

No. 20-3289

In the United States Court of Appeals for the Sixth Circuit

NICHOLAS MERIWETHER,
PLAINTIFF-APPELLANT,
V.
FRANCESCA HARTOP, ET AL.,
DEFENDANTS-APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO, WESTERN DIVISION
CASE No. 1:18-CV-753

**MOTION FOR LEAVE TO FILE AMICI CURIAE
BRIEF OF THE BADER FAMILY FOUNDATION
AND HANS BADER IN SUPPORT OF
PLAINTIFF-APPELLANT AND REVERSAL**

Matthew J. Burkhart
Ohio Bar No. 0068299
Gallagher Kavinsky & Burkhart LPA
8740 Orion Place, Suite 200
Columbus, Ohio 43240-4063
(614) 885-9022
mjb@gkb-law.com
Attorney for Amici Curiae

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations
and Financial Interest

Sixth Circuit

Case Number: No. 20-3289

Case Name: Meriwether v. Hartop

Name of counsel: Matthew J. Burkhart

Pursuant to 6th Cir. R. 26.1, Bader Family Foundation and Hans Bader

Name of Party

makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

NO

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest.

NO

CERTIFICATE OF SERVICE

I certify that on June 3, 2020 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

/s/ Matthew J. Burkhart

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir R. 26.1 on page 2 of this form.

A. Grounds and Relief Sought

Pursuant to Federal Rule of Appellate Procedure 29(a) and Circuit Rule 29, proposed *amici curiae* Bader Family Foundation and Hans Bader (“Amici”) respectfully move the Court to grant leave to file the brief attached hereto as Exhibit A in support of Plaintiff-Appellant and urging reversal of the District Court’s judgment.

Amici obtained consent from Plaintiff-Appellant and Intervenors-Appellees to participate as *amici*, but Defendants-Appellees declined to consent. By email, Defendants-Appellees contended that “this case is already laden with a political hot topic and briefing from” amici “will only muddy the water and put the focus on the political issue.” But, as previewed below, the attached brief does not focus on any political issue but addresses only legal issues relevant to this case, and this court has granted motions to file amicus briefs even when a party has denied consent.¹

For this reason, Amici seek permission from the Court to file their brief.

¹ See, e.g., *EEOC v. Kaplan Higher Educ. Corp.*, 748 F.3d 749 (6th Cir. 2014) (docket entries in this case, Docket No. 13-3408, show Pacific Legal Foundation was granted leave to file an amicus brief, even though as party withheld consent).

B. Statement of Identity and Interest

The Bader Family Foundation is a nonprofit foundation operating under § 501(c)(3) of the Internal Revenue Code. It exists to promote civil liberties, free speech, academic freedom, and scholarly research.

Hans Bader is the Foundation's trustee and a lawyer who practiced education law, civil rights law, and administrative law for years, including handling Title IX issues at the U.S. Department of Education's Office for Civil Rights and in its Office of General Counsel.² While in the Office for Civil Rights, Bader drafted rulings in response to appeals from regional offices for the Deputy Assistant Secretary for Enforcement and vetted agency presentations about what constitutes sexual harassment in violation of Title IX.

Such experience and expertise is helpful in resolving this case, which features arguments about the meaning and scope of Title IX -- including Title IX issues that have received only abbreviated discussion in appellant's brief. Amici's experience provides more context and in-depth analysis of the Title IX issues.

² See, e.g., *U.S. v. Morrison*, 529 U.S. 598 (2000) (representing prevailing respondents); *Coalition for Economic Equity v. Wilson*, 122 F.3d 692 (9th Cir. 1996) (representing prevailing intervenor CADAP; defeating Title VII and Title IX preemption claims); *Parents Involved v. Seattle School Dist. No. 1*, 551 U.S. 701, (2007) (amicus in support of prevailing plaintiff); *In re Competitive Enterprise Inst.*, No. 15-1224 (D.C. Cir. Oct. 23, 2015) (ordering TSA to produce "a schedule for the expeditious issuance" of a passenger screening rule in response to a mandamus petition Bader filed on behalf of Competitive Enterprise Institute and the National Center for Transgender Equality).

Specifically, the attached brief expands on the elements required for specific conduct to violate Title IX. To violate Title IX, speech must not just create a hostile environment, but it must also interfere with access to an education. Here, Dr. Meriwether’s conduct did not deprive the complainant of any educational benefits.³ Nor did it create an objectively hostile environment in any sense,⁴ much less one that was “severe **and** pervasive” enough to violate Title IX’s high standard of liability.⁵

Bader has filed amicus briefs that judges, including Supreme Court justices, have found useful in other cases involving civil liberties and civil rights. For example, Bader filed an amicus brief that contained content cited by Supreme Court justices in *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701 (2007). Its content discussed how the Seattle Schools were using race—not to overcome racial prejudice or achieve integration but to promote racial division and foster racial stereotypes.⁶

³ See, e.g., *Burwell v. Pekin Community High School Dist.*, 213 F.Supp.2d 917, 932 (C.D. Ill. 2003) (citing Supreme Court and other rulings).

⁴ See, e.g., *Morris v. Oldham Cty. Fiscal Court*, 201 F.3d 784, 787 (6th Cir. 2000); *Burnett v. Tyco Corp.*, 203 F.3d 980, 981, 984 (6th Cir. 2000); *Curry v. Nestle USA, Inc.*, 2000 WL 1091490, *3–4 (6th Cir. Jul. 27, 2000); *Singh v. U.S. House*, 300 F.Supp.2d 48, 54 (D.D.C. 2004).

⁵ *Kollaritsch v. Michigan State University*, 944 F.3d 613, 620-21 (6th Cir. 2019).

⁶ See *Amicus Brief of Competitive Enterprise Institute in Support of Petitioner*, at 2-3, 8, in *Parents Involved in Community Schools v. Seattle School District No. 1*, Supreme Court Docket No. 05-908 (filed, Aug. 2006) (citing Harrell, *School Web* (continued on next page)

The Chief Justice’s plurality opinion cited this material—found in no other amicus brief—in finding that the school district’s motive for using race was at odds with the Equal Protection Clause’s “goal” of making race irrelevant.⁷

Similarly, Justice Thomas’s concurrence cited this same material about the school district’s pernicious racial theories as a reason that “local school boards should” not “be entrusted with the power to make decisions on the basis of race.” As he noted, the “Seattle school district’s Website formerly” defined as ““cultural racism”” useful traits such as “having a future time orientation” – that is, planning ahead -- and “emphasizing individualism as opposed to a more collective ideology.”⁸

Site Removed: Examples of Racism Sparked Controversy, Seattle Post-Intelligencer, June 2, 2006), available at:

<https://cei.org/sites/default/files/Amicus%20Curiae%20Brief%20in%20Parents%20Involved%20in%20Community%20Schools%20v.%20Seattle%20School%20District%20No.%201.pdf>.

⁷ *Parents Involved*, 551 U.S. at 730 n. 14 (plurality opinion) (“Seattle’s website formerly described “emphasizing individualism as opposed to a more collective ideology” as a form of “cultural racism,” and currently states that the district has no intention “to hold onto unsuccessful concepts such as [a] ... colorblind mentality.”) (citing the same source as Bader’s amicus brief).

⁸ 551 U.S. at 781 n. 30 (Thomas, J., concurring) (citing Harrell, *School Web Site Removed: Examples of Racism Sparked Controversy*, Seattle Post-Intelligencer, June 2, 2006 – the same article quoted at length at pp. 2-3 & 8 of Bader’s brief).

In *Sackett v. EPA*, 132 S.Ct. 1367, 1375 (2012), Justice Alito’s concurrence cited an amicus brief that Bader helped write for the Competitive Enterprise Institute in finding that petitioner had a right to pre-enforcement judicial review.⁹

C. Conclusion

Based on the foregoing, the attached brief will be useful to the Court, and Amici respectfully request that the Court grant the Motion for Leave to File Amici Curiae Brief of the Bader Family Foundation and Hans Bader in Support of Plaintiff-Appellant and Reversal.

⁹ See *Brief of the Competitive Enterprise Institute in Support of Petitioner*, in *Sackett v. EPA*, Supreme Court Docket No. 10-1062, <https://cei.org/sites/default/files/Sam%20Kazman%20and%20Hans%20Bader%20-%20Sackett%20amicus.pdf>.

Respectfully submitted,

/s/ Matthew J. Burkhart

Matthew J. Burkhart (0068299)
Ohio Bar No. 0068299
Gallagher Kavinsky & Burkhart LPA
8740 Orion Place, Suite 200
Columbus, Ohio 43240-4063
Telephone: (614) 885-9022
Telefax: (614) 885-9024
mjb@gkb-law.com

CERTIFICATE OF SERVICE

Pursuant to Fed. R. App. P. 25(c)(2)(A), I hereby certify that, on June 3, 2020, the foregoing was served on all parties by filing it with the Court's electronic filing system.

/s/ Matthew J. Burkhart

Matthew J. Burkhart
Ohio Bar No. 0068299