

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS

JARROD MCKINNEY,
Plaintiff,

v.

THOMAS J. VILSACK, in his official capacity
as U.S. Secretary of Agriculture; ZACH
DUCHENEAUX, in his official capacity as
Administrator, Farm Service Agency,
Defendants.

§
§
§
§
§
§
§
§
§
§
§

Civil Action No. 2:21-cv-00212-RWS

PLAINTIFF’S RESPONSE TO MOTION FOR LEAVE TO FILE AMICUS BRIEF

“The extent, if any, to which an *amicus curiae* should be permitted to participate in a pending action is solely within the broad discretion of the district court.” *Club v. Fed. Emergency Mgmt. Agency*, No. H-07-0608, 2007 WL 3472851, at *1 (S.D. Tex. Nov. 14, 2007) (citing cases). In *Club*, another federal court in Texas listed several reasons for denying an organization leave to file an amicus brief. *See id.* The court’s rationale applies with equal force in this case, in three ways.

First, the court noted that “a district court lacking joint consent of the parties should go slow in accepting” an amicus brief unless “the *amicus* has a special interest that justifies his having a say, or unless the court feels that existing counsel may need supplementing assistance.” *Id.* (quoting *Strasser v. Dooley*, 432 F.2d 567, 569 (1st Cir. 1970)). Here, the parties do not jointly consent to the filing of the amicus brief, the proposed amici have no “special interest” that will not be adequately promoted by Defendants, and Defendants are ably represented by counsel.

Second, “[a]n *amicus* who argues facts should rarely be welcomed.” *Id.* (internal citations omitted). The putative amici propose precisely that type of brief. By their telling, the organizations

plan only on sharing facts: namely, the “perspectives of socially disadvantaged farmers who stand to benefit from the challenged laws and would be harmed by Plaintiff’s request.” ECF No. 16 at 2. But Defendants are already seeking to justify Section 1005 on the basis of the purported disadvantage of those covered by the program. Moreover, it is far from clear, especially at this juncture, how farmers who were truly disadvantaged would be harmed by an injunction against Section 1005’s racially discriminatory program. As a federal court in Florida noted in issuing a preliminary injunction in a challenge to the law at issue here, “there is little evidence that the Government gave serious consideration to, or tried, race-neutral alternatives to Section 1005.” *Wynn v. Vilsack*, 3:21-cv-00514-MMH-JRK, ECF No. 41 at 29 (M.D. Fla. June 23, 2021). A race-neutral program in place of the racially discriminatory program currently in place may benefit many of the organizations’ members, including each member who submitted a declaration in this case. *See, e.g.*, Compl., ECF No. 1, Prayer for Relief ¶ 2 (requesting, as one form of relief, that Defendants open “eligibility for loan assistance to *all* farmers or ranchers with qualifying farm loans”) (emphasis added).

Third, while “federal appellate courts often permit the submission of highly partisan *amicus* briefs, there is significant variance in the extent to which district courts are willing to permit the participation of an *amicus* who acts primarily as an advocate for one party.” *Club*, 2007 WL 3472851, at *2. The concern with a partisan *amicus* brief is particularly pronounced here, where rather than provide objective analysis or information as a “friend of the court,” the proposed amici “come as an advocate for one side,” and present “only the facts of one side.” *Id.* (quotation omitted).

In addition to the above three factors identified in *Club*, the proffered *amicus* brief does not present information directly relevant to the disposition of Plaintiff’s Motion for Preliminary

Injunction. The brief purports to “focus[s] on the Court’s balancing of the equities in considering Plaintiff’s motion.” ECF No. 16 at 2. But the balance-of-equities and public interest factors merge where, as here, the government is the defendant. *Nken v. Holder*, 556 U.S. 418, 435 (2009). And “it is always in the public interest to prevent the violation of a party’s constitutional rights.” *Jackson Women’s Health Org. v. Currier*, 760 F.3d 448, 458 n.9 (5th Cir. 2014). Accordingly, the proposed amicus brief will not assist the Court in considering Plaintiff’s Motion for Preliminary Injunction.

The Motion for Leave to File an Amicus Brief (ECF No. 16) should be denied.

DATED: July 16, 2021.

Respectfully submitted:

PACIFIC LEGAL FOUNDATION

s/ Wencong Fa
Wencong Fa (Lead Attorney)
Texas Bar No. 24087487
(Pro Hac Vice)
Joshua P. Thompson
Cal. Bar No. 250955
Christopher M. Kieser
Cal. Bar No. 298486 (Pro Hac Vice)
930 G Street
Sacramento, CA 95814
Telephone: (916) 419-7111
Fax: (916) 419-7747
Email: WFa@pacificlegal.org
Email: JThompson@pacificlegal.org
Email: CKieser@pacificlegal.org

Glenn E. Roper
Colo. Bar No. 38723 (Pro Hac Vice)
1745 Shea Center Dr., Suite 400
Highlands Ranch, CO 80129
Telephone: (916) 419-7111
Fax: (916) 419-7747
Email: GERoper@pacificlegal.org

Counsel for Plaintiff Jarrod McKinney

CERTIFICATE OF SERVICE

I hereby certify that on July 16, 2021, I filed the foregoing document with the Clerk of the Court through the District Court's ECF system, which will send notice of this filing to all counsel of record.

s/ Wencong Fa
Wencong Fa

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS**

JARROD MCKINNEY,
Plaintiff,

v.

THOMAS J. VILSACK, in his official capacity
as U.S. Secretary of Agriculture; ZACH
DUCHENEAUX, in his official capacity as
Administrator, Farm Service Agency,
Defendants.

§
§
§
§
§
§
§
§
§
§
§

Civil Action No. 2:21-cv-00212-RWS

[PROPOSED] ORDER DENYING MOTION FOR LEAVE TO FILE AMICUS BRIEF

Pending before the Court is the National Black Farmer Association and the Association of American Indian Farmers’ Opposed Motion for Leave to File an Amicus Curiae Brief in Opposition to Plaintiff’s Motion for Preliminary Injunction. ECF No. 16. After reviewing the Motion, the Response, the record, and the applicable caselaw, it is hereby ORDERED:

That the National Black Farmer Association and the Association of American Indian Farmers’ Opposed Motion is DENIED.

IT IS SO ORDERED.