STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DAVID C. RODEARMEL, Plaintiff, v. HILLARY RODHAM CLINTON, et al., Defendants.	No. 1:09-cv-00171-RBW-JR Honorable Karen LeCraft Henderson Honorable James Robertson Honorable Reggie B. Walton

Reply in Support of
Motion of Professors of Linguistics for Leave
to File Memorandum as *Amici Curiae*

Plaintiff David Rodearmel's opposition to our motion for leave to file an *amicus* memorandum is untimely, and in any event the arguments it makes are insubstantial.

The opposition is untimely. Our motion for leave was filed and served on Monday, June 22, 2009. Rodearmel's opposition was due 14 calendar days later, on Monday July 6. (The response period under this Court's local rules was 11 calendar days, with three days added because the motion was not served by hand.[1]) But the opposition was not filed until Thursday, July 9—three days late. Rodearmel has not sought leave to file out of time and has offered no excuse for having missed the deadline. Under LCvR 7(b), therefore, "the Court may treat the motion as conceded."

There is good cause to accept the proposed *amicus* memorandum. The principal authority Rodearmel relies on recognizes that an *amicus* brief is appropriate "when the *amicus* has unique information or perspective that can help the court beyond

1. *See* LCvR 7(b) (response period); Fed. R. Civ. P. 6(a)(2) (periods of 11days or longer are measured in calendar days); Fed. R. Civ. P. 6(d) (additional time for service).

the help that the lawyers for the parties are able to provide."[2] This is such a case. Our proposed *amicus* brief does not present ordinary legal argument, but provides an in-depth analysis that draws on linguistic theory and methodology.

Under these circumstances, it is irrelevant that we have not questioned defense counsel's competence. Although counsel for the defendants are very able, the fact remains that they are lawyers, not linguists. The movants are therefore better able to present an analysis that is based on linguistics.

It is also irrelevant that the movants have no concrete or particularized interest in the outcome of this case. The movants are seeking to submit a memorandum as *amici curiae*, not intervene as parties, so they need not have the sort of interest that would give them standing to sue. In this respect, the movants here are no different than the over-whelming majority of modern-day *amici*. Indeed, they no different than Judicial Watch, which represents Rodearmel here and which has frequently filed *amicus* briefs in cases where its only interest was ideological. For example, Judicial Watch has filed *amicus* briefs in support of the Congressional subpoena power, in support of local governments' display of the Ten Commandments, in support of the federal government's ban on "partial birth" abortions, and in opposition to same-sex marriage.[3] Judicial Watch's interest in those issues was no less generalized than the movants' interest is here.

Rodearmel expresses skepticism about the movants' expertise, but that argument, too, is wide of the mark. The issues addressed by our proposed memorandum are relevant only to the legal issue of how the Ineligibility Clause should be interpreted. They are

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2. *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1063, 1064 (7th Cir. 1997).

3. *See* Ex. 1 hereto (identifying these cases and others in which Judicial Watch has filed amicus briefs).

therefore matters of "legislative fact": facts that are relevant to determining a purely legal issue, as opposed to those that relate to the specific dispute between the parties.[4] Legislative facts are subject to judicial notice, so the movants need not prove their expertise in the manner that would be required if they were proffered as expert witnesses on an issue of adjudicative fact.[5] That distinguishes this case from *New York v. Microsoft Corp.*, on which Rodearmel relies, because in that case the proposed amici sought to address factual issues relating to the remedy to be imposed, not issues of pure law.[6]

More importantly, we do not ask the Court to blindly accept what the movants say based on their authority as experts. Rather, we ask that the Court consider our analysis on its merits and to accept or reject it based on whether it makes sense. For although expertise in linguistics was necessary in developing our analysis, no such expertise is needed in order to understand and evaluate it. What matters is the contents of the movants' analysis, not the contents of their CVs.

It is also irrelevant that the movants have not claimed special expertise regarding 18th-century English. Although the Framers' English differs to some extent from our own—primarily with regard to vocabulary and style—the differences are insignificant compared to the similarities. Modern-day readers can easily understand 18th-century

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4. *See. e.g.*, Fed. R. Ev. 201(a) adv. comm. note; *Friends of the Earth v. Reilly*, 966 F.2d 690, 693–94 (D.C. Cir. 1992).

5. *See, e.g.*, *Daggett v. Commission on Governmental Ethics and Election Practices*, 172 F.3d 104, 112 (1st Cir. 1999) (legislative facts are typically presented in briefs, not by trial testimony); *Friends of the Earth*, 966 F.2d at 694 (evidentiary hearing is rarely necessary with respect to legislative facts); *City of New York Mun. Broadcasting System (WNYC) v. FCC*, 744 F.2d 827, 840 n.17 (D.C. Cir. 1984) (agency may take official notice of legislative facts); 21B Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice & Procedure* 2d § 5103.2. *Cf. Muller v. Oregon*, 208 U.S. 412, 421–22 (1908) (relying on "Brandeis Brief").

6. 2002 U.S. Dist. Lexis 22862 at *4, 2002-2 Trade Cas. (CCH) ¶ 73,859 (D.D.C. Nov. 6, 2002).

texts such as the Constitution. If special expertise in 18th-century English were a prerequisite for interpreting and analyzing texts from that period, the Constitution would have to be translated into more modern language before the courts could be interpret it. Indeed, in that event Rodearmel's lawyers would have to demonstrate their own linguistic qualifications before their arguments could be taken seriously.

Rodearmel argues that "the Court is in no need of outside assistance to interpret the meaning of the word 'increase' or simple grammar." But that begs the question. The entire point of amici's memorandum is that interpreting the Ineligibility Clause is not as simple as Rodearmel claims it is.

Finally, Rodearmel is way off base in his speculation about "what role the government may have had in encouraging the submission of this brief." All contact with the amici was initiated by undersigned counsel, with no involvement by the government. The government was not even told the individual amici's names, and its only role was to consent to the memorandum's being filed.

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For the foregoing reasons, and those in our original motion papers, the movants should be granted leave to file their memorandum as *amici curiae*.

Respectfully submitted,

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