UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

THE LOUISIANA FORESTRY ASSOCIATION, INC., *et al.*,	)	
Plaintiffs,	)	
v.	)	**CIVIL NO. 11-1623**
HILDA L. SOLIS, *et al.*,	)	**JUDGE DRELL**
Defendants.	)	**MAGISTRATE JUDGE KIRK**

DEFENDANTS' BRIEF IN OPPOSITION TO
MOTION FOR LEAVE TO FILE A BRIEF AS AN *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("the Chamber") seeks leave to file a brief in the instant action as *amicus curiae* in support of Plaintiffs' Motion for a Preliminary Injunction. (ECF No. 15). The Chamber should not be granted leave to submit a brief in this litigation as *amicus curiae* because the Chamber is not an impartial "friend of the court," the Chamber's members' interests are already represented because many of plaintiffs represent small businesses similar to those claimed to be represented by the Chamber, and the Chamber does not provide any information not already provided by the parties. For the reasons presented herein, defendants oppose the Chamber's motion for leave to file an *amicus* brief.

The extent, if any, to which *amicus curiae* should be permitted to participate in a pending action is solely within the discretion of the district court.[1] See United States v. Ahmed, 388 F. Supp. 196, 198 n.1 (S.D.N.Y. 1992) (noting that district courts "have broad discretion to permit or deny the appearance of *amici curiae* in a given case"); see also Club v. Fed. Emergency Mgmt. Agency (FEMA), et al., No. H-07-0608, 2007 WL 3472851, at *1 (S.D. Tex. Nov. 14, 2007). In cases where a party does not consent to the filing, such as is the case here, the Court should be particularly cautious before making a determination on the application for leave:

> . . . a district court lacking joint consent of the parties should go slow in accepting, and even slower in inviting, an *amicus* brief unless, as a party, although short of a right to intervene, the *amicus* has a special interest that justifies his having a say, or unless the court feels that existing counsel may need supplementing assistance.

Strasser v. Doorley, 432 F.2d 567, 569 (1st Cir. 1970); see also Club, 2007 WL 3472851, at *1.

A district court grants leave to file a brief as *amicus curiae* where: (1) the petitioner has a special interest in the case; (2) the petitioner's interest is not represented competently or at all in the case; (3) the proffered information is timely and useful; and (4) the petitioner is not partial to a particular outcome in the case. See Sciotto v. Marple Newtown Sch. Dist., 70 F. Supp. 2d 553, 555 (E.D. Pa. 1999). Courts have recognized a difference between a trial-level *amicus curiae* and an appellate-level *amicus curiae*. See Club, 2007 WL 3472851, at *1 ("A district court must keep in mind the differences between the trial and appellate court forums in determining whether it is appropriate to allow an *amicus curiae* to participate."); see also Price v. Corzine, No. 06-1520 (GEB), 2006 WL 2252208, at *2 (D.N.J. Aug. 7, 2006) ("At the trial level, where issues of

[1] As this Court is aware, there is an action pending in the U.S. District Court for the Northern District of Florida (Bayou Lawn & Landscape Services, et al. v. Solis, et al., No. 11-cv-0445) that is nearly identical to the instant action. The Chamber of Commerce moved and was granted *amicus* status in that case. Defendants were not given an opportunity to oppose the Chamber's motion prior to the Court's ruling.

fact as well as law predominate, the aid of *amicus curiae* may be less appropriate than at the appellate level, where such participation has become standard procedure.").

In this case, the proposed *amicus curiae* offers no special interest to justify its having a say in this action that is not already represented by plaintiffs. The Chamber alleges that it represents "small businesses" with 100 employees or less. (See Mot. For Leave to File Br. as an *Amicus Curiae* (ECF No. 41), at 1). However, many of the plaintiffs represent similar (if not the same) small businesses. (See Compl. (ECF No. 1), at 7, 10-11). In addition, there is no indication from the Chamber as to how many of its members are users of the H-2B program or that plaintiffs themselves are not members of the Chamber of Commerce. Therefore, the Chamber has inadequately demonstrated that it has a "special interest" in this litigation. In addition, there is no evidence, nor does the Chamber argue, that existing counsel needs supplemental assistance. See, e.g., Club, 2007 WL 3472851, at *1 (denying *amicus curiae* participation by interest group where parties did not jointly consent, where parties were ably represented by counsel, and where the applicant *amicus curiae* was considered "partisan.") (Citations omitted). Therefore, the Chamber has failed to demonstrate that its members' interests are not adequately represented by counsel.

Although defendants do not contest the timeliness of the Chamber's filing, the Chamber has failed to demonstrate the utility of its participation as *amicus curiae*. The Chamber indicates that it offers a "different perspective" from plaintiffs. (See ECF No. 41, at 2). However, the Chamber has failed to demonstrate what that "different perspective" is. As stated above, the plaintiffs represent small businesses similar to those alleged to be represented by the Chamber. Furthermore, the Chamber's briefing is duplicative of that already provided by the parties. Similar to the Chamber, plaintiffs already argue that (1) the Department of Labor does not have

"rulemaking authority" over the H-2B program; (2) the rulemaking at issue is "invalid" because it is not in accord with the law, and, therefore, it is not in accord with the Administrative Procedure Act; and (3) the wage rule at issue is "impermissibly retroactive." (Compare Pls.' Mem. of Law in Supp. of Mot. For Prelim. Inj. (ECF No. 15-1) with Br. of *Amicus Curiae* Chamber of Commerce in Supp. of Pls. (ECF No. 41-1)). In addition, defendants provide a detailed regulatory and statutory history of the H-2B program. (See Defs.' Opp'n to Prelim. Inj. (ECF No. 36), at 2-12). Therefore, the Chamber offers nothing to contribute to the Court's understanding of the issues in this case that is not already offered by the parties.

Finally, the Chamber is not impartial to the outcome of the litigation. While partiality of *amicus curiae* is not dispositive, it is "a factor to consider in deciding whether to allow participation." See Sciotto, 70 F. Supp. 2d at 556 (citing Waste Mgmt. of Pa. v. City of York, 162 F.R.D. 34, 36 (M.D. Pa. 1995)). Indeed, as explained in the Club case, "some district courts express strong reservations about permitting the submission of *amicus* briefs that strongly favor one side over the other." Club, 2007 WL 3472851, at *2; see also U.S. v. Gotti, 775 F. Supp. 1157, 1159 (E.D.N.Y. 1991) ("Rather than seeking to come as a 'friend of the court' and provide the court with an objective, dispassionate, neutral discussion of the issues, it is apparent that the NYCLU has come as an advocate for one side . . . . In doing so, it does the court, itself and fundamental notions of fairness a disservice."). Here, the Chamber is admittedly a partisan petitioner. Accordingly, the Court should strongly consider denying the Chamber's participation for this and the other reasons discussed.

Defendants respectfully request that the Court deny the Chamber's Motion for Leave to File a Brief as an Amicus Curiae.

Respectfully submitted this 3rd day of October, 2011:

TONY WEST
Assistant Attorney General, Civil Division

DAVID J. KLINE
Director, District Court Section
Office of Immigration Litigation

JESSICA W.P. D'ARRIGO
Trial Attorney, District Court Section
Office of Immigration Litigation

By: /s/ Geoffrey Forney
GEOFFREY FORNEY
Trial Attorney, District Court Section
U.S. Department of Justice
450 5th Street, NW
Washington, DC 20001
202-532-4329 (voice); 202-532-4393 (fax)
geoff.forney@usdoj.gov

ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

I hereby certify that on October 3, 2011, I electronically filed the foregoing DEFENDANTS' BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE A BRIEF AS AN *AMICUS CURIAE* with the Clerk of Court by using the CM/ECF system, which will provide electronic notice and an electronic link to the same to the following attorneys of record:

Ann Margaret Pointer
apointer@laborlawyers.com
Andria Lure Ryan
aryan@laborlawyers.com
FISHER & PHILLIPS (ATL)
1075 Peachtree St NE Ste 3500
Atlanta, GA 30309

Michelle I. Anderson
manderson@laborlawyers.com
Edward F. Harold
eharold@laborlawyers.com
Keith M. Pyburn, Jr
kpyburn@laborlawyers.com
Timothy H. Scott
tscott@laborlawyers.com
FISHER & PHILLIPS (NO)
201 St Charles Ave Ste 3710
New Orleans, LA 70170

Leon R. Sequeira
SEYFARTH SHAW (DC)
975 F St N W
Washington, DC 20004-1454
lsequeira@seyfarth.com

Philip Eugene Roberts
LEAKE & ANDERSSON (LAF)
P O Drawer Z
Lafayette, LA 70502-6618
proberts@leakeandersson.com

Dean M. Arruebarrena
darruebarrena@leakeandersson.com
Edward T. Hayes
ehayes@leakeandersson.com

Certificate of Service, Continued:

LEAKE & ANDERSSON
1100 Poydras St Ste 1700
New Orleans, LA 70163-1701

Arthur N. Read
FRIENDS OF FARMWORKERS, INC.
42 S 15th St Ste 605
Philadelphia, PA 19102-2205
aread@friendsfw.org

Edward Tuddenham
LAW OFFICE OF EDWARD TUDDENHAM
228 W 137th St
New York, NY 10030
etudden@prismnet.com

Katharine Murphy Schwartzmann
SOUTHERN POVERTY LAW CENTER
4431 Canal St
New Orleans, LA 70119
katie.schwartzmann@gmail.com

Mary C. Bauer
SOUTHERN POVERTY LAW CENTER
400 Washington Ave
Montgomery, AL 36104
mary.bauer@splcenter.org

John B. Rosenquest , IV
MORGAN LEWIS & BOCKIUS (Miami)
200 S Biscayne Blvd Ste 5300
Miami, FL 33131-2339
jrosenquest@morganlewis.com

David M. Kerr
dkerr@morganlewis.com
Howard M. Radzely
hradzely@morganlewis.com
MORGAN LEWIS & BOCKIUS (DC)
1111 Pennsylvania Ave N W
Washington, DC 20004

Certificate of Service, Continued:

Shane B. Kawka
skawka@uschamber.com
Robin S. Conrad
rconrad@uschamber.com
NATIONAL CHAMBER LITIGATION CNTR
1615 H St N W
Washington, DC 20062

/s/ Geoffrey Forney
GEOFFREY FORNEY
Trial Attorney
United States Department of Justice