

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

ZACHARY SOLOMON,

Plaintiff-Appellee,

v.

ST. JOSEPH HOSPITAL;
CATHOLIC HEALTH SYSTEM OF
LONG ISLAND, INC.,

Defendants-Appellants.

No. 21-2729

On Appeal from the United States District Court
for the Eastern District of New York

**MOTION OF VIVIAN RIVERA-ZAYAS FOR LEAVE TO FILE
BRIEF AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY
AND DISMISSAL WITH DIRECTION TO VACATE AND
REMAND**

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INTRODUCTION

Vivian Rivera-Zayas, as the Proposed Administrator of the Estate of Ana Martinez, deceased, respectfully moves for leave to file the attached amicus brief in support of neither party, to address the second question stated in the Court's June 16, 2022, order: whether the district court had subject-matter jurisdiction to hear this action. As explained below, Ms. Riviera-Zayas has a strong interest in the Court's potential resolution of that issue in this case because she is party to a pending, fully briefed appeal to this Court that presents a very similar issue of subject-matter jurisdiction, and she believes that her amicus brief will be valuable to the Court. *See* Fed. R. App. P. 29(3).

Counsel for Movant has contacted counsel for the parties to seek consent to the filing of this motion. Plaintiff-Appellee does not have counsel of record in this Court, but his district court counsel stated that Plaintiff consents. Counsel for Defendants-Appellees stated that they "do not oppose a motion for leave to file an amicus brief on or after the date the court-appointed amicus files a brief," but they do oppose a filing at this time.

BACKGROUND

On June 9, 2020, Zachary Solomon filed a lawsuit in Nassau County Supreme Court against St. Joseph Hospital and Catholic Health System of Long Island, Inc. (together, St. Joseph), arising out of a hospital-acquired pressure injury he suffered while a patient in March and April 2020, and bringing claims for malpractice, negligence, and gross negligence under New York law. A-19. St. Joseph removed the action to the Eastern District of New York on July 17, 2020. A-9. St. Joseph asserted that federal-officer removal jurisdiction and federal question jurisdiction existed because Mr. Solomon's claims "arise from countermeasures and response to COVID-19." A-10 ¶ 4.

St. Joseph moved to dismiss Mr. Solomon's action, pursuant to Rule 12(b)(1) and Rule 12(b)(6), based on the Public Readiness and Emergency Preparedness (PREP) Act, 42 U.S.C. §§ 247d-6d–6e. On September 29, 2021, the district court denied the motion, holding that the PREP Act's immunity provision, 42 U.S.C. § 247d-6d(a)(1), did not apply to Mr. Solomon's claims, as he alleged "that his injuries resulted from a cause separate from a covered countermeasure." A-72–73.

St. Joseph appealed from the district court’s denial of its motion to dismiss. In its opening brief filed on February 9, 2022, St. Joseph invoked the collateral order doctrine as the basis for appellate jurisdiction and stated that it had “timely removed this action to the District Court on the basis of federal question jurisdiction and under the federal officer removal statute (28 U.S.C. § 1442).” Appellants’ Br. 4.

Plaintiff-Appellee did not file a responsive brief, and the matter was submitted for decision on June 15, 2022.

On June 16, 2022, the Court ordered that counsel be appointed as amicus curiae to address two questions:

- (1) Whether, and to what extent, we have appellate jurisdiction over the district court’s September 29, 2021, order; and
- (2) Whether the district court had subject-matter jurisdiction to hear the case below.

June 16, 2022, Order. The Order also states that either party may file a response to the amicus’s brief within 20 days of its filing.

ARGUMENT

Under Federal Rule of Appellate Procedure 29(a), this Court has discretion to allow the filing of a brief of amicus curiae at any time during initial consideration of a case on the merits. In considering a motion for leave to file an amicus brief, the Court considers “the movant’s interest”

and “the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case.” Fed. R. App. P. 29(a)(3). Both considerations support granting Ms. Rivera-Zayas’s motion. First, if the Court issues a decision in this case before a decision in Ms. Rivera-Zayas’s pending appeal, the Court’s resolution of the second question posed by the Court is very likely to impact the outcome of her pending appeal directly. Second, Movant’s participation would be valuable to the Court in light of the lack of briefing by the Plaintiff-Appellant on the question of subject-matter jurisdiction, as well as the expertise of Movant, through her counsel, on the issue. Finally, granting the motion would not prejudice either party.

I. Ms. Rivera-Zayas has a strong interest in the Court’s resolution of the second question posed in the June 16 Order.

This and other courts frequently allow parties to file amicus briefs in cases that may address issues that will impact them in other litigation. *See, e.g., Donohue v. Hochul*, 32 F.4th 200, 206 (2d Cir. 2022); *Hapag-Lloyd Aktiengesellschaft v. U.S. Oil Trading LLC*, 814 F.3d 146, 150 n.11 (2d Cir. 2016); *Simpson v. Pittsburgh Corning Corp.*, 901 F.2d 277, 284 (2d Cir. 1990); *Verizon N.Y. Inc. v. Village of Westhampton Beach*, 2014

WL 12843519, at *1–2 (E.D.N.Y. Mar. 31, 2014); *Schaghticoke Tribal Nation v. Norton*, 2007 WL 9719292, at *2–3 (D. Conn. Aug. 2, 2007). The Seventh Circuit has explicitly adopted a policy that it will grant permission to file an amicus curiae brief “when the would-be amicus has a direct interest in another case, and the case in which he seeks permission to file an amicus curiae brief may, by operation of stare decisis or res judicata, materially affect that interest.” *Nat’l Org. for Women, Inc. v. Scheidler*, 223 F.3d 615, 617 (7th Cir. 2000).

This principle strongly supports granting Ms. Rivera-Zayas’s request for leave to file an amicus brief. Ms. Rivera-Zayas is the plaintiff-appellee in *Rivera-Zayas v. Our Lady of Consolation Geriatric Care Center*, No. 21-2164-cv, which is pending before this Court and fully briefed. That appeal concerns claims Ms. Rivera-Zayas brought in Kings County Supreme Court pursuant to New York Public Health Law § 2801-d, and for negligence, gross negligence, and wrongful death. She alleged that her mother’s death from complications of COVID-19 resulted from inadequate infection-control policies and practices by the defendant nursing home. *Rivera-Zayas*, 2021 WL 3549878, at *1 (E.D.N.Y. Aug. 11, 2021). The defendants removed the action to the United States District

Court for the Eastern District of New York, invoking federal-question jurisdiction based on the PREP Act, as well as jurisdiction under the federal-officer removal statute. *Id.* Ms. Rivera-Zayas moved to remand the action to state court, and, on August 11, 2021, the district court granted that motion. *Id.* In finding that the PREP Act does not provide a basis for federal-question jurisdiction over claims like Ms. Rivera-Zayas's, the district court cited three other decisions from district courts within the Circuit rejecting the jurisdictional theories advanced by the defendant in her case—and by defendant-appellants here. *Id.* at *2 (citing *Dupervil v. Alliance Health Operations*, 516 F. Supp. 3d 238 (E.D.N.Y. 2021), *vacated as moot* (2d Cir. Aug. 1, 2022); *Garcia v. N.Y.C. Health & Hosps. Corp.*, 2021 WL 1317178 (S.D.N.Y. 2021); *Shapnik v. Hebrew Home for the Aged at Riverdale*, 535 F. Supp. 3d 301 (S.D.N.Y. 2021)).

The defendant nursing home appealed to this Court, arguing that the same bases of jurisdiction invoked in this case provide federal subject-matter jurisdiction in Ms. Rivera-Zayas's case: specifically, that a health care provider's desire to raise a PREP Act defense creates a federal question for purposes of 28 U.S.C. § 1331, and that the COVID-19 pandemic converted health care facilities into agents of federal officers

for purposes of 28 U.S.C. § 1442. That appeal was fully briefed as of April 25, 2022, and oral argument has been proposed for the week of October 31, 2022.

The second question posed in the Court’s June 16 Order is directly presented in Ms. Rivera-Zayas’s case. Accordingly, if the Court issues a decision addressing that question before deciding the appeal in Ms. Rivera-Zayas’s case, that decision will guide, if not fully determine, the outcome of the appeal in her case. Ms. Rivera-Zayas thus has a very strong interest in the outcome of this appeal.¹

¹ This Court’s June 16 Order also asks whether the Court has appellate jurisdiction over this case. Ms. Rivera-Zayas has no direct interest in that issue and does not address it in her proposed amicus brief. However, even if (as Ms. Rivera-Zayas believes) the Court lacks appellate jurisdiction, *see Will v. Hallock*, 547 U.S. 345, 350–53 (2006), the Court may reach the question of the district court’s subject-matter jurisdiction. This Court has held that 28 U.S.C. § 2106 provides authority to instruct a district court “to vacate its decision and order and remand the case to state court” for a lack of subject-matter jurisdiction, even where appellate jurisdiction is lacking. *BlackRock Financial Mgmt. Inc. v. Segregated Acct. of Ambac Assur. Corp.*, 673 F.3d 169, 180 (2d Cir. 2012).

II. Ms. Rivera-Zayas’s participation would be valuable and relevant to consideration of the question posed by the Court.

Where parties have not presented adversarial briefing on an argument important to the resolution of the case, this Court frequently relies on amici curiae to ensure “that the appeal could be considered in an adversarial context.” *United States v. Doe*, 356 F. App’x 488, 489 (2d Cir. 2009). Here, although the Court has appointed counsel as amicus curiae to address jurisdictional issues, it is unknown at this time how that brief will answer the questions posed by the Court. And because appellee is currently unrepresented in this Court, it is possible that the Court will not receive any brief arguing that the district court lacks subject-matter jurisdiction.

Allowing Ms. Rivera-Zayas to appear as amicus would ensure that the Court receives such argument and, therefore, would be valuable to the Court. *See Merrimon v. Unum Life Ins. Co. of Am.*, 758 F.3d 46, 52 (1st Cir. 2014) (noting helpfulness of amicus brief discussion of jurisdictional issue that was not fully briefed by parties); *cf. Neonatology Assocs., P.A. v. Comm’r*, 293 F.3d 128, 131 (3d Cir. 2002) (Alito, J., in

chambers) (stating that “an amicus who makes a strong but responsible presentation in support of a party can truly serve as the court’s friend”).

In addition, because Ms. Rivera-Zayas, through her counsel, has fully briefed the first question in her pending appeal, and her counsel has also addressed that issue in appeals in a number of other circuits, her brief can offer expertise on the complicated matters underlying the jurisdictional question, including the relevant details of the PREP Act, the federal-officer removal statute, and the growing body of case law addressing the issue presented in the second question posed by the Court’s June 16 order.

III. Granting leave to file an amicus brief would not delay resolution of the appeal or otherwise prejudice the parties.

Typically, an amicus curiae brief is due within seven days after the filing of the brief of the party supported or, if in support of neither party, within seven days of the filing of the appellant’s principal brief. Fed. R. App. P. 29(a)(6). The rule also allows the Court to “grant leave for later filing.” *Id.*

Here, the unusual circumstances of this case warrant granting Movant’s request for later filing. Ms. Rivera-Zayas, through her counsel, only learned of the pendency of this appeal from an unreported decision

in August 2022. Granting Ms. Rivera-Zayas's motion and accepting her brief for filing will not delay the resolution of this case or prejudice any party. This motion and the attached proposed brief are being filed before the September 16, 2022 due date for the brief of the Court-appointed amicus, and the Court's June 16 order allows both parties an opportunity to address the issues addressed herein in supplemental briefing due 20 days after the filing of that brief.²

CONCLUSION

For the foregoing reasons, the Court should grant Ms. Rivera-Zayas leave to file the accompanying brief as amicus curiae in support of neither party and dismissal of the appeal with instructions to the district court to vacate its decision and order and to remand the case to state court.

² Appellants' position that Ms. Rivera-Zayas's motion would be timely only after the filing of the court-appointed amicus brief is thus illogical, as filing at that time would risk further delay of the resolution of this appeal and prejudice the parties.

Respectfully submitted,

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August 12, 2022

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 32(g) and 27(d)(2), I certify that the foregoing motion is proportionately spaced, has a type-face of 14 points, and, as calculated by my word processing software (Microsoft Word), contains 2,015 words.

/s/ Adam R. Pulver
Adam R. Pulver

CERTIFICATE OF SERVICE

I hereby certify that this motion has been served through the Court's ECF system on counsel for Appellants and the court-appointed amicus curiae on August 12, 2022.

As no counsel for Appellee has appeared in this Court, I have served this motion on Appellee's district court counsel via e-mail on August 12, 2022.

/s/ Adam R. Pulver
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