UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

GROCERY MANUFACTURERS ASSOCIATION, *et al*.,	)	
Plaintiffs,	)	
v.	)	Case No. 5:14-cv-00117-CR
WILLIAM H. SORRELL, in his official capacity as the Attorney General of Vermont, *et al*.,	)	
Defendants.	)	

AMICI CURIAE VERMONT PUBLIC INTEREST RESEARCH GROUP & CENTER FOR FOOD SAFETY'S RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION TO STRIKE AMICI'S SUR-REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

Plaintiffs have taken the peculiar step of asking this Court to strike Amici Curiae's most recent filing despite this Court's October 7, 2014 order granting Amici permission to, "during the pendency of this case, . . . file memoranda as *amici curiae* without seeking further permission for each such filing." Op. & Order Den. VPIRG & CFS Mot. to Intervene as Defs., Doc. 52, at 12 (Oct. 7, 2014). Plaintiffs' request should be denied.

First, the Court has already held that Amici Vermont Public Interest Research Group and Center for Food Safety may participate in this case through the filing of memoranda, without seeking leave of court to do so. *See id.* The Court's order plainly contemplated multiple filings, referring to "memoranda" (not "memorandum"), "each such filing" (not "the filing"), and "the pendency of the case" (not "one briefing in the case"). *Id.* In making this ruling, the Court noted that "additional briefing by [Amici] may prove helpful to the court," that Plaintiffs "do not

oppose [Amici's] participation as *amici curiae*," and that the State had consented to allow Amici "'to offer briefing on all motions, responses, replies and other filings by the parties.'" *Id*. at 11-12 (citing Doc. 21 at 3).

This ruling is the law of the case and the Court should adhere to it. *See United States v. Uccio*, 940 F.2d 753, 758 (2d Cir. 1991) (explaining that "when a court has ruled on an issue, that decision should generally be adhered to by that court in subsequent stages in the same case"). The only bases for deviation from law of the case do not apply: There has been no "intervening change of controlling law," there is no "new evidence," and there is no need to "correct a clear error or prevent manifest injustice" on the issue of whether Amici may file memoranda during the pendency of this case. *See United States v. Tenzer*, 213 F.3d 34, 39 (2d Cir. 2000) (quotation marks and citation omitted) (laying out standard for reconsideration). Thus there is no basis for the Court to reconsider its prior ruling.

Law of the case is particularly appropriate where, as here, injustice would occur if the Court *did* reconsider its prior ruling. *See Uccio*, 940 F.2d at 758 (court should adhere to its prior decision where "disregard of an earlier ruling [would] prejudice the party seeking the benefit of the doctrine"). As explained in Amici's filings for their Motion to Intervene, Amici are heavily invested in the outcome of this case, were integral to the passage of Act 120, and have significant expertise on the issues presented here. *See generally* VPIRG-CFS Mot. to Intervene and Related Filings, Doc. 18 *et seq.* If the Court had not granted Amici permission to file memoranda for the pendency of the case, Amici may well have sought an appeal of the Court's order denying intervention.

Second, contrary to Plaintiffs' protestations, district courts have broad discretion in fashioning the terms of amici participation, and the Court's Order establishing such participation

was well within that discretion. *See, e.g.,* John Bordeau et al., 25 Fed. Proc., L. Ed. § 59:381 (2014) (explaining that "it is solely within the discretion of the court to determine the fact, extent, and manner of participation by the amicus"). District courts are not bound, as Plaintiffs suggest, by the Rules of Appellate Procedure. *See, e.g.*, *Concerned Area Residents for the Env't v. Southview Farm*, 834 F. Supp. 1410, 1413 (W.D.N.Y. 1993) ("District courts have broad discretion in deciding whether to accept *amicus* briefs."); *Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982) (concluding that trial court did not abuse discretion in appointing *amicus curiae* that "participated fully in the discovery, trial, and appeal" of the case), *abrogated on other grounds* by *Sandin v. Connor*, 515 U.S. 472 (1995).

The First Circuit, for example, has an entire judicial doctrine, known as "Amicus-Plus" status, pursuant to which its courts have discretionarily granted amici broader roles than Plaintiffs claim are permitted. *See, e.g.*, *Maine v. Director, U.S. Fish & Wildlife Serv.*, 262 F.3d 13, 14 (1st Cir. 2001) (explaining that "[a]s amicus-plus, Defenders have the right to submit briefs (including arguments not presented by the government), a limited right to call and cross-examine witnesses, and a right to receive notice and service of all documents and events as if they were parties in the case"); *Animal Protection Inst. v. Martin*, No. CV-06-128 BW, 2007 WL 647567 (D. Me. Feb. 23, 2007) (same). Here, the Court has not limited Amici to one brief but rather provided Amici the ability to participate fully in the case's briefing as a party would, without motion for leave, providing briefs at each stage but without upsetting the case's schedule. This type of participation is well within the various bounds of amici participation.

Third, despite Plaintiffs' misleading assertions otherwise, Amici have fully and carefully complied with the Court's prior order and with the briefing schedule set by the parties. Though Plaintiffs attest that they "consented to the November 14, 2014 filing of CFC [sic] and VPIRG's

original *amici* brief" but "did not consent to" supplemental memoranda from Amici, Mot. to Strike Mem. of *Amici* & for Order re: *Amici* Participation, Doc. 84, at 3-4, Amici are aware of no consent either way and, per this Court's Order, none was needed. The case's scheduling order unambiguously provided for an optional sur-reply, to be filed on or before December 15, a briefing opportunity that Amici—like the State—took. Because the Court had already granted Amici permission to file memoranda during the pendency of the case, Amici did not seek Plaintiffs' consent to file *either* their November 14 memorandum or their December 15 sur-reply. Plaintiffs' characterization to the contrary is thus untrue.

Rather, consistent with the Court's direction to "comply with the briefing schedule established by the parties and the court," Doc. 52 at 12, Amici have filed their papers in a timely manner and within the page limits utilized by the State. *See* VPIRG-CFS Mem. in Support of MTD & Opp. to PI, Doc. 64 (filed on November 14 deadline, at 55 pages to State's 70 pages); VPIRG-CFS Sur-Reply in Support of MTD, Doc. 77 (filed on December 15 deadline, at 6 pages to State's 7 pages). As Amici's carefully tailored filings illustrate, the Court's prior Order was sufficiently clear on Amici's participation; the Court should reject Plaintiffs' newly proposed limitations, transposed from the inapposite appellate context. As Plaintiffs recognize, the State also opposes their motion. Doc. 84 at 5.

Finally, when Plaintiffs argued against intervention for Amici, Plaintiffs urged the Court to grant amicus status instead because Amici could "give their arguments *full airing by filing papers* in this case as *amici curiae*." Pls.' Resp. to Mot. to Intervene, Doc. 22, at 15 (emphasis added). Plaintiffs assured the Court that they had "consented in advance to *amicus* participation" and that Amici's "advocacy interests can be *fully served* through those means." *Id.* (emphasis added). Plaintiffs *volte-face* seeking an order to limit such "full airing," in derogation of this

Court's October 7 order, should be denied. Rather, the Court should clarify for Plaintiffs that Amici are permitted to fully participate throughout these proceedings by briefing all motions, responses, replies, and other filings for the pendency of the case, in the same manner and by the same schedule as the parties.

CONCLUSION

For the reasons explained above, Plaintiffs' motion to strike Amici's Sur-Reply should be denied.

DATED: December 20, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2014, I electronically filed with the Clerk of Court the following document:

> Amici Curiae Vermont Public Interest Research Group and Center for Food Safety's Response in Opposition to Plaintiffs' Motion to Strike Amici's Sur-Reply in Support of Defendants' Motion to Dismiss

using the CM/ECF system. The CM/ECF system will provide service of such filing via Notice of Electronic Filing (NEF) to the following NEF parties:

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DATED: Montpelier, VT, December 20, 2014

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