

1 JOHN H. BEISNER (SBN 81571)
2 **SKADDEN, ARPS, SLATE,**
3 **MEAGHER & FLOM LLP**
1440 New York Avenue, N.W.
Washington, D.C. 20005-2111

4 Attorney for (Proposed) Amici Curiae,
5 THE CHAMBER OF COMMERCE
6 OF THE UNITED STATES OF AMERICA and PHARMACEUTICAL RESEARCH AND
7 MANUFACTURERS OF AMERICA

8 **UNITED STATES DISTRICT COURT**
9 **EASTERN DISTRICT OF CALIFORNIA**
10 **SACRAMENTO DIVISION**

11 AMERICAN BANKERS MANAGEMENT
12 COMPANY, INC.,
13 Plaintiff,

14 v.

15 ERIC L. HERYFORD, in his official capacity
16 as DISTRICT ATTORNEY, TRINITY
17 COUNTY,
18 Defendant.

Case No. 2:16-CV-00312-KJM-KJN

**REPLY IN SUPPORT OF MOTION FOR
LEAVE TO FILE BRIEF OF THE
CHAMBER OF COMMERCE OF THE
UNITED STATES OF AMERICA AND
PHARMACEUTICAL RESEARCH AND
MANUFACTURERS OF AMERICA AS
AMICI CURIAE IN SUPPORT OF
PLAINTIFF'S MOTION FOR PARTIAL
SUMMARY JUDGMENT**

Date: April 22, 2016

Time: 10:00 a.m.

Judge: Hon. Kimberly J. Mueller

1 The Chamber of Commerce of the United States of America (“Chamber”) and
 2 Pharmaceutical Research and Manufacturers of America (“PhRMA”) respectfully submit this reply
 3 brief in support of their motion for leave to file a brief as *amici curiae* in this action. (See Dkt. No.
 4 18.) In their opening brief, the Chamber and PhRMA established, among other things, that: (1)
 5 they have a strong interest in this case because their members are increasingly the targets of suits
 6 involving contingency-fee arrangements between attorneys general and private counsel; (2) they
 7 have developed significant expertise with respect to the constitutional, ethical and policy issues
 8 surrounding the controversial contingency-fee arrangement challenged in this case; and (3) they
 9 have weighed in on this issue as *amici* in numerous other cases. (See *id.* at 3-4 and n.3.) Unable to
 10 meaningfully dispute these core contentions, defendant raises a hodgepodge of arguments in his
 11 opposition, all of which fail.

12 **First**, defendant argues that the proposed amicus brief is “unrelated to, and go[es] well
 13 beyond Plaintiff’s summary judgment motion.” (Opp’n at 3.) This unelaborated assertion makes
 14 no sense. Plaintiff contends that defendant cannot retain outside counsel; *amici* agree and have set
 15 forth the reasons in support of that conclusion in their brief. As a review of the proposed amicus
 16 brief makes clear, *amici* “supplement” plaintiff’s efforts by “provid[ing] focused legal analysis” –
 17 from the perspective of organizations whose members have been increasingly targeted in similar
 18 suits – on the intractable due-process problems that flow from the use of contingency-fee counsel
 19 in quasi-criminal cases like the one brought by defendant. *State of Missouri v. Harris*, No. 2:14-
 20 cv-00341-KJM-KJN, 2014 U.S. Dist. LEXIS 89716, at *9, *12 (E.D. Cal. July 1, 2014) (Mueller,
 21 J.) (granting leave to file amicus briefs to two advocacy organizations; recognizing that their
 22 additional legal analysis would assist the court in making a “well-informed decision” on the
 23 pending motions).

24 **Second**, although defendant acknowledges that the Chamber and PhRMA represent the
 25 interests of more than three million U.S. businesses and that their members are increasingly the
 26 targets of suits involving contingency-fee arrangements between attorneys general and private
 27 counsel (Opp’n at 3, 4), defendant nevertheless asserts – again without elaboration – that
 28

1 “[m]ovants fail to identify any legal issues that have possible ramifications beyond the parties
 2 directly involved in the case.” (*Id.*) This unsupported contention is patently wrong, as any
 3 decision by this Court would no doubt be cited by other parties in similar cases involving state
 4 actors who employ private counsel. Moreover, as this Court has previously recognized, any time
 5 “constitutional issues [are] implicated” in a case, there are “‘potential ramifications beyond the
 6 parties directly involved.’” *State of California v. U.S. Dep’t of Labor*, No. 2:13-CV-02069-KJM-
 7 DAD, 2014 U.S. Dist. LEXIS 5439, at *3-4 (E.D. Cal. Jan. 14, 2014) (Mueller, J.). That principle
 8 undoubtedly holds true here.

9 **Third**, defendant argues that *amici* should not be allowed to participate because “this case is
 10 still in its infancy.” (Opp’n at 3.) This Court, however, has routinely allowed *amici* to participate
 11 in cases from the earliest stages of litigation, *see, e.g., Harris*, 2014 U.S. Dist. LEXIS 89716, at *9,
 12 *12 (granting leave to file amicus briefs to assist in the resolution of motions to dismiss), and
 13 plaintiff fails to cite even a single case standing for the illogical proposition that *amici* must wait to
 14 participate until important, threshold legal questions have already been decided. Moreover, given
 15 the constitutional injuries caused by the defendant’s actions, *amici* have an interest in facilitating
 16 the correct resolution of this dispute as quickly as possible.

17 **Fourth**, defendant contends that the proposed amicus brief is unnecessary because
 18 “[p]laintiff is already represented by experienced counsel.” (Opp’n at 3.) This argument is a red
 19 herring. The issue is not whether plaintiff is adequately represented, but whether plaintiff’s
 20 position adequately protects the interests of nonparties that might be affected by this Court’s
 21 resolution of the issues presented. *Amici* represent the interests of **millions** of American businesses
 22 and have weighed in on the due-process issues presented by this litigation in a variety of other
 23 cases. Indeed, the Chamber has been permitted to participate as an *amicus* in a host of other
 24 federal and state court cases addressing similar issues for more than a decade.¹ Accordingly, *amici*

25 ¹ Specifically, the Chamber has submitted amicus briefs in the following cases: *Bristol-Myers*
 26 *Squibb Co. v. Hood ex rel. Mississippi*, No. 2015-M-1543-SCT (Miss. 2014); *Cephalon v. Wilson*,
 27 No. 2014-001465 (S.C. 2014); *Hood ex rel. Mississippi v. Bristol-Myers Squibb Co.*, No. 3:13-cv-
 05910-FLW-TJB (D.N.J. 2013); *Merck Sharp & Dohme Corp. v. Conway*, No. 13-5792 & 13-5881
 (6th Cir. 2013); *Oklahoma v. Tyson Food, Inc.*, No. 4:05-cv-00329 (N.D. Okla. 2007);

(cont’d)

are able “to lend a unique perspective” on the issues in this case. *U.S. Dep’t of Labor*, 2014 U.S. Dist. LEXIS 5439, at *4.²

Fifth, defendant argues that *amici* should not be allowed to participate in the action because they are “partisan.” (Opp’n at 4.) But as this Court has previously explained: “the Ninth Circuit has said ‘there is no rule that amici must be totally disinterested.’” *Jamul Action Comm. v. Stevens*, No. 2:13-cv-01920-KJM-KNJ, 2014 U.S. Dist. LEXIS 107582, at *15 (E.D. Cal. Aug. 5, 2014) (Mueller, J.) (quoting *Funbus Sys., Inc. v. State of Calif. Pub. Utils. Comm’n*, 801 F.2d 1120, 1125 (9th Cir. 1986)) (rejecting argument that amicus status should not be granted to an interested party and granting leave to file). Indeed, it would be impractical to screen amicus briefs on the basis of the supposed neutrality of their authors, and any attempt to do so would raise serious concerns about viewpoint discrimination. *See, e.g., Neonatology Assocs., P.A. v. Comm’r of Internal Revenue*, 293 F.3d 128, 132- 33 (3d Cir. 2002) (Alito, J.) (on motion for leave to file amicus brief) (“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.”).

In sum, given the frequency with which amicus briefs have been welcomed by this Court, the core constitutional issues implicated by this case, the significant interest of *amici* in the

(cont’d from previous page)

Pennsylvania v. Janssen Pharmaceutica, Inc., No. 2 EM 2009, 24 EAP 2009 (Pa. 2009); *Lender Processing Servs. Inc. v. Eighth Judicial Dist. Ct.*, No. 61387 (Nev. 2012); *Atlantic Richfield Co. v. Santa Clara*, No. 10-546 (U.S. 2010). In each of these cases, the Chamber either had leave to file or had consent of the parties to file, or the case was terminated before the issue of amicus participation was resolved. The briefs can be found at the Chamber’s website at <http://www.chamberlitigation.com/cases/issue/attorney-fees>.

² Notably, the Chamber and PhRMA have filed amicus briefs for decades in courts throughout the country, and courts and commentators have described these briefs as “helpful” and “influential.” *E.g., Kedy v. A.W. Chesterton Co.*, 946 A.2d 1171, 1179 n.8 (R.I. 2008); *Scott v. Cingular Wireless*, 161 P.3d 1000, 1004 (Wash. 2007); David L. Franklin, *What Kind of Business-Friendly Court? Explaining the Chamber of Commerce’s Success at the Roberts Court*, 49 Santa Clara L. Rev. 1019, 1026 (2009); *see also id.* (quoting Supreme Court practitioner Carter Phillips: “The briefs filed by the Chamber in that Court and in the lower courts are uniformly excellent. They explain precisely why the issue is important to business interests. . . . Except for the Solicitor General representing the United States, no single entity has more influence on what cases the Supreme Court decides and how it decides them than the [Chamber.]”).

1 resolution of those due-process issues, and *amici*'s ability to provide a unique, national perspective
2 on those issues, the Court should grant the Chamber and PhRMA leave to file their proposed brief
3 as *amici curiae* in support of American Bankers' Motion for Partial Summary Judgment.

4 Dated: April 15, 2016

Respectfully submitted,

5 /s/ John H. Beisner (SBN 81571)

6 JOHN H. BEISNER

7 **SKADDEN, ARPS, SLATE,**

MEAGHER & FLOM LLP

1440 New York Avenue, N.W.

8 Washington, D.C. 20005-2111

9 *Attorney for The Chamber of Commerce of the*
10 *United States of America and Pharmaceutical*
11 *Research and Manufacturers of America*
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28