

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
RICHMOND DIVISION**

BARBARA H. LEE; GONZALO J. )  
AIDA BRESCIA; and )  
THE DEMOCRATIC PARTY )  
OF VIRGINIA )  
*Plaintiffs,* )

v. )

Civil Action No. 3:15CV357-HEH

VIRGINIA STATE BOARD OF )  
ELECTIONS; JAMES ALCON; )  
DR. CLARA BELLE WHEELER; )  
SINGLETON B. MCALLISTER; the )  
VIRGINIA DEPARTMENT OF )  
ELECTIONS; and EDGARDO CORTES )  
*Defendants.* )

\_\_\_\_\_)

**MEMORANDUM IN SUPPORT OF  
MOTION FOR LEAVE TO PARTICIPATE AS AMICUS CURIAE**

The Public Interest Legal Foundation, Inc., has filed a motion for leave for leave to participate as *amicus curiae* in opposition to Plaintiff’s cause of action and requested relief in this matter. In support of this motion the proposed *amicus* states as follows:

The Public Interest Legal Foundation, Inc. (“PILF”) is a non-partisan, public interest organization headquartered in Plainfield, Indiana, and with undersigned counsel in Alexandria, Virginia. Founded in 2012, PILF seeks to promote the integrity of American elections and preserve the Constitutional balance giving states control over their own elections. PILF files *amicus curiae* briefs as a means to advance its purpose, preserve election integrity and has appeared as *amicus curiae* in federal courts on multiple occasions.

The Plaintiffs have brought the instant litigation in Virginia as part of a nationally coordinated litigation campaign seeking to transform long-standing legal standards related to

federal election laws. As of the date of this filing, related claims advancing similar legal theories include *One Wisconsin Institute, Inc. v. Nichol*, Case No. 15-cv-324 (W.D. Wis.) and *Ohio Organizing Collaborative v. Husted*, Case No. 2:15-cv-1802 (S.D. Ohio). Counsel for the Plaintiffs here is the same as counsel for the plaintiffs in Ohio and Wisconsin. Plaintiffs in those cases also challenge facially race-neutral election process rules as violating federal civil rights guarantees. This national litigation strategy obviously has been initiated in states with a significant role in the upcoming 2016 federal elections.

PILF can provide an understanding of this national strategy and the national implications of Plaintiff's cause of action which any singular defendant is unlikely to provide. PILF can marshal an array of election law experts who served in the Voting Section of the United States Department of Justice across multiple administrations who enforced the statutes at issue in this case, as well as other election law practitioners with significant experience. PILF employs or is affiliated with national election law experts, scholars and practitioners who can provide this court with a comprehensive history of the enforcement of these statutes and their traditional enforcement considerations.<sup>1</sup>

This court previously permitted undersigned counsel to file a brief as *amici curiae* in another election law case challenging Virginia election process rules filed by Plaintiff's counsel.<sup>2</sup>

PILF now seeks leave to appear as *amicus curiae* in this matter, and in particular regarding issues touching on:

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<sup>1</sup> See *eg.*, Adams, J. Christian (2015) "Transformation: Turning Section 2 of the Voting Rights Act into Something It Is Not," *Touro Law Review*: Vol. 31: No. 2, Article 8.

<sup>2</sup> *Democratic Party of Virginia v. Virginia State Board of Elections*, (E.D. Va.) Civil Action No. 1:13-cv-1218 SMH/TRJ.

- 1) Appropriate and longstanding legal standards for enforcement of the Voting Rights Act.
- 2) Plaintiff's efforts to introduce a statistical trigger for liability under Section 2 of the Voting Rights Act akin to a disparate impact standard.
- 3) The appropriate use of experts in Voting Rights Act and federal civil rights cases regarding election process rules as opposed to legislative districts.
- 4) Remedial issues, including standards related to renewed statewide preclearance obligations under Section 3 of the Voting Rights Act of the sort that the United States Supreme Court suspended in *Shelby County v. Holder*, 570 U.S. \_\_\_\_ (2013).

The decision to permit *amicus curiae* to participate in a pending case is “solely within the broad discretion of the district court.” *Tafas v. Dudas, et al.*, 511 F.Supp.2d 652 (E.D. VA 2007) (overruled on other grounds); citing *Waste Mgmt., Inc. v. City of York*, 162 F.R.D. 34, 36 (M.D. Pa. 1995); see *Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982). While there is no rule governing the appearance of *amicus* in a district court, the courts have recognized they have broad discretion whether to permit a non-party to participate as *amicus curiae*. “Even when a party is well represented, an *amicus* may provide important assistance to the court.” *Neonatology Assocs., P.A. v. Commissioner of Internal Revenue*, 293 F.3d 128, 132 (3rd Cir. 2002). Indeed the courts have regularly permitted parties with both pecuniary and policy interests to appear as *amici*. As explained by Judge Alito:

A restrictive policy with respect to granting leave to file may . . . create at least the perception of viewpoint discrimination. Unless a court follows a policy of either granting or denying motions for leave to file in virtually all cases, instances of seemingly disparate treatment are predictable. A restrictive policy may also convey an unfortunate message about the openness of the court.

*Neonatology Assocs., P.A.*, 293 F.3d at 133; *see also United States v. Alkaabi*, 223 F. Supp. 2d. 583, 592 (D.N.J. 2002).

Proposed *amicus* has numerous interests in this case, not all of which the Defendants are likely to advance. First, proposed *amicus* seeks to ensure that Virginia is not subject to renewed federal oversight of all election law changes of the sort suspended in *Shelby County*. Second, proposed *amicus* seeks to provide a comprehensive understanding to this Court on the national implications of the Plaintiff's legal theories, particularly as they pertain to questions of Constitutional federalism. Third, proposed *amicus* seeks to preserve a traditional understanding of Section 2 of the Voting Rights Act, which contains a robust requirement of causality such that a plaintiff must demonstrate that a particular election practice ultimately prevents, in fact, the ability of minorities to fully participate in the political process. Fourth, and finally, proposed *amicus* seeks to prevent treasured civil rights statutes such as the Voting Rights Act of 1965 from being turned into partisan weapons to leverage federal power over state elections merely to advantage one political party and disadvantage another.

The Supreme Court has said that confidence in the integrity of the electoral process encourages citizen participation in the democratic process. *Crawford et al. v. Marion County Election Board*, 553 US 181, 197 (2008). The Virginia statutes challenged in this case promote the integrity of Virginia elections. PILF seeks to provide a national perspective in a case which might seem from the pleadings merely an effort confined to the Commonwealth.

Counsel for the Defendants have consented to the appearance of the proposed *amicus* in this case. Undersigned counsel has attempted to contact Plaintiffs' counsel by telephone multiple times during the week of July 19, 2015, seeking consent to the instant motion. As of the

date of this filing, undersigned counsel has not received any response to his request from Plaintiffs' counsel.

For the foregoing reasons, PILF respectfully requests that this Court grant leave to allow appearance as *amicus curiae*.

Dated: July 30, 2015

Respectfully submitted,

/S/

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*Pro Hac Vice application to be filed*

*Attorneys for Amicus Curiae*

**CERTIFICATE OF SERVICE**

I hereby certify that on this 30<sup>th</sup> day of July, 2015, I transmitted the foregoing document to the named parties' emails by means of an electronic filing pursuant to the ECF system.

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