicus brief by bringing new challenges to the September Map and requesting new relief instead of simply offering a unique or helpful perspective. In a litigation, "[t]he named parties should always remain in control, with the amicus merely responding to the issues presented by the parties." *Waste Mgmt. of Pennsylvania, Inc. v. City of York*, 162 F.R.D. 34, 36 (M.D. Pa. 1995).

The NAACP claims that its proposal is "consistent with the proposed plan put forward by the *Contreras* Plaintiffs." Dkt. 142-1 at 13. That claim ignores, however, that its proposed brief presents *new* legal arguments regarding Black voter dilution in districts not challenged on that basis by any party, and seeks *new* relief by submitting an entirely new map with "alternative boundaries from Defendants' plan[.]" ECF No. 142-1 at 8. Specifically, Exhibit A to the NAACP's proposed brief contains its "Alternative Proposed Remedial Plan" which seeks to redraw House districts 6, 8, 9, 26, 28, and 38, and Senate districts 3 and 14. Critically, *none* of

these districts are contested by the any of the plaintiffs in the three related actions.[1] The NAACP's proposal also relies on populations and citizen voting age population ("CVAP") results that conflict with those relied on by the *Contreras* Plaintiffs, further calling into question the NAACP's claim that their proposal is consistent with the *Contreras* proposal. *Compare* Dkt. 135-21, Ex. 9 at 62-66 *with* Dkt. 142-1, Ex. A at 27.

The NAACP's motion for leave to file its proposed brief should be denied because its brief would exceed the province granted to an amicus to act as a "friend of the court." *See Nat'l Comm'n on Egg Nutrition v. F.T.C.,* 570 F.2d 157, 160 n. 3 (7th Cir. 1977) (issue raised by amicus that was not raised by the parties was not properly before the court); *see also State of Mich.*, 940 F.2d at 165 ("Amicus . . . has never been recognized, elevated to, or accorded the full litigating status of a named party or a real party in interest."). Notably, the NAACP does not even attempt to meet the Seventh Circuit's criteria for amicus participation. *See Voices for Choices*, 339 F.3d at 545. *First*, there is no claim, and no basis to claim, that the *Contreras* plaintiffs—or the plaintiffs in the related actions—are not represented by adequate counsel. *Voices for Choices*, 339 F.3d at 545. *Second*, the NAACP does not claim to have "a direct interest in another case that may be materially affected by a decision in this case." *Id*. *Third*, the NAACP does not provide a "unique perspective or specific information that can assist the court" in deciding the issues *already* before it—*i.e.*, the *Contreras* plaintiffs' claims of Latino voter dilution in specific districts. *Id.*

[1] The *Contreras* Plaintiffs challenge House Districts 3, 4, 21, 24, and 39, and Senate Districts 2 and 11 under the Voting Rights Act and House District 21 and Senate District 11 under the Equal Protection Clause. *See* Dkt. 135. The *McConchie* Plaintiffs challenge House Districts 1, 2, 3, 4, 21, 22, 23, 24, 32, 39, 50, 77, and 114. The *East St. Louis NAACP* Plaintiffs challenge only House District 114.

Rather, the NAACP is plainly seeking to redress distinct perceived issues regarding Defendants' September Map, separate and apart from those presented by the existing plaintiffs. But as non-parties, the NAACP has no rights to raise new claims or seek its own relief. *See Adams v. City of Chicago*, 1995 WL 491496, at *1 (N.D. Ill. Aug. 11, 1995) ("Only a named party or an intervening real party in interest is entitled to litigate on the merits.") (quoting *Michigan*, 940 F.2d at 166); *Waste Mgmt. of Pennsylvania*, 162 F.R.D. at 36. If the NAACP had wanted to claim Black voter dilution in new districts, or participate as a party in this Court's remedial phase, it needed to adhere to the well-establish requirements for civil litigation and file a well-pleaded complaint in time for its claims to be tested by motion practice and for Defendants to take discovery on those claims. Because the NAACP's proposed brief unquestionably seeks to "create, extend, or enlarge" the claims and issues raised by the three sets of plaintiffs, the Court should deny the Motion as improper. *State of Mich.*, 940 F.2d at 165.

B. The Motion Should Be Denied Because It Is Untimely and Would Prejudice Defendants

Despite the September Map having been public since August 31, 2021, the NAACP waited until just *four* business days before Defendants' November 24, 2021, deadline to file their responsive submissions to attempt to raise its issues with the September Map. Even had the NAACP proffered any reason for this delay, which it did not, this timing is unacceptable in light of the extremely expedited case schedule the parties are now operating under—which has also been public for more than a month. Allowing the NAACP's brief at this eleventh hour would be prejudicial to Defendants. *First*, due to the necessary yet break-neck speed of this case, Defendants are already tasked with responding to three plaintiffs' submissions and nine expert reports in a matter of twelve days. Had the NAACP filed a lawsuit at a proper time, thus entitling them to participate in the Court's remedial phase, Defendants would have had the

opportunity to argue for a schedule that would allow adequate time for them, and their experts, to analyze and respond to *four* submissions. The NAACP's unjustified choice of timing leaves Defendants with insufficient time to adequately respond, and the motion should be denied on this ground alone. *Second*, by seeking to inject new claims and new relief into the case at this late stage, the NAACP denied Defendants the opportunity to test their claims through motion practice and discovery. This would further prejudice Defendants' ability to adequately respond to its proposed brief and remedial plan.

In addition to these reasons, the NAACP's motion should be denied because it ignored the Federal Rule of Appellate Procedure's deadline for amicus briefs, which requires that an "amicus curiae must file its brief . . . no later than 7 days after the principal brief of the party being supported is filed." Fed. R. App. Proc. 29(e). The NAACP filed its brief eight days after the *Contreras* Plaintiffs (and all related-case plaintiffs) filed their submission. Courts deny leave to file amicus briefs on this basis alone. *See, e.g.*, *In re Calpine Corp.*, 2008 WL 2462035, at *1 (S.D.N.Y. June 9, 2008).

CONCLUSION

The NAACP's proposed brief would allow it to exceed any recognized role of an amicus curiae, would inject new claims, relief, and complexity into this action, was unjustifiably filed with less than three weeks before the hearing or trial in this case, and would prejudice Defendants. Defendants respectfully request that the Court deny the NAACP's Motion.

Dated: November 22, 2021

Respectfully submitted,

/s/ Sean Berkowitz

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