IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID MCNEELY; 5 ALPHA INDUSTRIES, LLC; and JOHN DOE

Petitioners,

v.

THE SECOND JUDICIAL DISTRICT COURT, STATE OF NEVADA, WASHOE COUNTY, and THE HONORABLE DAVID A. HARDY, DISTRICT COURT JUDGE, DEPT. 15

Respondents,

And

HILLARY SCHIEVE; and VAUGHN HARTUNG

Real Parties of Interest

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Case No. 86559
District Court Case No. CV22-02015

PETITIONER JOHN DOE'S OPPOSITION TO MOTION FOR LEAVE TO FILE AMICUS BRIEF

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Petitioner John Doe hereby opposes Proposed Amicus Curiae Rost C. Olsen's Motion for Leave to File Amicus Brief. This Opposition is supported by the attached memorandum of points and authorities.

The Court should deny the instant Motion for four reasons. First, Mr. Olsen asserts no interest that is distinguishable from the interests of Respondents. Second, Mr. Olsen's brief would unfairly prejudice Petitioners. Third, the alleged harm/interest against which he seeks to protect has been mooted by Legislative action. Fourth, an amicus curiae cannot potentially violate ethical rules. In short, for the reasons detailed below, the Court should deny the instant Motion.

A. Mr. Olsen Has No Cognizable Legal Interest Under NRAP 29.

The filing of an amicus curia brief is not a matter of right, but rather a privilege at the Court's discretion. *See* NRAP 29(a); *see also*, *N. Sec. Co. v. United States*, 191 U.S. 555, 556 (1903). A party seeking to become an amicus curia must set forth "the movant's interest" and "the reasons why an amicus brief is desirable." NRAP 29(c). Four criteria inform whether the movant has an interest and whether an amicus brief is desirable, as follows:

(1) Whether the proposed amicus has some interest in another pending case involving a similar question; or

(2) Whether counsel for the party to the appeal is inadequate or the briefing insufficient; or

(3) There are facts, laws, or circumstances that may otherwise escape the court's attention; or

(4) Whether the proposed amicus possesses a substantial, legitimate interest that will likely be affected by the outcome of the case and which interest will not adequately be protected by the parties to the case.

See e.g., *Taylor v. Roberts*, 475 So. 2d 150, 152 (Miss. 1985).[1]

In this case, Mr. Olsen's Motion meets none of these criteria.

Preliminarily, Mr. Olsen does not assert that he has an interest in another pending case; he does not assert that Respondent's counsel is inadequate or that the briefing is insufficient; and he does not assert any facts, laws, or circumstances that may otherwise escape this Court's attention. Thus, immediately, he has not met 3 of the 4 criteria, and as to criterion 4, he fails to assert a substantial, legitimate interest in the case which would not be protected by the parties to the case.

Mr. Olsen's stated interest is that he is "an unelected attorney working for a state agency." [Mot. 2:14.] He further claims that an amicus brief is desirable because it "would allow for the presentation of the perspective of one of these rank-and-file state workers whose rights would be affected by the issuance of writ…."

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[1] Other courts have articulated this as a three-factor test, *see e.g.*, *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997), or even a five-factor test. *See Oregon-California Trails Ass'n v. Walsh*, 467 F. Supp. 3d 1007, 1073 (D. Colo. 2020).

[Mot. 3:10-11.] Like Mr. Olsen, Respondents, too, are public officials. Indeed, other than their method of acquiring office, the interests of any "rank-and-file state worker" and Respondents are identical and indistinguishable in this instance. Moreover, Mr. Olsen does not describe how Respondents fail to adequately protect those interests of the "rank-and-file." Put simply, Mr. Olsen's status as "an unelected attorney working for a state agency" is not a substantial interest to warrant this amicus brief. The Court should deny the Motion.

B. The Amicus Brief Will Unfairly Prejudice Petitioners

"The vast majority of amicus curiae briefs are filed by allies of litigants and duplicate the arguments made in the litigants' briefs, in effect merely extending the length of the litigant's brief. Such amicus briefs should not be allowed. They are an abuse. The term 'amicus curia' means friend of the court, not friend of a party." *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997). Courts should deny motions for leave to file such briefs. *Id*.

Like the unfair amicus brief in *Ryan*, Mr. Olsen's proposed brief likewise adds nothing new. It does not provide this Court with an unbiased account of law. Mr. Olsen simply regurgitates Respondents' points, often wholly incorporating their arguments into his propose brief. This occurs most egregiously when he unabashedly states, "Undersigned concurs with and incorporates by reference Schieve's &

Hartung's arguments [sic] presented in § IV of their Brief stating how this matter does not implicate First Amendment rights." [PAB, 10.]

These arguments are prejudicial to Petitioners and are not the arguments of a friend of the court. Instead, Mr. Olsen's proposed amicus brief has the effect of simply lengthening Respondents' brief, putting Petitioners at a clear disadvantage. If the Court grants this Motion, Respondents will essentially be given two bites at the apple. Mr. Olsen's proposed amicus brief adds 15 pages of argument to Respondents' brief.[2] In sum, Mr. Olsen's proposed amicus brief is prejudicial to Petitioners, and the Court should deny Mr. Olsen's request to participate as amicus curiae.

C. The Legislature Has Mooted Whatever Harm Mr. Olsen Seeks To Protect Against

Mr. Olsen's assertion that his proposed amicus brief would "illuminate potentially unintended consequences" of granting the writ is misplaced because the complained-of conduct here—more specifically, the Investigator Defendants' use of

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[2] In fact, Mr. Olsen's proposed amicus brief exceeds the type-volume limitation for an amicus brief in this petition matter. Pursuant to NRAP 21(d), a petition, answer or reply "shall not exceed 15 pages unless it contains no more than 7,000 words." NRAP 29(e) in turn mandates that an amicus brief "may be no more than one-half the maximum length authorized by these Rules for a party's brief." In this instance, then, an amicus brief must not exceed 3,500 words. However, Mr. Olsen certifies that his proposed amicus brief "contains 3593 words." [PAB p. 30.] This is yet another instance of prejudice to Petitioners.

GPS devices—is not capable of repetition. *See, e.g.*, https://www.leg.state.nv.us/App/NELIS/REL/82nd2023/Bill/10252/Text (enacted text of Assembly Bill 356, which became effective July 1, 2023). Thus, his breathless hyperbole that "quixotic self-proclaimed government watchdogs" might "use private investigators to trespass against their neighbors working for public entities" is mooted by the passage of AB 356. In short, Mr. Olsen has no interest to warrant an amicus brief, and the Court should deny the Motion.

D. The Court Should Not Accept A Brief That Potentially Violates Ethical Laws.

It appears that in his efforts to insert himself into this matter, Mr. Olsen may have violated Nevada's Code of Ethical Standards, NRS 281A.400 *et seq.* The Court should not accept a brief that violates Nevada's ethical laws.

By his description, Mr. Olsen is a "unelected attorney employed with a state agency." [Mot. 2:14.] In point of fact, Mr. Olsen is an attorney with the Nevada Public Utilities Commission—a fact that can be quickly gleaned from the fact that Olsen used his state-issued email address to file his motion and proposed amicus brief and listed the Public Utilities Commission's Carson City address and his state-issued telephone number in identifying himself.[3] [*See* Motion for Leave p. 1.]

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[3] *See, e.g.*, https://nvbar.org/for-the-public/find-a-lawyer/?usearch=14410 (Mr. Olsen's SCR 79 address and contact information) (last accessed July 19, 2023).

And therein lies Mr. Olsen's apparent ethical problem. Pursuant to NRS 281A.400(7), a public employee like Mr. Olsen "shall not use governmental time, property, equipment or other facility to benefit a significant personal or pecuniary interest of the public officer or employee" unless (1) the public officer or employee who is responsible for and can authorize the use of such property, equipment, or facility "has established a policy allowing the use or the use is necessary as a result of emergency circumstances"; (2) the " use does not interfere with the performance of the public officer's or employee's public duties"; (3) the cost or value of the use is nominal; and (4) the use "does not create the appearance of impropriety."

Despite the clear prohibition against the use of government time, property, equipment, and other facilities to benefit a personal interest, Mr. Olsen appears to have done exactly that. By his own admission, Mr. Olsen has moved for leave to file an amicus brief to further his personal interests. [PAB, p. 2:13-26.] Mr. Olsen appears to have written his motion and proposed amicus brief on the Public Utility Commission's time, and used government property, equipment, and facilities to draft and file his motion and proposed amicus brief with this Court. Further, the undersigned is unaware of any policy established by the Nevada Public Utilities Commission that would permit Mr. Olsen to use government property, equipment, or facilities to further his personal interest in the outcome of this matter.

It therefore appears that Mr. Olsen's efforts to enter this case have come at the expense of the State—and ultimately, the taxpayers. This creates an undeniable appearance of impropriety.

The Court should deny Mr. Olsen's Motion for Leave to File Amicus Brief.

Dated this 20th day of July, 2023.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this opposition complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type-style requirements of NRAP 32(a)(6) because the brief has been prepared in a proportionally spaced typeface (14-point Times New Roman font). I further certify that this motion complies with the page limit set forth in NRAP 27(d)(2) because it is 8 pages. *See* NRAP 27(d)(2) ("A motion or a response to a motion shall not exceed 10 pages, unless the court permits or directs otherwise.").

I further certify pursuant to NRAP 28.2 that I have read this opposition, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this opposition complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires that every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the appendix where the matter relied on is to be found.

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I understand that I may be subject to sanction in the event that this opposition is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 20th day of July, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Armstrong Teasdale LLP and that on the 20th day of July, 2023, I served the foregoing document on the parties in this case by electronically filing via the Court's e-filing system, as follows:

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