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Clerk of Supreme Court

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

8 DAPHNE WILLIAMS,
9

10 *Defendant-Appellant,*

11 vs.

12 CHARLES “RANDY” LAZER,
13

14 *Plaintiff-Respondent.*

Supreme Court No. 80350

Appeal from the
Eighth Judicial District Court
for Clark County, Nevada

District Court Case No.
A-19-797156-C

15 **REPLY OF THE FIRST AMENDMENT LAWYERS ASSOCIATION**
16 **IN RESPONSE TO LAZER’S OPPOSITION TO ITS MOTION FOR**
LEAVE TO FILE AMICI CURIAE BRIEF IN SUPPORT OF DEFENDANT-
APPELLANT

17 The First Amendment Lawyers Association (“FALA”) and the American
18 Civil Liberties Union (“ACLU”), two organizations devoted to freedom of speech,
19 each desired to file an *amicus curiae* brief in this case. Remarkably, Plaintiff-
20 Respondent Charles “Randy” Lazer (“Respondent”) refused consent in each
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1 instance. The FALA and the ACLU each were therefore required to file a motion
2 for leave to file an *amicus curiae* brief, along with the proposed brief, which each
3 did. Yet more remarkable, Respondent filed a written opposition to each.¹

4 Respondent's reason for opposing the two motions is still more bizarre: The
5 attorney for the Appellant (Mr. Randazza) is a member and former officer of FALA;
6 and he donated to (and apparently is a former member of) the ACLU. Respondent
7 cites no authority for its position and offers no legal reasoning.

8 FALA has over 100 members around the country; the ACLU has over 1.2
9 Million members!² To drive the point home, Respondent's theory would disqualify
10 any attorney who belongs to or has contributed to the ACLU. What about the
11 National Rifle Association with its nearly 5 Million members?³ If the Republican
12 Party elects to file an *amicus curiae* brief, is it constrained to hire an attorney who is
13 a Democrat?

14 Then, in what Respondent seems to think is the final nail in the coffins of the
15 ACLU and FALA in their efforts to file *amicus curiae* briefs, Respondent makes the
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17 ¹ Having been involved in literally scores of cases in which *amicus curiae*
18 briefs were proposed, this is the first instance in memory in which consent was
refused by any party.

19 ² https://en.wikipedia.org/wiki/American_Civil_Liberties_Union

20 ³ https://en.wikipedia.org/wiki/National_Rifle_Association

1 laughable assertion that an amicus brief is tantamount to allowing Appellant to file
2 an extra brief. Other than the extremely rare *amicus curiae* brief that supports neither
3 side, when is that not the case?⁴

4 And, in another stunt, Respondent's counsel served their oppositions on
5 "every party." FED. R. CIV. PROC. 5(a)(1). Arguably, an amicus curiae is not a
6 "party" to the action. Clever! However, "A lawyer shall not communicate ex parte
7 with a judge." NEV. R. PROF. CONDUCT 3.5(b). Accord: Local Rule IA 7-2. After
8 reasonable electronic research, the undersigned is unable to find any decision
9 addressing the issue of service on amicus' counsel or whether it is unethical to do
10 so. However, failure to do so at the very least violates common notions of civility
11 and professionalism.

12
13 ***Mr. Randazza's Non-Participation***

14 Mr. Randazza submitted a request to FALA to consider filing an *amicus*
15 *curiae* brief. FALA, which files *amicus curiae* briefs on a relatively regular basis,
16 has an Amicus Committee consisting of eight (now seven) members of the Board.⁵

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18 ⁴ NEV. R. APP. PROC. 29(f) acknowledges the possibility of an amicus
curiae brief supporting neither side.

19 ⁵ Robert L. Corn-Revere, Esq., a Washington, D.C. partner of Davis
20 Wright Tremaine LLP; Professor Jennifer M. Kinsley, Esq., Salmon P. Chase
College of Law at Northern Kentucky University; Reed Lee, Esq. JD Obenberger

1 Pursuant to FALA's established procedures, the Amicus Committee voted in favor
2 of recommending the filing of an *amicus* brief. That recommendation was
3 forwarded to the FALA Board of Directors, consisting of roughly 20 FALA officers
4 and former officers, including the undersigned and Mr. Randazza. The Board voted
5 to approve the recommendation, with Mr. Randazza obviously recusing himself.
6 The Board asked the undersigned to author the brief, with the assistance of Professor
7 Jennifer Kinsley.⁶ They both agreed.

8 Mr. Randazza played no part, directly or indirectly, in the writing of the brief
9 other than to request it, nor did any associate of his firm.

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16 and Associates, Chicago, IL; Lawrence G. Walters, Esq., Walters Law Group,
17 Longwood, FL; D. Gill Sperlein, Esq., Law Office of D. Gill Sperlein, San
18 Francisco, CA; Allan B. Gelbard, Esq., Gelbard Law, Los Angeles, CA; Gary S.
19 Edinger, Esq., Gainesville, FL; and Allen Dickerson, Esq. although Mr. Dickerson
20 since has resigned from FALA because of his nomination to the Federal Election
21 Commission.

19 ⁶ Professor Kinsley is on the faculty of the Salmon P. Chase College of
20 Law at Northern Kentucky University. She has been a member of FALA for
21 decades.

1 *Amicus Briefs*

2 Rule 29 of the Nevada Rules of Appellate Procedure was derived from and is
3 much akin to the like-numbered federal rule.⁷ Two, sitting United States Supreme
4 Court Justices have commented on *amicus curiae* briefs in a way very relevant to
5 the pending motions. First, now-Justice Alito observed,

6 “The decision whether to grant leave to file must be made at a
7 relatively early stage of the appeal. It is often difficult at that point to
8 tell with any accuracy if a proposed amicus filing will be helpful.
9 Indeed, it is frequently hard to tell whether an amicus brief adds
10 anything useful to the briefs of the parties without thoroughly studying
11 those briefs and other pertinent materials, and it is often not feasible to
12 do this in connection with the motion for leave to file. Furthermore,
13 such a motion may be assigned to a judge or panel of judges who will
14 not decide the merits of the appeal, and therefore the judge or judges
15 who must rule on the motion must attempt to determine, not whether
16 the proposed amicus brief would be helpful to them, but whether it
17 might be helpful to others who may view the case differently. Under

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19 ⁷ *See Kellogg v. Journal Commc’ns*, 108 Nev. 474, 477, 835 P.2d 12
20 (1992) (Relying heavily on interpretations of the Federal Rules of Appellate
21 Procedure in construing the Nevada rules derived from them.).

1 these circumstances, it is preferable to err on the side of granting leave.

2 If an amicus brief that turns out to be unhelpful is filed, the merits panel,
3 after studying the case, will often be able to make that determination
4 without much trouble and can then simply disregard the amicus brief.”

5 *Neonatology Associates, P.A. v. C.I.R.*, 293 F.3d 128, 132–133 (3d Cir. 2002) (Alito,
6 J., in chambers).

7 Justice Breyer, as a sitting justice, made similar observations:

8 “In the U.S. Supreme Court, as a matter of course, we hear not
9 only from the parties to a case but also from outside groups, which file
10 . . . amicus curiae briefs that help us to become more informed about
11 the relevant science. In the ‘right-to-die’ case, we received about 60
12 such documents from organizations of doctors, psychologists, nurses,
13 hospice workers, and handicapped persons, among others. Many
14 discussed pain control technology, thereby helping us to identify areas
15 of technical consensus and disagreement. Such briefs help to educate
16 the judges on potentially relevant technical matters, helping to make us,
17 not experts, but moderately educated laypersons, and that education
18 improves the quality of our decisions.”

1 S. Breyer, *The Interdependence of Science and Law*, AMERICAN ASSOCIATION FOR
2 THE ADVANCEMENT OF SCIENCE, SCIENCE AND TECHNOLOGY POLICY YEARBOOK,
3 Chap. 9, (1999).

4 Indeed, courts often invite *amicus curiae* briefs. See 6AA Wright & Miller,
5 *et al.*, FED. PRAC. & PROC. JURIS. § 3975 – *Authorization to File an Amicus Brief*
6 (West 5th ed. 2020).

7
8 ***Conclusion***

9 As noted earlier, crucial to this petition is that the Court of Appeals here acted
10 as a precedent-setting court, rather than its usual function as an error-correcting
11 court. The proposed *amicus curiae* briefs establish as much.

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1 The Court should direct the clerk of the court to file the proposed brief of both
2 the FALA and the ACLU.⁸

3 Dated: January 13, 2021.

4 /s/ Clyde DeWitt

Clyde DeWitt

5 *Counsel for Amici Curiae*

6 *First Amendment Lawyers Association*

18 ⁸ *E.g., Labastida v. State*, 115 Nev. 298, 300, n.1, 986 P.2d 443, 444
19 (1999); and *Diaz v. Eighth Judicial Dist. Court ex rel. Cty. of Clark*, 116 Nev. 88,
20 95 n.3, 993 P.2d 50, 55 (2000); *cf. Exec. Mgmt., Ltd. v. Ticor Title Ins. Co.*, 118 Nev.
21 46, 53, 38 P.3d 872 (2002) (“Federal cases interpreting the Federal Rules of Civil
Procedure ‘are strong persuasive authority, because the Nevada Rules of Civil
Procedure are based in large part upon their federal counterparts.’”).

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Dated: January 13, 2020.

Clyde DeWitt