

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISION**

DAVID B. MEANS, ET AL.

CIVIL ACTION NO. 5:23-cv-00669

VERSUS

JUDGE DAVID C. JOSEPH

DESOTO PARISH, ET AL.

MAGISTRATE JUDGE HORNSBY

**PLAINTIFFS' MEMORANDUM IN OPPOSITION TO MOTION FOR LEAVE TO FILE
BRIEF AS AMICI CURIAE OR ALTERNATIVELY MOTION TO STRIKE
UNTIMELY EXPERT REPORTS**

MAY IT PLEASE THE COURT:

The NAACP Legal Defense and Educational Fund, Inc. (“LDF”), Louisiana State Conference of the NAACP, and the DeSoto Branch of the NAACP’s (“Proposed Amici”) have moved for leave to file a brief as Amici Curiae in support of Defendants in this matter. Rec. Doc. 46. Because Proposed Amici’s brief includes as attachments two last-minute expert reports in support that Proposed Amici did not disclose to Plaintiffs’ counsel when requesting consent, and because Proposed Amici seek to address the court at the July 11-13 preliminary injunction hearing without an adequate opportunity for Plaintiffs¹ to review and respond to their lengthy expert reports, Plaintiffs respectfully request that the Court deny Proposed Amici’s motion or, in the alternative, strike the Declarations of Dr. Lisa Handley and Bill Cooper attached to Proposed Amici’s brief, and in support thereof state as follows:

1. On Thursday, July 6, 2023, counsel for LDF wrote to Plaintiffs’ counsel notifying Plaintiffs of LDF’s intent to seek leave to file a motion and accompanying brief to appear as amicus curiae in the instant case before the Tuesday, July 11 preliminary injunction hearing. LDF also notified Plaintiffs that they would be requesting an opportunity to address the Court, and asked for Plaintiffs’

¹ Plaintiffs in this matter are David B. Means, Ryan Dupree, Robert G. Burford, Robert Gross, Mary L. Salley, Martha Trisler, John F. Pearce, Joe Cobb, Jack L. Burford, Jack E. Barron, W. Bruce Garlington, Donald Barber, Billy Dwayne Brumley, and Sherry Brumley.

position. Ex. 1 (July 6, 2023 email correspondence between LDF's counsel and Plaintiffs' counsel). In response, Plaintiffs indicated that they consent to LDF's request to file an amicus brief, but that they object to LDF's request to address the Court. *Id.*

2. On Friday, July 7, 2023, at 10:02 PM CDT, less than four days before the preliminary injunction hearing is scheduled to begin, Proposed Amici filed their motion for leave to file their brief as amici curiae in support of Defendants, and included with their proposed brief two lengthy declarations from William S. Cooper and Dr. Lisa Handley, which declarations and exhibits total a combined **166 pages** in length, including numerous tables, charts, and data. *See* Rec. Doc. 46-1 at 32-198. These voluminous materials would require substantial time for Plaintiffs to analyze and provide a rebuttal. Proposed Amici also request the opportunity to address the Court at the July 11-13 preliminary injunction hearing. *See* Rec. Doc. 46 at 1.

3. Although Plaintiffs consented to LDF filing an amicus brief, they did not consent to the filing of two new expert reports on the eve of the July 11-13 preliminary injunction hearing; Proposed Amici did not disclose to Plaintiffs their intent to submit these two expert declarations. Had Proposed Amici been forthcoming about their intent to seek leave to include these declarations, Plaintiffs would not have consented to the filing of the amicus brief.

4. The filing of these new voluminous expert reports at the eleventh hour in support of Defendants is improper both procedurally and as a matter of fairness to Plaintiffs. To review, Plaintiffs first filed suit back in mid-May. The Court ordered Defendants to respond to Plaintiffs' Motion for Preliminary Injunction no later than the close of business on June 26, 2023. Rec. Doc. 27. A scheduling conference was then held on June 27, 2023, at which time no mention was made of Proposed Amici or their intent to file expert reports in support of Defendants. Subsequently, the Court ordered that Bench Books and all exhibits and witnesses to be relied on for the preliminary injunction hearing were

due on or before July 5, 2023. Rec. Doc. 35. No exception was made for expert reports of amici; even if these reports were permitted,² Proposed Amici failed to file their reports by the Court-ordered deadline, making them untimely for purposes of the July 11-13 hearing. Due to the late stage of preliminary injunction proceedings here, Plaintiffs now will not have adequate time to fully review or meaningfully address these reports before the hearing commences on July 11. Proposed Amici have been on notice about Plaintiffs' constitutional concerns with Defendants' maps since at least early December 2022, *see* Rec. Doc. 46-1 at 189, but inexplicably opted to wait until the last minute to submit their expert reports here.

5. Where, as here, an amicus brief is “not timely and useful,” “introduces new factual and legal issues not previously addressed by the parties,” and filed “to advocate on behalf of” a defendant rather than from a “neutral” position, and where the defendant is adequately “represented by paid counsel” and allowing its filing would “merely allow the Defendant to have an additional, and unfair, opportunity to re-argue the facts and law of its case,” the appropriate course is to deny leave to file the amicus brief. *See Evanston Ins. Co. v. Rodriguez Eng'g Labs.*, 2023 U.S. Dist. LEXIS 9880, at *3-4 (W.D. Tex. Jan. 20, 2023).

6. Additionally, arguments made in Proposed Amici's brief are legally irrelevant and waived for purposes of the preliminary injunction proceedings. The brief relies primarily on their two experts' declarations to argue that each of the *Gingles* preconditions and Senate Factors are satisfied for the five majority-Black districts in Defendants' Enacted Plan, and thus that “any map that fails to include five majority-Black districts would likely violate” Section 2 of the Voting Rights Act. *See* ECF 46-1 at 10, 15. This is the kind of analysis that Defendants' expert Mr. Hefner entirely failed to do when he drew the Enacted Plan with race as the predominant concern while only offering generalized

² The local rules of this Court make no provision for amicus filings or submission of expert reports by amicus curiae.

conclusions that Section 2 of the Voting Rights Act required it, demonstrating on its own that Defendants had no “strong basis in evidence” for drawing the Enacted Plan based on race. *See* Rec. Doc. 12 at 28, 28 n.19. Notably, Defendants in their Opposition to Plaintiffs’ Amended Motion for Preliminary Injunction likewise failed to argue that the Enacted Plan satisfies strict scrutiny, waiving that argument. Rec. Doc. 37 at 5.

7. Any post-hoc justification offered by Defendants or Proposed Amici in their brief, their expert declarations, or at the preliminary injunction hearing should thus be rejected by the Court both as irrelevant and as waived. *See Hays v. Louisiana*, 936 F. Supp. 360, 369 (W.D. La. 1996) (rejecting “patently post-hoc rationalizations” offered as alleged race-neutral explanations for a district’s racially-motivated design); *Johnson v. Miller*, 929 F. Supp. 1529, 1557 (S.D. Ga. 1996) (rejecting a “*post hoc* rationalization for the drawing of a plan based solely on racial considerations”); *Harris v. McCrory*, 159 F. Supp. 3d 600, 620 (M.D.N.C. 2016) (similar).

8. Because the legal conclusions in Proposed Amici’s brief largely hinge on, and are inextricably intertwined with, the analysis and conclusions contained in their untimely submitted expert reports, the Court should exercise its broad discretion to deny Proposed Amici’s motion for leave to file their amici brief in its entirety. *See In Re Halo Wireless, Inc.*, 684 F.3d 581, 596 (5th Cir. 2012) (“Whether to permit a nonparty to submit a brief, as *amicus curiae*, is, with immaterial exceptions, a matter of judicial grace.” (internal quotation marks omitted)); *see also United States v. Hamdan*, 2021 U.S. Dist. LEXIS 39599, *15-16 (E.D. La. Mar. 3, 2021) (“[A]cceptance of an ... *amicus curiae* should be allowed only sparingly.” (internal quotation marks omitted)); *United States v. Davis*, 180 F. Supp. 2d 797, 800 (E.D. La. 2001) (“The privilege of being heard *amicus* rests solely within the discretion of the court.”).

9. Additionally, even if the Court decides to accept Proposed Amici’s brief, the Court should still strike the expert reports attached thereto as both untimely and offering irrelevant post-hoc justifications for Defendants’ racial gerrymander. Because Proposed Amici are not parties, the Court’s discretion to strike their expert reports is much higher than for a typical untimely-filed expert report by a party. Beyond the Court’s “broad discretion” then to exclude expert opinions under Rule 16 to “preserve the integrity and purpose of [a] pretrial order,” *see Geiserman v. MacDonald*, 893 F.2d 787, 790 (5th Cir. 1990), the Court here has full discretion to strike Proposed Amici’s untimely expert testimony in the interests of fairness and preserving the integrity of its orders where allowing those reports would be contrary to the Court’s schedule governing presentation of evidence at the preliminary injunction hearing. *Cf. In re Petition of Honey Island Adventure, L.L.C.*, 2017 U.S. Dist. LEXIS 210676, at *2 (E.D. La. Dec. 22, 2017) (The Court has discretion to “exclude expert testimony or strike pleadings if a party fails to comply with deadlines imposed by a scheduling order.”).

10. Striking these expert declarations is particularly justified where the reports contain entirely new information, data, and analysis that was not contained in Mr. Hefner’s declaration in support of Defendants’ Opposition to Plaintiffs’ Motion for Preliminary Injunction, and where these reports were filed less than **four days** before the preliminary injunction hearing and four days after Plaintiffs had already filed their Reply brief in support of their preliminary injunction motion. *See* Rec. Doc. 46.

11. By contrast, Defendants will have had nearly **47 days** at the start of the preliminary injunction hearing to review Dr. Gary Joiner’s amended expert report that was filed on May 25, 2023. *See* Rec. Doc. 10. The potential prejudice to Plaintiffs at the preliminary injunction stage is thus high if they are deprived of a fair and meaningful opportunity to review and rebut the analysis and conclusions made in Proposed Amici’s reports. *Cf. Stewart v. Moncla Marine Operations LLC*, 2023

U.S. Dist. LEXIS 87747, *5 (W.D. La. May 17, 2023) (striking untimely updated expert report that was “not truly supplemental” because it included “new information and analysis” and where trial was “imminent”); *Wagner v. Hurst*, 2019 U.S. Dist. LEXIS 86491, at *9 (W.D. La. May 21, 2019) (striking untimely expert report where the pretrial order deadline had passed and where the other side would be prejudiced without allowing the other side to identify competing experts and continuing the trial date); *H&A Land Corp. v. City of Kennedale*, 2005 U.S. Dist. LEXIS 59021, at *12-13 (N.D. Tex. Mar. 18, 2005) (striking untimely and undisclosed expert report because it was the “essence of surprise” and “highly prejudicial” to the other side who was unable to address the new evidence in its own motion). Yet continuing the preliminary injunction hearing to a later date would be even more prejudicial to Plaintiffs because the window of time for obtaining a remedy here is already narrow due to Defendants’ undue delay in adopting the Enacted Plan.

12. Finally, obvious misunderstandings of the law are evident from a cursory review of the Proposed Amici’s brief and their experts’ declarations. A few in particular are worth highlighting. For instance, Proposed Amici assert that Section 2 of the Voting Rights Act requires preserving 5 majority-Black districts, ECF 46-1 at 10, a higher proportion of majority-Black districts (5 out of 11, or 45.5 percent of the districts) than the actual percentage of African Americans in DeSoto Parish which dropped to just 37.2% in 2020. Rec. Doc. 46-1 at 40-41 (acknowledging that “the Any Part Black . . . percentage in DeSoto Parish dropped from 42.42% in 2000 to 37.2% in 2020). 37.2 percent of 11 districts amounts to just **4.09 districts**. Proposed Amici thus argue that the law requires Defendants to maintain a number *higher than* proportional representation, even though Section 2 of the Voting Rights Act has never been applied to even require *proportional* representation, as the Supreme Court just recently re-affirmed. *Allen v. Milligan*, 216 L. Ed. 2d 60, 81 (2023) (“Forcing proportional representation is unlawful and inconsistent with this Court’s approach to implementing §2.”).

13. Proposed Amici also assert the Enacted Plan “largely follows the outlines of the 2011 plan it replaces,” which they argue refutes Plaintiffs’ argument that the unusually shaped boundaries were drawn based on race. *See* Rec. Doc. 46-1 at 28. But even if the Enacted Plan had perfectly mirrored the prior cycle’s redistricting plan, that would not protect Defendants against a racial gerrymandering claim; as the Supreme Court recently explained, “[i]f that were the rule, a State [or parish] could immunize from challenge a new racially discriminatory redistricting plan simply by claiming it resembles an old racially discriminatory plan. That is not the law.” *Allen*, 216 L. Ed. 2d at 77; *see also Bethune-Hill v. Va. State Bd. of Elections*, 141 F. Supp. 3d 505, 544-45 (E.D. Va. 2015) (“[T]he inquiry in a racial sorting claim examines the basis upon which voters were placed ‘within or without a particular district.’ ‘That’s the way we’ve always done it’ may be a neutral response, but it is not a meaningful answer.” (internal citation omitted)), *aff’d in part and vacated in part*, 580 U.S. 178 (2017).

14. Accordingly, because “the amicus brief does not assist the court” in resolving this action, “permission to file an amicus brief should be denied.” *AWT Be Good LLC v. Chesapeake Louisiana, L.P.*, CV 16-1412, 2019 U.S. Dist. LEXIS 94645, at *2 (W.D. La. June 4, 2019) (Hicks, C.J.) (denying motion for leave to file amicus curiae brief).

CONCLUSION

WHEREFORE, for the reasons set out above, Plaintiffs respectfully request that the Court deny Proposed Amici’s Motion for Leave to File Brief as Amici Curiae, or in the alternative, strike the two expert declarations attached to that brief, and order that Proposed Amici not be permitted to address the court at the July 11-13 preliminary injunction hearing.

Dated: July 10, 2023

/s/ Reid A. Jones

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*Admitted *Pro Hac Vice*

Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on July 10, 2023, I served the foregoing via email on all counsel of record by operation of the Court's CM/ECF filing system.

/s/ Reid A. Jones

Reid A. Jones

EXHIBIT 1

From: [Shawn Sheehy](#)
To: [Victoria Wenger](#); Rjones@wwmlaw.com; [Jason Torchinsky](#); [Ken Daines](#); mfrazier@wwmlaw.com; [Phil Gordon](#); cfr@bswllp.com; cd@bswllp.com; Jeanne.Comeaux@bswllp.com; peter.butler.jr@bswllp.com; thomas.benjamin@bswllp.com; tim.hardy@bswllp.com
Cc: [Sara Rohani](#); [Stuart Naifeh](#); ajones@dhw-law.com
Subject: RE: Means v. DeSoto Parish Amicus
Date: Thursday, July 6, 2023 2:55:36 PM
Attachments: [image001.png](#)
[image179432.png](#)
[image519801.png](#)
[image880363.png](#)
[image629626.png](#)

Ms. Wenger,

Thank you. Plaintiffs consent to LDF's request to file an amicus brief. We object to LDF's request to address the Court.

Thank you,



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From: Victoria Wenger <vwenger@naacpldf.org>
Sent: Thursday, July 6, 2023 11:47 AM
To: Rjones@wwmlaw.com; jtorchinsky@holtzmanvogel.com; Ken Daines <kdaines@holtzmanvogel.com>; mfrazier@wwmlaw.com; Phil Gordon <pgordon@holtzmanvogel.com>; Shawn Sheehy <:ssheehy@holtzmanvogel.com>; cfr@bswllp.com; cd@bswllp.com; Jeanne.Comeaux@bswllp.com; peter.butler.jr@bswllp.com; thomas.benjamin@bswllp.com; tim.hardy@bswllp.com

Cc: Sara Rohani <Srohani@naacpldf.org>; Stuart Naifeh <snaifeh@naacpldf.org>; ajones@dhw-law.com

Subject: RE: Means v. DeSoto Parish Amicus

Dear Counsel,

I am recirculating to correct an error in the email address for Attorney Sheehy. Please see below.

Regards,

Victoria Wenger (she/her)

Attorney



40 Rector Street, 5th Floor, New York, NY 10006
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From: Victoria Wenger

Sent: Thursday, July 6, 2023 11:41 AM

To: Rjones@wwmlaw.com; jtorchinsky@holtzmanvogel.com; kdaines@holtzmanvogel.com; mfrazier@wwmlaw.com; pgordon@holtzmanvogel.com; sheehy@holtzmanvogel.com; cfr@bswllp.com; cd@bswllp.com; Jeanne.Comeaux@bswllp.com; peter.butler.jr@bswllp.com; thomas.benjamin@bswllp.com; tim.hardy@bswllp.com

Cc: Sara Rohani <SRohani@naacpldf.org>; Stuart Naifeh <snaifeh@naacpldf.org>; ajones@dhw-law.com

Subject: Means v. DeSoto Parish Amicus

Dear Counsel,

On behalf of the Legal Defense Fund (“LDF”), we write to inform you that we intend to seek leave to file a motion and accompanying brief to appear as amicus curiae in *Means v. DeSoto Parish* this week, in advance of the Tuesday, July 11 preliminary injunction hearing. We will be requesting an opportunity to address the Court.

Please let us know your position on our motion by close of business, 5 PM Central, today, Thursday, July 6.

Sincerely,

Victoria Wenger

Attorney | (she/her)



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