IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PRIESTS FOR LIFE, *et al.*, Plaintiffs, -v- DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al*., Defendants.	Case No. 1:13-cv-01261-EGS

PLAINTIFFS' OPPOSITION IN RESPONSE TO
ACLU MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

ARGUMENT

I. Preface.

The American Civil Liberties Union ("ACLU") has filed a motion (Doc. No. 16) for leave to file a brief as *amicus curiae* in support of Defendants' motion seeking summary judgment (Doc. Nos. 13-14) and, accordingly, opposing Plaintiffs' motions for preliminary injunction and summary judgment (Doc. Nos. 7-8). ACLU's motion is facially deficient, and its proposed brief is substantively redundant. Moreover, Plaintiffs oppose this motion for two reasons relating directly to the ACLU: (1) the highly biased and adversarial nature of the ACLU's public position on the fundamental religious freedom issues involved in this case—a bias the ACLU's own motion confesses; and (2) the motion's failure to explain why the ACLU is uniquely situated to act as a "friend of the court" in this litigation and to thus occupy precious time and space that is fully and zealously engaged by the parties. Indeed, even the government, as the party-defendant, takes no position as to the value of the ACLU's intercession as *amicus*. (ACLU Mot. at 3). For these reasons and as more fully set forth below, Plaintiffs respectfully submit that the ACLU's motion should be denied.

II. The Legal Standard.

Given the case load of the federal judiciary and the abusive practice of non-parties filing redundant and overly partisan briefs, district courts have taken substantive steps to cure the abuse by requiring a putative *amicus* to provide the court with a substantive explanation as to why the proposed *amicus* brief is actually helpful to the court in its decision-making process. Thus, this Court, citing the rationale of the Seventh Circuit, denied a motion by the ACLU seeking leave to file an *amicus* brief:

> The ACLU has moved the court for leave to participate as *amicus curiae* in this case in support of defendants' position that the Senate Plan is retrogressive. The

> court is of the opinion that the limitations on *amicus* filings outlined by the Seventh Circuit in *National Organization for Women v. Scheidler*, 223 F.3d 615 (7th Cir. 2000), are applicable here. The ACLU has presented no unique information or perspective that can assist the court in this matter, and seeks only to make additional legal arguments on behalf of the United States, a more than adequately represented party. Accordingly, the court denies the ACLU's motion for leave to file an *amicus curiae* brief.

Georgia v. Ashcroft, 195 F. Supp. 2d 25, 33 (D.D.C. 2002) (Sullivan, J). In *NOW, Inc. v. Scheidler*, Judge Posner set out clearly the policies and the rationale underlying a more exacting scrutiny of such motions by appellate courts, which this Court appropriately applied to district courts:

> Whether to permit a nonparty to submit a brief, as *amicus curiae*, is, with immaterial exceptions, a matter of judicial grace. The reasons are threefold.
>
> 1. We court of appeals judges have heavy caseloads requiring us to read thousands of pages of briefs annually, and we wish to minimize extraneous reading. It would not be responsible for us to permit the filing of a brief and then not read it (or at least glance at it, or require our law clerks to read it), at least when permission is granted before the brief is written, and so reliance on our reading it invited. Therefore, *amicus curiae* briefs can be a real burden on the court system. In addition, the filing of an amicus brief imposes a burden of study and the preparation of a possible response on the parties.
>
> 2. *Amicus curiae* briefs, which we believe though without having proof are more often than not sponsored or encouraged by one or more of the parties in the cases in which they are sought to be filed, may be intended to circumvent the page limitations on the parties' briefs, to the prejudice of any party who does not have an *amicus* ally. The lawyer for one of the would-be *amici curiae* in this case admits that he was paid by one of the appellants for his preparation of the *amicus curiae* brief. And that appellant comes close to admitting that its support of the requests to file *amicus* briefs is a response to our having denied the appellant's motion to file an oversized brief.
>
> 3. *Amicus curiae* briefs are often attempts to inject interest-group politics into the federal appellate process by flaunting the interest of a trade association or other interest group in the outcome of the appeal.
>
> The policy of this court is, therefore, not to grant rote permission to file an *amicus curiae* brief; never to grant permission to file an *amicus curiae* brief that essentially merely duplicates the brief of one of the parties . . .; to grant permission to file an *amicus* brief only when (1) a party is not adequately

> represented (usually, is not represented at all); or (2) when the would-be *amicus* has a direct interest in another case, and the case in which he seeks permission to file an *amicus curiae* brief may, by operation of *stare decisis* or *res judicata*, materially affect that interest; or (3) when the *amicus* has a unique perspective, or information, that can assist the court of appeals beyond what the parties are able to do. The first ground is not available to these requesters; the appellant's argument that no one can adequately represent it within the page limits permitted by this court is, of course, a reason against granting the request—it is an end run around our order denying permission to file an oversized brief. The second ground is illustrated by the two *amicus curiae* briefs that the motions judge did allow to be filed on behalf of the appellants, for both of those *amici curiae* are organizations faced with the same kind of civil RICO claims that formed the basis of the judgment against the appellants. Finally, none of the rejected briefs presents considerations of fact, law, or policy overlooked by the appellants, who have filed briefs totaling 104 pages. So ground (3) is unavailable as well.

NOW, Inc. v. Scheidler, 223 F.3d 615, 616-17 (7th Cir. 2000) (citations and a parenthetical omitted). In yet another denial of a motion to file an *amicus* brief, this Court again pointed to the abuse and exploitation of judicial resources:

> Proposed intervenors argue that, in the event they are not permitted to intervene, the Court should permit them to participate in this action in the role of *amicus curiae*. The Court has broad discretion to permit such participation pursuant to 15 U.S.C.§ 16(f). An *amicus curiae*, defined as "friend of the court," Black's Law Dictionary 7th ed. 1999 at 83, does not represent the parties but participates only for the benefit of the Court. Accordingly, it is solely within the discretion of the court to determine the fact, extent, and manner of participation by the *amicus*. *See Ryan v. CFTC*, 125 F.3d 1062, 1064 (7th Cir. 1997) (Posner, J., in chambers) ("In an era of heavy judicial caseloads and public impatience with the delays and expense of litigation, we judges should be assiduous to bar the gates to *amicus curiae* briefs that fail to present convincing reasons why the parties' briefs do not give us all the help we need for deciding the appeal.").

United States v. Microsoft Corp., No. 98-123, 2002 U.S. Dist. LEXIS 26552, at *17 (D.D.C. Feb. 28, 2002) (Kollar-Kotelly, J.). As discussed below, the ACLU's motion fails all three prongs of the test articulated by the Seventh Circuit. Indeed, in setting out the legal standard in this district, the ACLU relies entirely on the third prong, claiming, without any factual basis, that the ACLU "has unique information or perspective that can help the Court beyond the help that the lawyers for the parties are able to provide." (ACLU Mot. at 4). Not surprisingly, while the

ACLU cited to *Cobell v. Norton*, 246 F. Supp. 2d 59, 62 (D.D.C. 2003), which in turn quotes from *Ryan, supra*, the ACLU's motion omitted the fuller standard applied by this Court. (ACLU Mot. at 4). That is,

> an *amicus* brief should normally be allowed when a party is not represented competently or is not represented at all, when the *amicus* has an interest in some other case that may be affected by the decision in the present case (though not enough affected to entitle the *amicus* to intervene and become a party in the present case), or when the *amicus* has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide. Otherwise, leave to file an *amicus curiae* brief should be denied**.**

Cobell v. Norton, 246 F. Supp. 2d at 62 (emphasis added; citation omitted).

In short, simply reciting the standard in its motion does not mean that the ACLU has satisfied it. Indeed, as set forth below, it has not. Thus, the ACLU's motion for "leave to file an *amicus curiae* brief should be denied."

III. The ACLU Motion Is Facially Deficient.

First, it can hardly be said that the parties are not represented competently or not at all. Indeed, the ACLU seeks to intercede on behalf of the government defendants, who are quite obviously committed to zealously representing the interests of the government and upholding the government's regulatory authority under the Patient Protection and Affordable Care Act. One look at Defendants' filings in this case, with an opening brief of 43 pages and an administrative record exceeding 500 pages (Doc. No. 12) ("ACA"), demonstrates the zealousness of the government's commitment to its adversarial role.

Second, the ACLU does not claim to have a case pending, either as a party or as legal counsel representing a party, that might be affected by the decision in the present case. At best, the ACLU claims to have filed *amicus* briefs in other cases. (ACLU Mot. at 5-6). But this clearly does not satisfy the second prong of the three-part test articulated in *Ryan* and adopted by this Court. If it did, we could fully anticipate the ACLU (and other similarly situated advocacy

organizations) launching forum shopping sprees to file *amicus* briefs in lenient courts and then using those filings to bootstrap themselves into this and every other court. *See NOW, Inc. v. Scheidler*, 223 F.3d at 617 (referencing a real party interest in another case where *stare decisis* or *res judicata* would affect the outcome).

Finally, we come to the third prong of the three-part test and the only one the ACLU feigns to satisfy. (ACLU Mot. at 2). But the arguments in support of this prong do not even approach a rationale. Thus, we are told that the ACLU has "filed comments with the federal government about the constitutionality of the federal rule at issue here, and has filed numerous *amicus* briefs in similar challenges nationwide." (ACLU Mot. at 2). But how does the filing of public comments provide "unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide"? *Cobell, supra*, 246 F. Supp. 2d at 62. Indeed, it does not.

In fact, the administrative record includes hundreds of pages of such comments, and the Court may take judicial notice of the legions of public comments made by literally thousands of individuals, groups, and entities. (*See, e.g.* Index for Rulemaking Record [Doc. No. 12-2] at 2-5). How does the act of adversarial political speech supporting the government's contraception mandate place the ACLU above thousands of other partisan groups and lobbyists? It does not.

And, as noted above, that the ACLU is in the business of filing *amicus* briefs to further its political agenda is neither unique nor indicative of a coherent or rational argument not already posited by Defendants and addressed by Plaintiffs in the nearly 100 pages of briefing (with yet another round of briefing still to come).

IV. The ACLU's Proposed *Amicus* Brief Is Redundant.

Finally, we turn to the redundancy of the ACLU's proposed *amicus* brief. Even a cursory review of the putative brief exposes this defect in the motion. It would not be an exaggeration to describe the proposed *amicus* brief as a pale version of the government's brief, with but the literary angst of a political lobbyist flexing its strong bias in favor of the contraception mandate. In effect, the ACLU brief is little more than a "me too" underscored by a "we really mean it!"

V. Conclusion.

For the foregoing reasons, Plaintiffs respectfully request that this Court deny the ACLU motion for leave to file an *amicus curiae* brief.

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CERTIFICATE OF SERVICE

I hereby certify that on October 22, 2013, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties and the non-party movant ACLU for whom counsel has entered an appearance by operation of the Court's electronic filing system. Parties may access this filing through the Court's system. I further certify that a copy of the foregoing has been served by ordinary U.S. mail upon all parties for whom counsel has not yet entered an appearance electronically: none.

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