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IN THE DISTRICT COURT OF APPEAL
FOR THE FIRST DISTRICT, STATE OF FLORIDA

SECRETARY OF STATE CORD BYRD, *et al.*,

Appellants,

Case No. 1D23-2252
L.T. Case No. 2022-CA-000666

v.

BLACK VOTERS MATTER CAPACITY BUILDING INSTITUTE, INC., *et al.*,

Appellees.
_____/

APPELLANTS' RESPONSE TO "MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF OF J. MORGAN KOUSSER"

Appellants respond in opposition to the "Motion for Leave to File *Amicus Curiae* Brief of J. Morgan Kousser," dated October 23, 2023.

Kousser is a historian and a California resident who testified as an expert witness against Florida in parallel federal litigation that challenges the same congressional district at issue here. Mot. at 2–3. His proposed 27-page amicus brief is not an amicus brief at all, but rather an expert report chock-full of facts contained nowhere in the stipulated record presented below. Kousser's expert report claims to chronicle the history of race discrimination in Florida since 1865 and the purported

factual background of Florida's redistricting standards. Written in the first person, the expert report presents a dense historical narrative replete with bibliographic references to books, articles, newspaper accounts, and internet sources. It culminates in Kousser's opinion that a history of race discrimination justifies Florida's redistricting standards.

Perhaps recognizing that no court would allow a non-party to file an expert report for the first time on appeal, Kousser named his expert report an "amicus curiae brief" and now presents it to the Court in that disguise.

The expert report should be rejected for several reasons.

First, an amicus curiae may not load an appellate record with new facts not introduced by the parties in compliance with the rules of evidence. *Dade Cnty. v. E. Air Lines Inc.*, 212 So. 2d 7, 8 (Fla. 1968) (striking an amicus brief and appendix that sought to "interject in these proceedings matters dehors the record"). Rather, an amicus curiae is limited to argument on the factual record developed in the trial court. Far from confining himself to the record, Kousser's stated intent is to introduce copious new facts into the record. Kousser acknowledges that his expert report does not "discuss" the "factual record in this case," but instead presents "a few pieces of evidence that help to form the factual

basis for my conclusion." Proposed Br. at 1. It is not the prerogative of an amicus curiae to ignore the record and present new "evidence" to an appellate court.

Second, Kousser's motion attempts an end-run around the parties' Stipulation. The parties agreed to resolve this case on a finite set of stipulated facts filed with the trial court on August 11, 2023. R. 8026–57. In the Stipulation, Appellees represented that "no material factual issues remain in dispute regarding [their] diminishment claim and . . . the Court may rule on that claim as a matter of law." R. 8027. Appellees then represented to the trial court in a motion to amend the scheduling order that the parties' Stipulation "resolves all remaining factual disputes." R. 8058. The trial court relied on those representations, canceled the evidentiary portion of the trial, and scheduled a non-evidentiary hearing in its place. R. 8061. With Appellees' consent, Kousser now seeks to circumvent the parties' Stipulation by introducing 27 pages of untested factual assertions found nowhere in the Stipulation.

That is improper. As this Court has recognized, pretrial stipulations "are binding upon the parties and the court, and should be strictly enforced." *Delgado v. Agency for Health Care Admin.*, 237 So. 3d 432,

437 (Fla. 1st DCA 2018) (quoting *Lotspeich Co. v. Neogard Corp.*, 416 So. 2d 1163, 1165 (Fla. 3d DCA 1982)). As Appellees argued in their answer brief, "when a case is tried upon stipulated facts the stipulation is binding not only upon the parties but also upon the trial and appellate courts," and "no other or different facts will be presumed to exist." Answer Br. at 19 (quoting *Troup v. Bird*, 53 So. 2d 717, 721 (Fla. 1951)). "An appellate court's concern is 'simply to determine whether the trial court properly applied the law to the stipulated facts.'" Answer Br. at 19 (quoting *Trumbull Chevrolet Sales Co. v. Seawright*, 134 So. 2d 829, 835 (Fla. 1st DCA 1961)).

The parties' Stipulation did not provide for Kousser's expert testimony or the introduction of the "facts" that fill Kousser's expert report. Appellants consented to the cancellation of the evidentiary proceedings in reliance on the parties' Stipulation and on the appropriate limitations it placed on the factual record. Consideration of the expert report would violate the Stipulation; indeed, Appellees' consent to Kousser's motion flies in the face of their agreements in the Stipulation and their representations to the trial court that all factual disputes had been resolved.

Third, Kousser's motion attempts an end-run around the rules of evidence. An expert report is textbook hearsay. *Engebretsen v. Fairchild Aircraft Corp.*, 21 F.3d 721, 728–29 (6th Cir. 1994); *Rose v. ADT Sec. Servs., Inc.*, 989 So. 2d 1244, 1249 (Fla. 1st DCA 2008). Expert reports are out-of-court statements offered to prove the truth of the matter asserted. § 90.801(1)(b), Fla. Stat. Kousser's report is no exception. It provides a nearly 30-page historical narrative of purported facts. Kousser offers that historical narrative because he wants this Court to credit the assertions it contains—that is, for the truth of the matter asserted. Worse still, Kousser's report is a conduit for hearsay within hearsay gleaned from a selective reading of newspapers, anecdotes, and a database of race discrimination that Kousser himself maintains. While an expert may rely on hearsay in forming opinions, *id.* § 90.704, the expert may not be the vehicle to introduce and establish as true the facts contained in hearsay statements, *Linn v. Fossum*, 946 So. 2d 1032, 1037 (Fla. 2006).

The hearsay rule cannot be evaded by simply swapping out the words "expert report" for the words "amicus curiae brief." *See Castro v. State*, 201 So. 3d 77, 77 (Fla. 3d DCA 2015) ("Florida courts emphasize

substance over form. . . . In essence, if the pleading is incorrectly labeled, this Court will focus on the substance of the pleading and not its title."). The rules of evidence bar Kousser's expert report under any name.

Fourth, Kousser's motion is an end-run around the rules of expert discovery and the trial court's scheduling order. The scheduling order established a timeline for expert disclosures. R. 1973. Appellees' expert disclosures were due on January 27, 2023. *Id.* ¶ 2. Appellees in fact disclosed two experts timely, and Appellants took the depositions of those experts. Unlike the plaintiffs in the parallel federal litigation, Plaintiffs here did not disclose Kousser. Nor did Plaintiffs disclose Kousser as a witness on their witness list, or his expert report as an exhibit on their exhibit list, when those disclosures were due on June 28, 2023. Now Kousser, as a "historian and university professor with expertise in Florida's history of discrimination," Mot. at 2, provides his own factual record after never having been disclosed, deposed, or otherwise tested about the so-called facts that he presents. The disclosure of an expert report on appeal denies Appellants any opportunity to pre-

sent rebuttal expert reports or to conduct discovery and cross-examination, as contemplated by the rules of evidence and the trial court's scheduling order.

Finally, while Kousser claims a "professional and personal interest" in this litigation, Mot. ¶ 3, it is clear that his interest does not go beyond intellectual intrigue or curiosity. He has no stake in the outcome of this dispute. Kousser lives and works in California, more than 2,200 miles from Tallahassee. *See* Proposed Br. at 1; California Institute of Technology, Division of the Humanities and Social Sciences, https://www.hss.caltech.edu/people/j-morgan-kousser. His "interest" in this litigation was not significant enough for him to seek to intervene as a party over the past 18 months, nor were his opinions important enough for any party to present them in a timely expert report. While Kousser has appeared more than once as a putative expert witness in Florida, espousing positions hostile to this State's public policy, that alone does not give Kousser an "interest" in this proceeding warranting the Court's consideration.

CONCLUSION

Kousser's motion is a poorly camouflaged attempt to unilaterally supplement a stipulated record with never-before-seen hearsay facts

and expert testimony. This Court should refuse to countenance those prejudicial and inappropriate tactics. It should deny Kousser's motion.

Respectfully submitted,

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I certify that a true and correct copy of this response has been filed with the Florida Courts E-Filing Portal and served by email on October 24, 2023, upon:

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