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22 **UNITED STATES DISTRICT COURT**  
23 **DISTRICT OF ARIZONA**

24 Mi Familia Vota; et al.,  
25 Plaintiffs,  
26 and  
27 DSCC and DCCC,  
28 Intervenor-Plaintiffs,  
29 v.  
30 Katie Hobbs, in her official capacity as  
31 Arizona Secretary of State; et al.,  
32 Defendants,  
33 and  
34 RNC and NRSC,  
35 Intervenor-Defendants.

Case No. CV-21-01423-DWL

**PLAINTIFFS' AND INTERVENOR-  
PLAINTIFFS' OPPOSITION TO  
AMICI STATES' MOTION TO  
FILE AMICUS CURIAE BRIEF  
SUPPORTING ATTORNEY  
GENERAL'S CORRECTED  
MOTION TO DISMISS**

On January 25, the State of Texas, on behalf of itself and 13 other states (the “Proposed Amici”), filed a motion for leave to file an amicus curiae brief in support of the Attorney General’s motion to dismiss (“Motion”) and lodged the proposed amicus brief on the docket. *See* Docs. 102, 103. The Court should deny Texas’s Motion for two reasons.

First, the Motion is untimely. The Proposed Amici waited more than two months after the Attorney General filed his motion to dismiss, and roughly one month after Plaintiffs and Intervenor-Plaintiffs responded, to seek leave to participate as amici. This is long past the date when courts in this District typically permit amicus participation—and the Proposed Amici’s delay would prejudice Plaintiffs and Intervenor-Plaintiffs, who have no opportunity to address the filing under the current briefing schedule.

Second, the Proposed Amici have failed to demonstrate that their participation will be helpful to the Court. The Proposed Amici do not point to any unique interest not adequately represented by Arizona. The proposed brief largely duplicates arguments already made in the Attorney General’s motion to dismiss.

Should the Court grant the Motion, however, the Court should give Plaintiffs and Intervenor-Plaintiffs an opportunity to file a sur-reply addressing the amicus brief.

### **LEGAL STANDARD**

The district court has discretion to allow or disallow an amicus brief. *E.g.*, *Miller–Wohl Co. v. Comm’r of Labor and Indus.*, 694 F.2d 203, 204 (9th Cir. 1982). However, “[i]n the absence of a federal statute or rule governing the participation of amici in district courts, the court ‘look[s] to the Federal Rules of Appellate Procedure for guidance.’” *JZ v. Catalina Foothills Sch. Dist.*, 2021 WL 5396089, at \*1 (D. Ariz. Nov. 18, 2021).

### **ARGUMENT**

#### **I. THE MOTION IS NOT TIMELY.**

Under the Federal Rules of Appellate Procedure, a proposed amicus brief and motion ordinarily “must be filed ‘no later than 7 days after the principal brief of the party being supported is filed.’” *JZ*, 2021 WL 5396089, at \*1 (quoting Fed. R. App. P. 29(a)(6)). This makes good sense. The seven-day rule both ensures an orderly briefing schedule and

1 gives the party the amicus is opposing an opportunity to respond to any points raised by  
 2 the amicus in a forthcoming principal or reply brief. *See* Fed. R. App. P. 29, 1998 comm.  
 3 note (explaining that “[t]he 7-day stagger . . . is long enough to permit an amicus to review  
 4 the completed brief of the party being supported and avoid repetitious argument” but “short  
 5 enough that no adjustment need be made in the opposing party’s briefing schedule,” and  
 6 noting that the opposing party “will have sufficient time to review arguments made by the  
 7 amicus and address them in the party’s responsive pleading”).

8 Pursuant to the Court’s order on the motions to intervene, the Attorney General’s  
 9 motion to dismiss was filed on November 17, 2021. Docs. 53 & 72. Pursuant to a  
 10 subsequent Court order, Plaintiffs’ and Intervenor-Plaintiffs’ responsive pleadings were  
 11 filed on December 29, 2021. Docs. 81, 92 & 94. Yet the Proposed Amici waited *10 weeks*  
 12 after the Attorney General’s filing—and almost a month after Plaintiffs and Intervenor-  
 13 Plaintiffs had already filed their response brief—to file their motion for leave to file an  
 14 amicus brief. Courts in this district have denied leave to file for much less significant  
 15 delays. In *JZ v. Catalina Foothills School District*, for example, Judge Collins denied leave  
 16 to file a proposed amicus brief where the movant “did not seek to participate in th[e]  
 17 litigation as amicus within 7 days of Plaintiffs’ Opening Brief” and instead sought leave to  
 18 participate three weeks later, claiming that it would have filed sooner had it been aware of  
 19 the litigation. 2021 WL 5396089, at \*1.<sup>1</sup>

20 The Proposed Amici’s failure to acknowledge their delay provides further reason to  
 21 deny the Motion. *See ThermoLife Int’l, LLC v. Am. Fitness Wholesalers, LLC*, 831  
 22 F. App’x 325, 325 n.1 (9th Cir. 2020) (denying motion for leave to file an amicus brief  
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24 <sup>1</sup> Notably, in both of the recent examples the Proposed Amici provide of states “weigh[ing]  
 25 in as amici in election-law disputes” (Doc. 102 at 2), the proposed briefs were filed close-  
 26 in-time to the relevant briefing, leaving time for the opposing party to respond. *See* Ohio  
 27 Mot. for Leave, *United States v. Georgia*, No. 1:21-cv-2575, Doc. 46 (N.D. Ga. Aug. 3,  
 28 2021) (proposed amicus brief supporting movant filed six days after July 28 motion to  
 dismiss); *Fla. State. Conf. of the NAACP v. Lee*, No. 4:21-cv-187, Doc. 311 (N.D. Fla. Dec.  
 3, 2021) (proposed amicus brief supporting non-movant filed on same day as December 3  
 opposition to motion for summary judgment).

“because it is untimely by almost three months and offers no explanation as to why the court should excuse the late filing”) (citing *Marbled Murrelet v. Babbitt*, 83 F.3d 1060, 1062 n.1 (9th Cir. 1996) (denying leave to file amicus brief where “motion was filed late and there was no attempt to show good cause for the late filing”)); *In re Calpine Corp.*, 2008 WL 2462035, at \*1 (S.D.N.Y. June 9, 2008) (denying leave where court had “endorsed an agreed upon briefing schedule” but movant “waited over two months from the date Appellants’ principal brief was due to motion the Court for leave to file a brief as amicus curiae and provide[d] the Court with no explanation of why it should grant leave for such a delayed filing”). The Proposed Amici do not mention, let alone justify, their 10-week delay here.

## II. THE PROPOSED AMICI’S PARTICIPATION WILL NOT ASSIST THE COURT.

Even if the motion for leave were timely, the Proposed Amici fail to establish how the proposed brief will assist the court in resolving the pending motion to dismiss. An amicus brief is not appropriate if it simply “duplicate[s] the arguments made in the litigants’ briefs, in effect merely extending the length of the litigant’s brief.” *JZ*, 2021 WL 5396089, at \*1. To the extent the Proposed Amici have an interest in the resolution of the motion to dismiss, the Proposed Amici do not (and cannot) explain why the Attorney General has not adequately articulated those views already.<sup>2</sup>

A comparison of the proposed brief and the Attorney General’s motion to dismiss shows that the proposed brief principally repackages the Attorney General’s arguments. Besides addressing the “ultimate burden of proof” at summary judgment or trial, which is irrelevant to the 12(b)(6) inquiry, the proposed brief argues that discriminatory-purposes claims must overcome a presumption of legislative good faith; that making Plaintiffs

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<sup>2</sup> The Proposed Amici effectively seek a more forgiving standard than the parties to this litigation. The Court’s order on the motions to intervene provides that the intervenor parties may seek leave to file separate briefs only to the extent they are not duplicative of the arguments already raised by the original parties. Doc. 53. The Proposed Amici should not be held to a lesser standard, particularly when they have failed to seek leave to file their brief until briefing on the underlying motion is nearly complete.

1 overcome this burden is important so states do not have to expend costs in discovery; and  
 2 that Plaintiffs in this case have not adequately alleged purposeful race discrimination. *See*  
 3 Doc. 103 at pp. 3-12. The Attorney General has already made those points in his opening  
 4 brief. Doc. 76 at pp. 10-15. Presumably, he will do so again in his reply. This is another  
 5 reason to deny the Proposed Amici's Motion. *JZ*, 2021 WL 5396089, at \*1.

6 **III. IF THE COURT GRANTS THE MOTION, THE COURT SHOULD GIVE**  
 7 **PLAINTIFFS AND INTERVENOR-PLAINTIFFS AN OPPORTUNITY TO**  
 8 **RESPOND.**

9 The Motion should be denied because it is untimely and because the proposed  
 10 amicus brief largely duplicates points already made by the Attorney General. However, if  
 11 the Court permits the Proposed Amici to file their brief, the Court should grant Plaintiffs  
 12 and Intervenor-Plaintiffs an opportunity to explain why none of the Proposed Amici's  
 13 arguments support dismissal.

14 **CONCLUSION**

15 The Court should deny the Motion. However, if the Court grants the Motion,  
 16 Plaintiffs and Intervenor-Plaintiffs respectfully request that the Court allow them 14 days  
 17 to file a sur-reply limited to the points raised in the proposed amicus brief .

18 Dated: February 8, 2022

Respectfully submitted,

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/s/ John M. Geise

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**CERTIFICATE OF SERVICE**

I hereby certify that on February 8, 2022 copy of the foregoing **PLAINTIFFS' AND INTERVENOR-PLAINTIFFS' OPPOSITION TO AMICI STATES' MOTION TO FILE AMICUS CURIAE BRIEF SUPPORTING ATTORNEY GENERAL'S CORRECTED MOTION TO DISMISS** was filed electronically with the Arizona District Court Clerk's Office using the CM/ECF System for filing, which will provide a Notice of Electronic Filing to all CM/ECF registrants.

/s/ Sandra L. Moore

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