

No. 17-3113

In the
United States Court of Appeals
for the
Third Circuit

JOEL DOE, a Minor, by and through his Guardians John Doe and Jane Doe;
MACY ROE; MARY SMITH; JACK JONES, a Minor, by and through his
Parents John Jones and Jane Jones

Appellants,

v.

BOYERTOWN AREA SCHOOL DISTRICT; DR. BRETT COOPER, in his
official capacity as Principal; DR. E. WAYNE FOLEY, in this official capacity
as Assistant Principal; DAVID KREM, Acting Superintendent,

Appellees,

PENNSYLVANIA YOUTH CONGRESS FOUNDATION,
Intervenor-Appellee.

**ON APPEAL FROM AN ORDER ENTERED IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA IN CASE NO. 5:17-CV-01249,
HONORABLE EDWARD G. SMITH, U.S. DISTRICT JUDGE**

**REPLY IN FURTHER SUPPORT OF MOTIONS FOR LEAVE TO FILE
AMICI CURIAE BRIEF AND APPENDIX OF SCHOOL
ADMINISTRATORS FROM THIRTY STATES AND THE DISTRICT OF
COLUMBIA IN SUPPORT OF APPELLEES AND INTERVENOR-
APPELLEE**

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This Court, “consistent with the predominant practice in the courts of appeals” expressly favors “grant[ing] motions for leave to file amicus briefs unless it is obvious that the proposed briefs do not meet Rule 29’s criteria as broadly interpreted.” *Neonatology Assocs., P.A. v. Comm’r*, 293 F.3d 128, 133 (3d Cir. 2002) (Alito, J.). Appellants do not argue that the brief offered by proposed *amici curiae* school administrators, schools, and school districts from across the country¹ does not meet the Rule 29(a)(3) criteria of “(a) an adequate interest, (b) desirability, and (c) relevance” in this case, *id.* at 131 – indeed, they do not even cite the Rule.

Instead, Appellants primarily object to the proposed *amici curiae*’s collective professional judgment and experiences regarding transgender affirming policies and practices in the school setting, because they conflict with the Appellants’ position in this case. Appellants spend several pages disagreeing with proposed *amici*, mostly reiterating arguments already made against Appellees and Intervenor-Appellee. *See* Opp. at 5-10. But such disagreement in fact demonstrates why the proposed *amici curiae*’s brief is *desirable* in this matter, because “strong (but fair) advocacy on behalf of opposing views promotes sound decision making” and “[t]hus an amicus who makes a strong but responsible

¹ *See* Mot. for Leave to File Br. of *Amici Curiae* (“Motion”), Dkt. 003112834301 at 3-8 (identifying the 62 proposed *amici curiae*).

presentation in support of a party can truly serve as the court’s friend.”

Neonatology Assocs., 293 F.3d at 131.

To the extent that Appellants argue that the proposed *amici curiae*’s brief is *not* a fair presentation of opposing views, they mischaracterize what these educators actually offer in their brief. The proposed *amici* offer no more (nor less) than their professional perspectives as educators “based on their broad collective experience with adopting, implementing, and enforcing such [transgender affirming] policies in their schools.” Prop. Br. at 2. They do not claim to have “comprehensive knowledge” of the thoughts and feelings of every student or parent in their schools nor, despite Appellants’ arguments, is such “comprehensive knowledge” required. *See* Opp. at 4. The proposed *amici*’s brief *does* present their considered professional opinion based on their personal knowledge and experiences – and, notably, the proposed *amici* are in fact well-placed to be aware of any formal complaints and incidents of note within their schools.² *See* Prop. Br. at 1 (identifying *amici curiae* as “superintendents, principals, school board members, general counsel, social workers, and other officials from schools and school districts that have adopted, or are in the process of adopting inclusive

² Appellants also complain that not all of the proposed *amici* were formally interviewed in the process of drafting the proposed brief, Opp. at 4, but fail to note that the brief also explains that “*Amici* who were not interviewed or are not quoted in this brief have experiences consistent with those expressed herein.” Prop. Br. at 2.

policies and practices for their transgender students”); *see also* Mot. at 4-8 (providing specific titles and locations for all individual *amici* and locations of institutional *amici*).

Precisely because the proposed *amici curiae* do not wish to overstate or misrepresent their professional credentials or experiences to the court, they have offered a proposed Appendix with additional relevant background information for each of the 62 proposed *amici*. Though the information is presented as concisely as possible – a short paragraph (or less) is offered for each *amicus* – it is not feasible to include it within the brief itself given the Rule 29(a)(5) word limit for *amicus* briefs. It is therefore offered and moved for separately from the brief.³ While the brief can stand alone, the proposed *amici curiae* believe that the proposed Appendix is valuable to the Court, for example to address Appellants’ arguments regarding the proposed *amici*’s background and relevant knowledge. The Appendix does not, as Appellants complain, contain any additional legal or factual argument, and Appellants point to none. *See* Opp. at 10-11.

Appellants also complain that the proposed *amici* pejoratively compare complaining parties to “racists,” and request that two quotations in particular should be stricken as “scandalous” and “beyond the pale of zealous advocacy.”

³ A similar Appendix/Addendum has been accepted by all other courts to which leave has been sought to file one in conjunction with previous versions of this brief.

Opp. at 6-7. In the complained-of quotations, Mr. Bourgeois and Mr. DeBenedetto observe that some of the arguments made against racial desegregation in the past are echoed in similar arguments made against transgender affirming policies. *Id.* at 6. But the *amici*'s aim is simply to highlight that this *is* a civil rights issue, and that, similar to racial desegregation, the solution to other students' discomfort with transgender students cannot be to continue to violate the transgender students' civil rights.⁴ See Prop. Br. at 21-22. Appellants may disagree that the comparison is an apt one, but nothing in the proposed brief comes close to attacking the character or motives of Appellants, as they seem to suppose.

In short, Appellants fail to demonstrate that the proposed *amicus curiae* brief is anything other than the "strong (but fair) advocacy" that is desirable in an *amicus* submission. See *Neonatology Assocs.*, 293 F.3d at 131. With regard to Rule 29(a)(3)'s two remaining criteria, Appellants' Opposition leaves little room for doubt that the proposed *amici* have an adequate interest and offer facially

⁴ Other courts considering similar questions have drawn a similar comparison. See, e.g., Transcript of Oral Argument at 248-49, *Adams v. Sch. Bd. of St. Johns Cty.*, No. 3:17-CV-00739 (M.D. Fla, Jan. 17, 2018), ECF No. 160 (court drawing similarity between transgender student excluded from boys' room, and racial minorities forced to use "the bathroom that was marked 'colored'" in "the '50s in Jacksonville"); see also *G. G. v. Gloucester Cty. Sch. Bd.*, 853 F.3d 729, 730 (4th Cir. 2017), *as amended* (Apr. 18, 2017) (Davis, J., concurring) ("His case is part of a larger movement that is redefining and broadening the scope of civil and human rights so that they extend to a vulnerable group that has traditionally been unrecognized, unrepresented, and unprotected").

relevant information and opinion to the court. The issues raised in this appeal are an important matter of public interest – on that much, all parties agree – but of particular importance to educators like the proposed *amici curiae* and to the students whose needs they serve. And – though Appellants disagree with them – proposed *amici curiae*'s experiences and professional opinions offer relevant perspectives on how other schools and districts from across the country have addressed similar issues and what outcomes they have observed. Courts across the country agree. *See, e.g., Whitaker by Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1054–55 (7th Cir. 2017); *Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 274 n.6 (W.D. Pa. 2017) (noting the “helpful contributions” made by “a group of senior school administrators from school districts and state-wide educational agencies in 21 states and the District of Columbia”); *Bd. of Educ. of the Highland Local Sch. Dist. v. United States Dep’t of Educ.*, 208 F. Supp. 3d 850, 875, 876-77 (S.D. Ohio 2016) (citing brief of *amici curiae*).

While the Court will later decide whether the *amici curiae*'s experiences and collective professional judgment based on their experiences in other schools across the country are ultimately helpful to its determination of *this* case regarding *this* school district, at this stage of the proceedings, the proffered brief is plainly well within the parameters of interest, desirability, and relevance established by Rule 29

and this Court, and Appellants' opposition merely supports that assessment rather than undermines it. "Under these circumstances, it is preferable to err on the side of granting leave. If an amicus brief that turns out to be unhelpful is filed ... [the merits panel] can then simply disregard the amicus brief. On the other hand, if a good brief is rejected, the merits panel will be deprived of a resource that might have been of assistance." *Neonatology Assocs.*, 293 F.3d at 133.

CONCLUSION

For the reasons stated herein and in proposed *amici curiae*'s motions for leave to file their brief and appendix, this Court should grant leave to file the proffered *Amici Curiae* Brief of School Administrators from Thirty States and the District of Columbia in Support of Appellees and Intervenor-Appellee and the related Appendix.

Dated: February 9, 2018

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CERTIFICATES

Cynthia Cook-Robertson, counsel for *amici curiae* school administrators, hereby certifies that:

1. Pursuant to L.A.R. 28.3(d), I hereby certify that I am a member in good standing of the Bar of the United States Court of Appeals for the Third Circuit.

2. On this date, the foregoing Reply in Further Support of Motions for Leave to File *Amici Curiae* Brief and Appendix of School Administrators from Thirty States and the District of Columbia in Support of Appellees and Intervenor-Appellee with the Clerk of the Court using the CM/ECF system, which will automatically serve electronic copies upon all counsel of record.

3. Pursuant to L.A.R. 31.1(c), I hereby certify that the text of the electronic Reply in Further Support of Motions for Leave to File *Amici Curiae* Brief and Appendix of School Administrators from Thirty States and the District of Columbia in Support of Appellees and Intervenor-Appellee has been filed with the Court in both electronic and paper form, and that the text of the electronic brief is identical to the text in the paper copies.

4. Pursuant to L.A.R. 31.1(c), I hereby certify that a computer virus detection program was run on the electronic version of this Reply in Further Support of Motions for Leave to File *Amici Curiae* Brief and Appendix of School

Administrators from Thirty States and the District of Columbia in Support of Appellees and Intervenor-Appellee and that no virus was detected. The virus detection program utilized was Symantec Endpoint Protection.

DATED: February 9, 2018

/s/ Cynthia Cook Robertson
Cynthia Cook Robertson