

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2018-0198

AUTOMATED TRANSACTIONS, LLC AND DAVID BARCELOU,

Appellant,

v.

AMERICAN BANKERS ASSOCIATION, CREDIT UNION NATIONAL ASSOCIATION, INC., ROBERT H. STIER, JR., PIERCE ATWOOD LLP, CHARLES VON SIMSON, W. JOHN FUNK, GALLAGHER, CALLAHAN & GARTRELL, P.C., RALPH E. JOCKE, WALKER & JOCKE CO., LPA, MASCOMA SAVINGS BANK, AND STEPHEN F. CHRISTY,

Appellee,

APPEAL PURSUANT TO RULE 7 FROM A JUDGMENT OF THE SULLIVAN COUNTY SUPERIOR COURT

**MOTION OF AMERICAN CIVIL LIBERTIES UNION OF NEW
HAMPSHIRE AND ELECTRONIC FRONTIER FOUNDATION
FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE***

Pursuant to Supreme Court Rule 30, the American Civil Liberties Union of New Hampshire (“ACLU-NH”) and the Electronic Frontier Foundation (“EFF”), by and through their attorney, Gilles R. Bissonnette, submit this motion for leave to file a brief as *amici curiae* in this appeal. ACLU-NH and EFF requested consent from the parties to the filing of an *amicus* brief. Defendants/Appellees American Bankers Association, Mascoma Savings Bank, Stephen F. Christy, Credit Union National Association, Inc., Robert H. Stier, Jr., Pierce Atwood LLP, Ralph E. Jocke, and Walker & Jocke Co., LPA have provided written consent. Plaintiffs/Appellants David Barcelou and Automated Transactions LLC take no position on the relief requested in this motion. Since all parties have not provided written consent, ACLU-NH and EFF request leave to file the brief of *amici curiae*, which has been provisionally filed with this motion.

ACLU-NH is the New Hampshire affiliate of the American Civil Liberties Union—a nationwide, nonpartisan, public-interest organization with over 1.75 million members (including over 9,000 New Hampshire members and supporters). The ACLU-NH engages in litigation, by direct representation and as *amicus curiae*, to encourage the protection of individual rights guaranteed under state and federal law, including the right to freedom of speech. The ACLU-NH has appeared before state and federal courts in numerous First Amendment cases, both as direct counsel and as *amicus curiae*. These cases include: *Montenegro v. N.H. DMV*, 166 N.H. 215 (2014) (regulation allowing a vanity license plate to be rejected if it is offensive to good taste violated the right to free speech because it authorized arbitrary and discriminatory enforcement) (as *amicus*); *City of Keene v. Cleveland*, 167 N.H. 731, 741 (2015) (affirming, in part, dismissal of civil causes of action against speakers on the ground that “the First Amendment shields the respondents from tort liability for the challenged conduct”) (as *amicus*); *Doyle v. Comm’r, N.H. Dep’t. of Resources & Economic Dev.*, 163 N.H. 215 (2012) (special use permit was overbroad

because it applied without regard to the number of people attending an event and to a wide range of speech that had no relation to defendants' significant interests) (as direct counsel); *Rideout v. Gardner*, 838 F.3d 65 (1st Cir. 2016), *cert. denied*, 137 S. Ct. 1435 (2017) (striking down New Hampshire law banning online "ballot selfies" on grounds that it violates the First Amendment) (as direct counsel); *Petrello v. Manchester*, No. 16-cv-008-LM, 2017 U.S. Dist. LEXIS 144793 (D.N.H. Sep. 7, 2017) (striking down, on First Amendment grounds, Manchester's anti-panhandling ordinance, as well as permanently enjoining Manchester's anti-panhandling police practices) (as direct counsel).

EFF is a non-profit civil liberties organization that has worked for more than 25 years to protect consumer interests, innovation, and free expression in the digital world. EFF and its more than 38,000 dues-paying members have a strong interest in both sound patent policy and freedom of expression. EFF frequently participates in the public debate concerning patent policy and litigation through media interviews, blog posts, public speaking, and submissions to regulatory agencies and to Congress. As part of its mission, EFF has often served as *amicus curiae* in patent cases, including *Alice Corp. Pty. Ltd. v. CLS Bank International*, 134 S. Ct. 2347 (2014); *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749 (2014); and *Bilski v. Kappos*, 130 S. Ct. 3218 (2010). EFF has also served as *amicus curiae* in numerous First Amendment cases including *Fields v. City of Philadelphia*, 862 F.3d 353 (3d Cir. 2017); *Free Speech Coalition Inc. v. Attorney General United States*, 825 F.3d 149 (3d Cir. 2016); and *Kinney v. Barnes*, 443 S.W.3d 87 (Tex. 2014).

ACLU-NH and EFF will assist the Court by discussing the broad ramifications of the claims in this case. The speech at issue is part of a significant national debate about patent policy and litigation. The proposed brief describes this important context and explains how, in the view

of the present *amici*, a ruling finding the challenged statements capable of defamatory meaning would chill free expression and run afoul of the First Amendment.

In *In re Allaire Estate*, 103 N.H. 318, 320 (1961), this Court wrote that it “is not averse to wisdom in any form, from any source” and that the Court “does not hesitate to accept the benefit of briefs by *amicus curiae*.” The fundamental standard for submission of an *amicus* brief is whether it will aid in the determination of the issues. *See Nat’l Org. for Women, Inc. v. Scheidler*, 223 F.3d 615, 617 (7th Cir. 2000). Among other helpful roles of *amici*,

[s]ome friends of the court are entities with particular expertise not possessed by any party to the case. Others argue points deemed too far-reaching for emphasis by a party intent on winning a particular case. Still others explain the impact a potential holding might have on an industry or other group.

Neonatology Assocs., P.A. v. Comm’r of Internal Revenue, 293 F.3d 128, 132 (3d Cir. 2002) (citing Luther T. Munford, *When Does the Curiae Need an Amicus?*, 1 J. App. Prac. & Process 279, 281 (1999)).

The views of an *amicus* may align with those of one of the parties. *See Greater Hells Canyon Council v. Stein*, No. 2:17-CV-00843-SU, 2018 WL 438924, at *1 (D. Or. Jan. 16, 2018) (quoting *Funbus Sys., Inc. v. Cal. Pub. Utils. Comm’n.*, 801 F.2d 1120, 1125 (9th Cir. 1986)) (“[T]here is no rule that *amici* must be totally disinterested.”). Nor should an *amicus* need to show that a party is incompetently represented in order to participate. *Neonatology Assocs.*, 293 F.3d at 132 (“Even when a party is very well represented, an *amicus* may provide important assistance to the court.”).

ACLU-NH and EFF respectfully submit that their proposed brief will assist the Court to understand the potential impact of this case and the broad First Amendment principles at stake. For these reasons, ACLU-NH and EFF request that the Court grant this motion for leave to file the accompanying brief of *amici curiae*.

Respectfully Submitted,

American Civil Liberties Union of New Hampshire &
Electronic Frontier Foundation

By their Attorney,



Gilles R. Bissonnette, Esq.

Date: September 17, 2018

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion for Leave to File Amicus Brief was served this 17th day of September 2018 by first class mail, postage prepaid, and by electronic mail on counsel listed below:

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