IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

TAREQ AQEL MOHAMMED AZIZ, et al.,	)	
	)	
Petitioners,	)	
	)	
THE COMMONWEALTH OF VIRGINIA,	)	
	)	
Intervenor-Petitioner,	)	
	)	
v.	)	Civil Action No. 1:17-cv-116
	)	
DONALD TRUMP, President of the United States, et al.,	)	
	)	
Respondents.	)	

INTERVENOR-PETITIONER'S BRIEF IN OPPOSITION TO MOTION BY PROFESSOR VICTOR WILLIAMS FOR LEAVE TO FILE AMICUS BRIEF

The Court should deny Professor Williams's motion for leave to file an amicus brief arguing that "this Court does not have subject matter jurisdiction in this matter as the case presents a nonjusticiable political question."[1] This Court rejected that argument in its February 13, 2017 memorandum opinion granting the Commonwealth's motion for a preliminary injunction, after the Government advanced it both in its briefing and at the hearing on February 10. Professor Williams could have sought leave to file a brief in support of the Government's position while the Commonwealth's motion remained pending, but that time passed weeks ago. Because the proposed amicus brief is neither timely nor useful, his motion should be denied.

[1] Dkt. 115 at 2.

ARGUMENT

A. Legal standards.

"The Court has broad discretion in deciding whether to allow a non-party to participate as an *amicus curiae*."[2] Amicus briefs are "'allowed at the trial level where they provide helpful analysis of the law, they have a special interest in the subject matter of the suit, or existing counsel is in need of assistance.'"[3] But a motion for leave to file an amicus brief "should not be granted unless the court deems the proffered information timely and useful."[4] "[I]f a proposed brief would not be helpful, an amicus may be turned away. An amicus brief may be unhelpful for many reasons, including because it is untimely or does not provide information relevant to a pending decision."[5]

B. The proposed amicus brief is not timely.

Professor Williams's motion should be denied as untimely. It comes three weeks after the Government opposed the Commonwealth's motion for a preliminary injunction and more than two weeks after the Court granted the motion.

Courts regularly deny non-parties leave to file amicus briefs once a motion has been fully briefed (not to mention decided). For instance, in *Centeno-Bernuy v. Perry*,[6] the U.S. District

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[2] *Tafas v. Dudas*, 511 F. Supp. 2d 652, 659 (E.D. Va. 2007) (citing *Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982), and *Waste Mgmt., Inc. v. City of York*, 162 F.R.D. 34, 36 (M.D. Pa. 1995)).

[3] *Id.* (quoting *Bryant v. Better Bus. Bureau*, 923 F. Supp. 720, 727 (D. Md. 1996)).

[4] *Id.* (internal punctuation and citations omitted).

[5] *Jamul Action Comm. v. Chaudhuri*, No. 2:13-cv-01920, 2015 WL 1802813, at *2 (E.D. Cal. Apr. 17, 2015).

[6] 302 F. Supp. 2d 128 (W.D.N.Y. 2003).

Court for the Western District of New York found untimely a leave-to-file motion because "the hearing ha[d] been completed and the preliminary injunction motion ha[d] been submitted for decision."[7] Similarly, in *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*,[8] the court denied leave to file an amicus brief after the parties had already briefed the plaintiffs' preliminary-injunction motion and presented "arguments at a lengthy hearing."[9]

Professor Williams could have sought leave to file an amicus brief before the February 10 hearing on the Commonwealth's preliminary-injunction motion, but he did not, despite publicly criticizing "judicial interference with the Commander-in-Chief's decisions as to war strategy" as early as February 6.[10] Five other sets of amici timely sought and were granted leave to file briefs in this case on February 8 and February 9.[11] As in *United States v. Yaroshenko*, where the U.S. District Court for the Southern District of New York rejected a proposed amicus brief by the Russian Federation, "nothing stopped [him] from seeking leave of the Court to file an amicus

[7] *Id.* at 131 n.1.

[8] 282 F. Supp. 2d 1271 (D.N.M. 2002).

[9] *Id.* at 1274 ("Allowing *amici* to step in at this late point would not be appropriate. . . . The Court has reached a decision . . . without reliance on the [proposed amicus] brief."). *See also Jamul Action Comm.*, 2015 WL 1802813, at *2 (rejecting amicus brief that was "best understood as a request for reconsideration of the court's previous order").

[10] *See* Dkt. 115-1 at 7 (citing Professor Williams's interview with the press: Stephen Dinan, *Lawyer Says Trump is Right to Chide Judge over "Ridiculous" Ruling*, WASH. TIMES (Feb. 6, 2017), http://www.washingtontimes.com/news/2017/feb/6/lawyer-trump-right-chide-judge-ridiculous-ruling/).

[11] *See* Dkt. 58 (Anti-Defamation League); Dkt. 66 (Muslim Advocates, *et al.*); Dkt. 72 (Americans United for Separation of Church and State, and the Southern Poverty Law Center); Dkt. 79 (16 States and the District of Columbia); Dkt. 88 (Fred T. Korematsu Center for Law and Equality, *et al.*).

brief or other submission at that time. Yet [he] failed to do so."[12] Because of his unexplained delay, Professor Williams simply missed his opportunity to support the Government's position.[13]

C. The proposed amicus brief is not useful because the nonjusticiability argument was already raised by the Government and rejected by the Court.

Even if it were timely, Professor Williams's motion should also be denied because the only argument in his proposed brief is duplicative of the Government's previous arguments—arguments that the Court has already considered and rejected.[14]

The Government argued in its brief opposing the Commonwealth's motion,[15] as well as at the hearing on the motion,[16] that the issues in this case are not justiciable. In its memorandum opinion, the Court expressly acknowledged that the Government had "invok[ed] the political question doctrine"[17]—and then held that it did not apply here:

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[12] 86 F. Supp. 3d 289, 290 (S.D.N.Y. 2015). *Cf. Cal. Trout v. Norton*, No. C 97-03779 SI, 2003 WL 23413688, at *8 (N.D. Cal. Feb. 26, 2003) ("Because the court finds that the applicants could have sought amicus status at an earlier state of the litigation, the request is untimely.").

[13] *See Jamul Action Comm.*, 2015 WL 1802813, at *2 (rejecting amicus brief that was "unhelpful to resolve any pending issue").

[14] *See Long v. Coast Resorts, Inc.*, 49 F. Supp. 2d 1177, 1177-78 (D. Nev. 1999) (rejecting motion by United States to file amicus brief that "merely reargue[d] what was argued fully and competently by Plaintiffs").

[15] *See* Dkt. 80 at 14 (arguing that "[j]udicial second-guessing" of the Executive Order "would constitute an impermissible intrusion on the political branches' plenary constitutional authority over foreign affairs, national security, and immigration").

[16] *See* Tr. of Hearing (Feb. 10, 2017) at 38:21-23 ("What [the court] cannot review and what the Government, I have to, I have to toe this line, is national security judgments delegated to the president . . . ."); *see also id.* at 35:19-25, 36:1-4 ("MR. REUVENI: Well, that's really the heart of the case, Your Honor. That's really the heart of the case. What branch of Government has the authority to make national security determinations?").

[17] Dkt. 111 at 10.

> "This is a familiar judicial exercise." *Zivitovsky [v. Clinton]*, 566 U.S. [189] at 196 [(2012)]. "At least since *Marbury v. Madison*, [the Supreme Court] has recognized that when" government action "is alleged to conflict with the Constitution, 'it is emphatically the province and duty of the judicial department to say what the law is.'" *Id.* (quoting *Marbury*, 1 Cranch 137, 177 (1803)). "That duty will sometimes involve the '[r]esolution of litigation challenging the constitutional authority of one of the three branches,' but courts cannot avoid their responsibility merely 'because the issues have political implications.'" *Id.* (quoting *INS v. Chadha*, 462 U.S. 919, 943 (1983)).[18]

The Court explained: "'the Supreme Court has repeatedly and explicitly rejected the notion that the political branches . . . are not subject to the Constitution when policymaking in [the immigration] context.'"[19]

Because Professor Williams's only arguments duplicate those raised by the Government and rejected by the Court, it would not be useful to consider his brief now. As Judge Rakoff aptly reasoned, such belated filings are truly not "friend of the court" briefs:

> An amicus curiae proves true to its name as a "friend of the court" when it offers a fresh perspective on an unsettled question of law that the actual parties to the litigation have not fully addressed. Here, however, Russia seeks to comment on matters that have already been decided or that are not truly in issue, and the Court sees no benefit in allowing it do so.[20]

The untimely and unhelpful amicus brief proposed here should be declined for the same reasons.

CONCLUSION

Professor Williams's motion for leave to file an amicus brief should be denied.

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[18] *Id.*

[19] *Id.* at 12 (quoting *Washington v. Trump*, 847 F.3d 1151, 1162 (9th Cir. 2017)).

[20] *Yaroshenko*, 86 F. Supp. 3d at 290-91.

Respectfully submitted,

THE COMMONWEALTH OF VIRGINIA

By: /s/

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CERTIFICATE OF SERVICE

I hereby certify that on March 15, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send a notification of such filing (NEF) to counsel of record, and sent the foregoing to counsel listed below by electronic mail and by first-class U.S. mail, postage pre-paid:

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By: /s/
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