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Electronically Filed
Jul 27 2023 01:18 PM
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Clerk of Supreme Court

5 *Amicus Curiae In Proper Person*

6 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

8 DAVID MCNEELY & 5 ALPHA INDUSTRIES,
9 *Petitioners,*

10 v.

11 THE SECOND JUDICIAL DISTRICT COURT,
STATE OF NEVADA, WASHOE COUNTY, and
12 the HON. DAVID A. HARDY, DISTRICT
13 JUDGE, DEPT. 15,
Respondents,

Case No. 86559

14 *and*

15 HILLARY SCHIEVE, VAUGHN HARTUNG,
and JOHN DOE, /
16 *Real Parties in Interest.*

17 **AMICUS CURIAE ROST C. OLSEN'S REPLY IN SUPPORT OF MOTION**
18 **FOR LEAVE TO FILE AMICUS BRIEF, PURSUANT TO NRAP 29**

19 *Amicus Curiae* Rost C. Olsen, appearing in proper person, files this Reply in
20 Support of his Motion to file the *amicus curiae* brief (the "Brief") accompanying his
21 Motion. This Reply is supported by the following memorandum of points and
22 authorities.

23 **MEMORANDUM OF POINTS AND AUTHORITIES**

24 Allowing the filing of an amicus brief is a function that resides wholly within the
25 discretion of this Court. Regardless of the merit—or lack thereof—of any proposed
26 amicus brief, NRAP 29 makes that abundantly clear. Undersigned accepts and
27 acknowledges that reality. However, John Doe's Opposition fails for the following
28 reasons.

1 **I. First, Neither Nevada, Nor its Encompassing Federal Courts Using NRAP**
2 **29’s Federal Counterpart, Has Adopted the *Taylor* Test in Determining**
3 **an Amicus’s Interest**

4 In claiming Undersigned does not have a cognizable interest as an amicus in this
5 matter, John Doe cites to *Taylor v. Roberts*, 475 So. 2d 150, 152 (Miss. 1985), which
6 lists four factors that John Doe claims Undersigned does not meet; John Doe further
7 claims Undersigned’s arguments heavily overlap with Respondents’. Opp. at 3-4.

8 However, while John Doe’s presentation of the *Taylor* test and argument
9 elsewhere in the Opposition implies that amicus practice must present wholly
10 independent argument, *see, e.g.*, Opp. at 4, this Court has held that “amici may not
11 present novel issues not argued by the parties.” *Saticoy Bay, LLC, Series 34 Innisbrook*
12 *v. Thornburg Mortgage Sec. T. 2007-3*, 138 Nev. Adv. Op. 35, 510 P.3d 139, 145, n.7
13 (2022). And, this Court has expressly preferred that third parties who present no
14 additional questions but otherwise have an interest in litigation participate as amici
15 instead of other means such as intervention. *See Hairr v. First Jud. Dist. Ct.*, 132 Nev.
16 180, 188, 368 P.3d 1198, 1203 (2016). Additionally, the Ninth Circuit, California,
17 Oregon, and other jurisdictions who mandate amici seek leave to file do not appear to
18 have adopted this test. Further, the United States Supreme Court, notably, does not even
19 mandate amici seek leave prior to filing briefs. *See* USSCR 37(2).

20 Here, while John Doe in a rather conclusory manner states Undersigned has not
21 met criteria that this Court has not laid out for amici, Undersigned’s Brief illuminates
22 circumstances from third parties that “may otherwise escape the Court’s attention.” *See*
23 Opp. at 3. While John Doe dismissively conflates elected officials with rank-and-file
24 public employees, *see id.* at 3-4, the fact of the matter is the vast majority of public
25 employees do not enjoy the political influence and resources Schieve and Hartung have.
26 And yet granting the underlying petition would affect elected- and rank-and-file
27 employees alike. If, say, a teenager employed by a State agency investigating a store
28 making underage sales¹ draws the ire of someone with John Doe’s resources, what

¹ *See* Brief at 13, n. 17.

1 recourse or influence would that teenager have should this Court essentially hold that
2 there is a First Amendment right to trespass against that teenager?

3 While Undersigned acknowledges his plight in a similar circumstance would
4 likely not be as bleak as that teenager's, Undersigned submits he has nowhere near the
5 profile or resources that Schieve or Hartung have. Ultimately, Undersigned is simply a
6 rank-and-file state worker who wishes to do his job, banter with friends and strangers on
7 occasion, and go about his life in peace. Granting this writ, particularly on the grounds
8 John Doe argues, would force him to fear for his and his family's safety with little hope
9 for recourse any time his agency angers a certain portion of the population.

10 **II. Second, Granting the Underlying Motion Would Not Unfairly Prejudice**
11 **John Doe**

12 John Doe's argument that granting the Motion would cause him unfair prejudice
13 is internally inconsistent. He claims that the Brief artificially extends Schieve's &
14 Hartung's page limits, while also claiming the arguments are redundant. *See Opp.* at 4-
15 5. Yet, logic dictates that if additional pages merely parrot previous arguments, then John
16 Doe should be able to refute them with little effort.

17 Further, inasmuch the Brief's arguments are not redundant, the Rules of Appellate
18 Procedure would permit John Doe the time and benefit of getting the final word in his
19 response. *See NRAP 29(g)*. John Doe accordingly will not suffer unfair prejudice should
20 this Court grant the underlying Motion.^{2,3}

21 ² Upon reading John Doe's Opposition, Undersigned has become aware of and
22 acknowledges an inadvertent mix-up in the word-limit with which he had to operate.
23 Undersigned mistakenly drafted the proposed Amicus Brief believing he had a 7,000
24 word limit (*see NRAP 29(e) and NRAP 32(a)(7)(A)(ii)*), instead of 3,500. *See NRAP*
25 *21(d)*. As the proposed Amicus Brief is approximately 3,953 words, Undersigned is
26 willing to edit and resubmit the proposed Brief to comport with the appropriate word
limit, should the Court so order.

27 ³ Notably, none of the other Petitioners have timely joined John Doe's Opposition or
28 filed their own Opposition to the Motion, despite being subject to the same potential
briefing requirements John Doe claims to be prejudicial.

1 **III. Third, John Doe’s Mootness Argument Fails, as His Own Arguments**
2 **Would Implicate Preemption**

3 John Doe next claims that Assembly Bill 356 renders the complained-of conduct
4 “not capable of repetition,” and thus renders the Brief moot. Opp. at 5-6. However, even
5 if Petitioners McNeely and 5 Alpha might be able to raise that argument successfully,
6 the basis for which John Doe seeks relief undercuts his claim for mootness.

7 The Supremacy Clause of the U.S. Constitution mandates that “the Laws of the
8 United States...shall be the supreme Law of the Land; ... any Thing in the Constitution
9 or Laws of any State to the Contrary notwithstanding.” U.S. Const. Art. IV, cl. 2.

10 John Doe has emphatically asserted that the First Amendment protects his alleged
11 conduct. *See* Supp. Brief at *passim*. Undersigned’s proposed Brief argues that the record
12 at this point implicates John Doe in tortious behavior that would ordinarily render his
13 identity discoverable. Am. Brief at 4-11. Should this Court find that John Doe’s alleged
14 conduct is protected under the First Amendment as he claims, it would render Assembly
15 Bill 356 null and void inasmuch as it prohibits John Doe’s alleged conduct as a basic
16 matter of preemption.

17 Thus, the arguments posed in the Brief are ripe specifically because of John Doe’s
18 own arguments, at a minimum.

19 **IV. Finally, John Doe’s Assertion That the Proposed Amicus Brief Violates**
20 **Ethics Laws is Based Solely on His Assumptions and Not Underlying Fact**

21 The Ethics in Government Law prevents public employees from using
22 “governmental time, property, equipment or other facility to benefit a significant
23 personal or pecuniary interest of the...employee or any person to whom the public
24 officer or employee has a commitment in a private capacity.” NRS 281A.400(7).
25 However, this section does not apply to a “limited use of governmental property,
26 equipment or other facility for personal purposes” if:

- 26 (1) The public officer or employee who is responsible for and
27 has authority to authorize the use of such property, equipment or
28 other facility has established a policy allowing the use or the use
is necessary as a result of emergency circumstances;

- 1 (2) The use does not interfere with the performance of the public
2 officer's or employee's public duties;
3 (3) The cost or value related to the use is nominal; and
4 (4) The use does not create the appearance of impropriety;

4 NRS 281A.400(7)(a).

5 In suggesting that Undersigned is in violation of this section of the Ethics in
6 Government Law, John Doe makes a host of unsupported assumptions. However, simply
7 stated, Undersigned: predominately prepared and researched his filings on his own
8 computer; used his work computer in this matter minimally and in accordance with his
9 employer's established policies; is unaware of any interference with his work
10 performance; and incurred no additional costs to his employer in this matter. *See Decl.*
11 *of Rost C. Olsen at passim.*

12 Finally, the only indications in Undersigned's filings of the identity of his specific
13 employer are on the initial pages of his filings. These list the email, phone number and
14 physical addresses associated with his e-filing account with this Court and his law
15 license in accordance with SCR 79. A layperson could learn the identity of
16 Undersigned's employer by looking at the email address or searching Undersigned's
17 listing on the State Bar website. However, Undersigned conspicuously and repeatedly
18 disclaims any suggestion that this information improperly implies an endorsement of his
19 employer. *See Motion at 2, n.1; Brief at 1, n.1.*

20 Accordingly, these facts show that Undersigned has engaged in no conduct that
21 would appear improper to a reasonable person, but merely exercised his *own* First
22 Amendment right to petition the Court. *See U.S. Const., Am. I, cl. 5.* He has thus not
23 violated the Ethics in Government Law thru this amicus practice.

24 Accordingly, Undersigned respectfully asks the Court to grant his Motion.

25 RESPECTFULLY SUBMITTED this 13th day of July 2023.

26 /s/ Rost C. Olsen
27 Rost C. Olsen, SBN 14410
28 *Amicus Curiae In Proper Person*

1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCPC 5(b), I certify that I served the foregoing document with its
3 accompanying attachment on the parties in said case by electronically filing via the
4 Court's e-filing system, as follows:

5 Ryan T. Gormley
6 Brittany M. Llewellyn
7 Jonathan J. Winn
8 Weinberg, Wheeler, Hudgins,
9 Gunn & Dial, LLC
6385 South Rainbow Blvd., Ste. 400
Las Vegas, NV 89118

10 Jeffrey F. Barr
11 Alina M. Shell
12 Armstrong Teasdale LLP
13 7160 Rafael Rivera Way, Ste. 320
Las Vegas, NV 89113

14 Adam Hosmer-Henner
15 Chelsea Latino
16 Philip Mannelly
17 Jane Susskind
18 McDonald Carano LLP
19 100 West Liberty Street, Tenth Floor
Reno, NV 89501

20 The Honorable David A. Hardy
21 Second Judicial District Court
22 Dept. 15
23 75 Court Street
Reno, NV 89501

24 Dated: July 13, 2023

25 */s/ Rost C. Olsen*
26 _____
27 *Amicus Curiae In Proper Person*

1 **DECLARATION OF ROST C. OLSEN**

2 I, Rost C. Olsen, declare the following:

3 1. I am an attorney, duly admitted to the State Bar of Nevada and licensed to
4 practice before all state courts in Nevada.

5 2. I am employed by an agency within the State of Nevada government.

6 3. The statements in this declaration are made upon my personal knowledge
7 and, where indicated, upon information and belief; I am of age, sound mind, and
8 competent to testify to the contents of this declaration.

9 4. I prepared the *pro se* Motion for Leave to File Amicus Curiae Brief and the
10 accompanying proposed Amicus Brief in Nevada Supreme Court case no. 86559,
11 *McNeely, et al. v. Second Jud. Dist. Ct., et al.*

12 5. When I was considering whether to seek to file as an amicus in the above-
13 described matter, I made my supervisor and my organization’s general counsel aware I
14 was contemplating this course of action. In notifying them, I informed my supervisor
15 and the general counsel that I would be filing the amicus as a *pro se* party representing
16 myself, and would explicitly state that the views stated in my filings are my own and not
17 those of my employer.

18 6. When preparing the amicus filings, I predominantly did so using my
19 personal computer resources on my own time. I used my work computer resources in
20 the preparation of these filings in the following instances:

- 21 a. I forwarded early draft filings to myself in order to be able to access them
22 in the event I had time to work on them during a lunch break while in the
23 office at the end of May/beginning of June;
- 24 b. I had a brief email chain correspondence with one attorney representing
25 parties in the matter;
- 26 c. I emailed the final drafts of my filings in .pdf format to myself the evening
27 of July 19, 2023 in order to file the next day due to problems I had accessing
28 the Court’s e-filing system that evening from my home computer;

1 d. I filed the final drafts of the filings on July 20, 2023 from my work
2 computer during a break I had that morning; and

3 e. I received automatically generated emails from efiling@nvcourts.nv.gov to
4 my work email regarding filings.

5 7. To my knowledge, the activities described in paragraph 6 incurred no
6 additional cost to my employer or the State.

7 8. The contact information listed on the initial pages of my filings is the
8 contact information I am required to provide pursuant to SCR 79, and is the contact
9 information affiliated with my Supreme Court e-filing account; to the best of my
10 knowledge, an attorney is allowed to have only one e-filing account with the Supreme
11 Court, regardless of whether filing *pro se*, or on behalf of a client.

12 9. My employer has a policy permitting and outlining acceptable limited
13 personal use of email and work computer resources. To the best of my knowledge, the
14 conduct I have engaged in does not violate that policy, nor has my employer informed
15 me that it does.

16 10. Further, in recent months, I have worked on numerous matters in the scope
17 of my employment. I have not received any complaints suggesting that my outside
18 activities, such as seeking leave to participate in the above-described matter as a *pro se*
19 amicus, have caused my work performance to suffer.

20 I declare under penalty of perjury that the foregoing is true and correct.

21
22 Dated: July 27, 2023

23
24 /s/ Rost C. Olsen
25 Rost C. Olsen
26
27
28