

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

TERESA M. ARNETT, SHARLEEN PELZL,
JAMES O. SMITH, AND RPOA TEXAS
OUTREACH, INC.,

Plaintiffs,

v.

FRANK DENTON, Chairman of Commissioners of
the Texas Department of Licensing and Regulation,
in his official capacity and STATE OF TEXAS,

Defendants.

Case No. 1:12-CV-913-LY

**MOTION OF THE HUMANE SOCIETY OF THE UNITED STATES AND THE TEXAS
HUMANE LEGISLATION NETWORK FOR LEAVE TO PARTICIPATE AS
AMICI CURIAE**

The Humane Society of the United States and the Texas Humane Legislation Network (the “*Movants*”) hereby file this Motion, which respectfully requests that they be permitted to file briefings on the legal issues arising in this lawsuit as *amici curiae*. The Movants have an important interest in the issues at stake in this lawsuit due to their historic advocacy on behalf of animals in breeding facilities and their role in the passage of the statute that plaintiffs are challenging. The Movants believe their specialized knowledge and experience can assist the Court and therefore seek leave to file briefs as *amici curiae* on the issues of law implicated in this lawsuit.

I. BACKGROUND

(a) History of this Case

1. Plaintiffs in this lawsuit allege that the Texas Dog or Cat Breeders Act, 82d Leg., R.S., ch. 1284, § 1, 2011 Tex. Gen. Laws 3583, codified at TEX. OCC. CODE § 802.001 *et seq.*

(the “*Act*”) and various regulations promulgated thereunder (the “*Rules*”) by the Texas Commission of Licensing and Regulation (the “*Commission*”) as enforced by the Texas Department of Licensing and Regulation (collectively with the Commission, “*TDLR*”) violate various provisions of the United States Constitution and the Texas Constitution.¹

2. Broadly speaking, the Act and the Rules provide for “the creation of a regulatory scheme on the breeders of certain dogs and cats within the State of Texas.”² The Movants spent considerable time and effort organizing popular and political support for the Act. Certain of the Plaintiffs lobbied against the Act.³

3. The Texas Legislature passed the Act and the Governor of Texas signed it in 2011. The TDLR then approved the Rules in March 2012.⁴ The Act and the Rules thereunder went into effect on September 1, 2012.⁵

4. One month after the Act and the Rules went into effect, this lawsuit was commenced.⁶ Shortly after commencing this lawsuit, Plaintiffs filed their *Motion for Temporary Restraining Order, Preliminary Injunction and Permanent Injunction* filed by Plaintiffs in this lawsuit on October 5, 2012 at Docket No. 5 (the “*TRO Motion*”), which requests that the Court issue orders enjoining the State of Texas and the TDLR from “taking any action to enforce either the Act or the Rules” prior to a full trial on the merits.⁷ No such trial has been scheduled.

¹ Plaintiffs’ Second Amended Complaint for Declaratory Relief at ¶¶ 22-29, *Arnett v. Denton*, No. 1:12-cv-913-LY (W.D. Tex. Oct. 31, 2012) (the “*Complaint*”).

² *Id.* ¶ 11.

³ *Id.*

⁴ *Id.* ¶ 13.

⁵ *Id.* ¶11.

⁶ Plaintiff’s [sic] Original Complaint for Declaratory Relief and Request for Temporary Restraining Order, Preliminary Injunction, and Permanent Injunction, *Arnett v. Denton*, No. 1:12-cv-913-LY (W.D. Tex. Oct. 1, 2012).

⁷ *TRO Motion* at ¶ 13.

5. On November 1, 2012, the Defendants filed a motion to dismiss the lawsuit and an objection to the TRO Motion.⁸

(b) The Act

6. The Act regulates a “dog or cat breeder,” defined as

a person who possesses 11 or more adult intact female animals and is engaged in the business of breeding those animals for direct or indirect sale or for exchange in return for consideration and who sells or exchanges, or offers to sell or exchange, not fewer than 20 animals in a calendar year.

TEX. OCC. CODE § 802.002(8) (Vernon 2012). “Intact” female animals are unspayed and capable of reproduction. *Id.* § 802.002(11).

7. The breeding of dogs for racing or hunting or agricultural purposes is generally exempt from the Act. *Id.* §§ 802.003 & 802.005. Further, a person who does have 11 or more unspayed females and is engaged in the breeding business can avoid regulation by rebutting the presumption that certain of the female animals are used for breeding purposes. *Id.* § 802.004.

8. The Act authorizes the Commission to promulgate the Rules under the Act and calls for the TDLR to enforce the Act and the Rules. *Id.* § 802.051. Fees can be charged to licensed breeders, personnel can be hired, and expenses can be paid. *Id.* §§ 802.052-054. The TDLR may collect and in some instances disseminate information on licensees, inspectors, and consumer information. *Id.* §§ 802.055-058. The TDLR must inspect licensed breeding facilities once every 18 months and investigate reported violations, and may contract with third-party inspectors to do so. *Id.* §§ 802.060-063.

⁸ Defendants’ Motion to Dismiss, *Arnett v. Denton*, No. 1:12-cv-913-LY (W.D. Tex. Nov. 1, 2012); Defendants’ Response to Motion for Preliminary Injunction, *Arnett v. Denton*, No. 1:12-cv-913-LY (W.D. Tex. Oct. 1, 2012).

9. Dog and cat breeders must be licensed after an application and inspection process. *Id.* §§ 802.101-104. License holders can renew their license, and the TDLR may revoke or suspend a license. *Id.* §§ 802.106-107.

10. Dog and cat breeders must maintain records. *Id.* §§ 802.153-154. They must also conform to the standards of care adopted by the Commission with the assistance of an advisory board, which shall be comprised of a diverse group of experts, breeders, and interested citizens. *Id.* §§ 802.065 & 802.201.

11. The Act does spell out basic standards of care. Federal regulations must be met and dogs must be provided with regular exercise. *Id.* § 802.201(b)(1)-(2). Animals must not be bred too frequently, and must be groomed and kept healthy. *Id.* § 802.201(b)(3)-(4). Cages must be safe and sanitary, and can no longer be stacked more than three high, or stacked in any fashion that permits animal waste to drip down to lower levels. *Id.* § 802.201(b)(5)-(7). Regular veterinary examinations are required, as are preventative care measures, and only veterinarians can euthanize animals. *Id.* § 802.201(b)(8)-(11). Breeders and their employees must be trained and cannot sell animals that are less than eight weeks old. *Id.* § 802.201(b)(12)-(13).

12. The TDLR may issue its standard administrative penalties to enforce the Act and the Rules. *Id.* § 802.251.

(c) The Parties & the Movants

13. Plaintiffs are three natural persons who reside in central Texas and operate dog-breeding or cat-breeding enterprises and one non-profit organization.⁹

14. Defendants in this lawsuit—the Commissioner of the TDLR in his official capacity and the State of Texas—need no introduction. The most recent version of the Complaint no longer lists the State of Texas as a defendant.

⁹ *Complaint*, ¶ 1-3.

15. The Movants are non-profit organizations dedicated to preventing cruelty to animals and preserving and protecting animal welfare. The Humane Society of the United States (“HSUS”) was established in 1954 and is the largest animal protection organization in the country, currently counting over 11 million Americans among its members and supporters. HSUS’s mission is to protect animals through legislation, litigation, investigation, education, science, advocacy, and field work. HSUS has been at the forefront of efforts to improve conditions for animals in breeding facilities, both in Texas and throughout the country. HSUS also devotes investigative resources to exposing the cruelty involved in certain aspects of dog and cat breeding, and works with law enforcement to prosecute cases of cruelty to animals in such facilities.

16. The Texas Humane Legislation Network (“THLN”) is a statewide organization that was established in 1975. Since that time THLN’s volunteers have been devoted to promoting the enactment and enforcement of laws to protect animals from neglect and abuse in the State of Texas. THLN was actively involved in advocating for the passage of the Texas Dog or Cat Breeders Act as well as other animal protection legislation.

II. RELIEF REQUESTED

17. The Movants respectfully request that the Court permit them to participate as *amici curiae* by filing legal briefs regarding the issues and claims implicated by both Plaintiffs’ Complaint and by Plaintiffs’ request for a temporary restraining order and preliminary injunction.

18. This Court has inherent authority to permit the Movants to file briefs on legal issues as *amici curiae*. “No statute, rule, or controlling case defines a federal district court’s power to grant leave to file an *amicus* brief[.]” *United States v. Olis*, No. H-07-3295, 2008 WL

620520 (S.D. Tex. Mar. 3, 2008). “The extent to which the court permits *amicus* briefing lies solely within the court’s discretion.” *Id.* (citing *Waste Mgmt. of Penn. V. City of York*, 162 F.R.D. 34, 36-37 (M.D. Pa. 1995)).

19. “Factors relevant to the determination include whether the proffered information is ‘timely and useful’ or otherwise necessary to the administration of justice.” *Id.* The Movants’ request to participate as *amici* satisfies these concerns. First, this information will be timely. This lawsuit is presently in its early stages and therefore allowing the Movants to file *amicus* briefs shall not cause surprise or other prejudice to any of the parties and will leave ample time for the Court to consider the Movants’ briefings, if it so desires.

20. Second, the Movants’ *amicus* briefs may help facilitate the administration of justice. The Movants shall closely mind the proper limits on the role of *amicus curiae*. The Fifth Circuit has stated that the “role as *amicus curiae* is limited to advising this Court on issues of law[.]” *In re Hunt*, 754 F.2d 1290, 1294 (5th Cir. 1985).

Amicus curiae perform a valuable role for the judiciary precisely because they are nonparties who often have different perspective from the principal litigants; *amicus curiae* presentations assist the court by broadening its perspective on the issues raised, and facilitate informed judicial consideration of a wide variety of information and points of view. An *amicus curiae* is one who assists the court by way of offering information and legal argument. The usual rationale for *amicus curiae* submissions is that they are of aid to the court and offer insights not available from the parties, and help the court with points of law.

4 AM.JUR.2d, *Amicus Curiae* § 1 (2012).

21. The Movants as *amici* would focus on broadening the Court’s prospective and facilitating its informed consideration.

An *amicus* can assist the court by (1) providing adversarial presentations when neither side is represented, (2) providing an adversarial presentation when only one point of view is represented, (3) supplementing the efforts of counsel even when both sides are represented, and (4) drawing the court’s attention to broader legal or policy implications that might otherwise escape the court’s consideration.

Id. The Movants believe that they are particularly well-suited to proffer assistance in this fourth role—drawing attention to broader legal and policy implications implicated by this lawsuit. The Movants have extensive knowledge and background with regard to both the Act and the Rules themselves, and with similar laws in other jurisdictions, and with regard to the dog and cat breeding practices and concerns that led to the enactment of these measures. The Movants were involved in the passage of the statute at issue here, and have acted as *amici* in other lawsuits making similar challenges to laws regulating breeding facilities.

22. HSUS has been routinely permitted to participate as *amici* or intervenors in numerous other challenges in federal courts to the constitutionality of similar animal welfare legislation enacted by other States. Recent examples of such decisions are:

- Order Granting Motion by the Human[e] Society of the United States for Leave to Intervene, *Cramer v. Brown*, No. 2:12-CV-03130-JFW-JEM (C.D. Cal. June 4, 2012) (granting motion of the Humane Society of the United States to intervene in a constitutional challenge to California animal cruelty legislation);
- Order Granting Motion to File Memorandum as Amicus Curiae, *NAIA Trust v. Volusia County, Fla.* No. 6:09-cv-340-KRS (M.D. Fla. Aug. 5, 2010) (granting motion of the Humane Society of the United States to participate as *amicus curiae* brief in a constitutional challenge to county ordinances pertaining to animal control and breeding licensing and requirements); and
- Order, *Prof'l Dog Breeders Advisory Council, Inc. v. Wolf*, No. 1:09-cv-258-SHR (M.D. Pa. April 6, 2009) (granting motion of, among others, the Humane Society of the United States and the American Society for the Prevention of Cruelty to Animals to participate as *amici curiae* in a constitutional challenges to Pennsylvania legislation regulating commercial dog breeding).

These decisions show that there is ample precedent for the Movants to participate in this case as *amici curiae*. Further, these decisions show that the Movants are well-suited to serve as *amici curiae*—their participation in similar cases across our nation and their wealth of experience with

animal welfare issues and resulting laws and regulation has provided them with specialized knowledge and unique perspectives that could assist this Court in the course of this lawsuit.

WHEREFORE, PREMISES CONSIDERED, the Movants respectfully request that this Court permit the Movants to participate in this case as *amici curiae* by filing briefs of no more than twenty (20) pages addressing any legal issues raised by any pleadings filed by the Plaintiffs, and grant Movants such other relief as to which they may be justly entitled.

Respectfully submitted November 6, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on November 6, 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following, and that I also caused a copy of the foregoing to be served on the following via U.S. Mail first class, postage pre-paid:

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