

**No. 23-10656**

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

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MOMS FOR LIBERTY – BREVARD COUNTY, FL, *ET AL.*,  
*Plaintiffs-Appellants,*

v.

BREVARD PUBLIC SCHOOLS, *ET AL.*,  
*Defendants-Appellees.*

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Appeal from the United States District Court for the Middle District  
of Florida, Honorable Roy B. Dalton, Jr., Case No. 6:21-cv-01849-RBD-  
DAB

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**REPLY IN SUPPORT OF MOTION BY YOUNG AMERICA'S  
FOUNDATION FOR LEAVE TO FILE AN *AMICUS CURIAE*  
BRIEF IN SUPPORT OF PLAINTIFFS-APPELLANTS AND  
REVERSAL**

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Pursuant to Local Rules 26.1-1 through 26.1-3, the undersigned certifies that the name of each person, attorney, association of persons, firm, law firm, partnership, and corporation that has or may have an interest in the outcome of this action—including subsidiaries, conglomerates, affiliates, parent corporations, publicly-traded companies that own 10% or more of a party's stock, and all other identifiable legal entities related to any party in the case, in addition to those set forth in the Initial Brief of Plaintiffs-Appellants, include:

1. Advancing American Freedom, Inc. – Amicus Curiae
2. Alliance Defending Freedom – Counsel for Amicus Curiae Young America's Foundation
3. American Center for Law and Justice – Amicus Curiae
4. American Cornerstone Institute – Amicus Curiae
5. American Values – Amicus Curiae
6. Brejcha, Thomas – Counsel for Amicus Curiae Thomas More Society
7. Brooks, B. Tyler – Counsel for Amicus Curiae Thomas More Society
8. Bursch, John J. – Counsel for Amicus Curiae Young America's Foundation

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9. Cameron, Daniel – Counsel for Amicus Curiae Commonwealth of Kentucky
10. Cook, Robert – Counsel for Amicus Curiae State of South Carolina
11. Eagle Forum – Amicus Curiae
12. Faith and Freedom Coalition – Amicus Curiae
13. Fitch, Lynn – Counsel for Amicus Curiae State of Mississippi
14. Foundation for Individual Rights and Expression – Amicus Curiae
15. Global Liberty Alliance – Amicus Curiae
16. Griffin, Tim – Counsel for Amicus Curiae State of Arkansas
17. Hermann, Kimberly S. – Counsel for Amicus Curiae Southeastern Legal Foundation
18. Hoffmann, Mathew W. – Counsel for Amicus Curiae Young America’s Foundation
19. Hydrick, Thomas T. – Counsel for Amicus Curiae State of South Carolina
20. International Conference of Evangelical Chaplain Endorsers – Amicus Curiae
21. Knusden, Austin – Counsel for Amicus Curiae State of Montana

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22. Labrador, Raul – Counsel for Amicus Curiae State of Idaho
23. Landry, Jeff – Counsel for Amicus Curiae State of Louisiana
24. Langhofer, Tyson C. – Counsel for Amicus Curiae Young America’s Foundation
25. Morris, J.T. – Counsel for Amicus Curiae Foundation for Individual Rights and Expression
26. National Association of Parents – Amicus Curiae
27. National Center for Public Policy Research – Amicus Curiae
28. National Religious Broadcasters – Amicus Curiae
29. O’Leary, Celia Howard – Counsel for Amicus Curiae Southeastern Legal Foundation
30. Paxton, Ken – Counsel for Amicus Curiae State of Texas
31. Project 21 – Amicus Curiae
32. Rokita, Theodore E. – Counsel for Amicus Curiae State of Indiana
33. Roth, Stuart J. – Counsel for Amicus Curiae American Center for Law and Justice
34. Sekulow, Jay Alan – Counsel for Amicus Curiae American Center for Law and Justice
35. Sekulow, Jordan A. – Counsel for Amicus Curiae American Center for Law and Justice

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36. Shapiro, Ilya – Counsel for Amicus Curiae The Manhattan Institute
37. Smith Jr., Emory J. – Counsel for Amicus Curiae State of South Carolina
38. Southeastern Legal Foundation – Amicus Curiae
39. State of Alaska – Amicus Curiae
40. State of Arkansas – Amicus Curiae
41. State of Idaho – Amicus Curiae
42. State of Indiana – Amicus Curiae
43. State of Kentucky – Amicus Curiae
44. State of Louisiana – Amicus Curiae
45. State of Mississippi – Amicus Curiae
46. State of Montana – Amicus Curiae
47. State of South Carolina – Amicus Curiae
48. State of Texas – Amicus Curiae
49. Students for Life of America – Amicus Curiae
50. Students for Life Action – Amicus Curiae
51. Taylor, Treg – Counsel for Amicus Curiae State of Alaska
52. The Family Foundation – Amicus Curiae
53. The Manhattan Institute – Amicus Curiae
54. Thomas More Society – Amicus Curiae

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55. Wheat, Marc J. – Counsel for Amici Curiae Advancing American Freedom, Inc., American Cornerstone Institute, American Values, Eagle Forum, Faith and Freedom Coalition, Global Liberty Alliance, International Conference of Evangelical Chaplain Endorsers, National Association of Parents, National Center for Public Policy Research, National Religious Broadcasters, Project 21, Students for Life of America, Students for Life Action, and The Family Foundation.
56. Wilson, Alan – Counsel for Amicus Curiae State of South Carolina
57. Young America’s Foundation – Amicus Curiae

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Young America’s Foundation has no parent corporation, and no corporation owns 10% or more of its stock. No publicly traded company or corporation has an interest in the outcome of this case or appeal.

## INTRODUCTION

Defendants admit that YAF’s proposed amicus brief provides unique perspective on campus speech issues and an argument distinct from Plaintiffs’. Opp. 2–3. Yet they still oppose YAF’s motion for leave to file that brief, labeling it “duplicative.” *Id.* at 3. Defendants are wrong. Federal Rule of Appellate Procedure 29 has no “duplicative” restriction, and courts broadly interpret the Rule’s requirements to freely grant motions like YAF’s. Even so, YAF’s proposed brief meets both the Rule’s conditions and Defendants’ improperly heightened standard. It collects background information, analyzes how this Court’s holding will affect viewpoint discrimination on college campuses, offers a distinctive legal argument, and analyzes precedent in depth. It fulfills the classic function of an amicus brief—to serve as a true friend to the court by aiding it in its truth-seeking role. Opposing it wastes everyone’s time and resources. In this First Amendment case, this Court should vindicate the vital function amicus briefs play in the marketplace of ideas and grant YAF’s motion.

## ARGUMENT

### **I. Rule 29—which courts “broadly interpret[ ]”—has no “duplicative” limitation.**

As Defendants properly concede, a Rule 29 motion requires only three things: (1) “the movant’s interest”; (2) why the brief is “desirable”; and (3) how the brief is “relevant.” Opp. 1 (quoting Fed. R. App. P.

29(a)(3)). Courts “broadly interpret[ ]” these requirements and deny leave to file only when “it is obvious” that a brief fails to meet them. *Neonatology Assocs., P.A. v. Comm’r*, 293 F.3d 128, 133 (3d Cir. 2002) (Alito, J.). That expansive reading makes sense given the similarly wide-ranging and useful insights amici offer: “collect[ing] background or factual references that merit judicial notice,” discussing “particular expertise not possessed by any party to the case,” “argu[ing] points deemed too far-reaching for emphasis by a party,” and “explain[ing] the impact a potential holding might have on an industry or other group.” *Id.* at 132; accord *City of Tuscaloosa v. Harcros Chems., Inc.*, 158 F.3d 548, 566 n.25 (11th Cir. 1998) (discussing “helpful[ ]” amici argument); *Prairie Rivers Network v. Dynegy Midwest Generation, LLC*, 976 F.3d 761, 763 (7th Cir. 2020) (Scudder, J.) (amici briefs can “[o]ffer[ ] a different analytical approach to the legal issues” and “[p]rovid[e] practical perspectives on the consequences of potential outcomes”); *Funbus Sys., Inc. v. State of Cal. Pub. Utils. Comm’n*, 801 F.2d 1120, 1125 (9th Cir. 1986) (“[A]mici fulfill the classic role of amicus curiae by assisting in a case of general public interest, . . . supplementing the efforts of counsel, and drawing the court’s attention to law that might otherwise escape consideration.”).

Giving Rule 29 an overly narrow reading would prevent helpful briefs from ever reaching the court’s attention. As here, the “decision

whether to grant leave to file must be made at a relatively early stage of the appeal.” *Neonatology Assocs.*, 293 F.3d at 132. Determining the desirability of the brief—which requires “thoroughly studying [the parties’] briefs and other pertinent materials”—“is often not feasible” on a motion for leave to file. *Id.* at 132–33. What’s more, opposition to the motion forces the panel or single judge deciding the motion to hazard a guess as to what the merits panel will find “desirable.” *See id.* at 133. If the motions panel or single judge rejects a good brief, “the merits panel will be deprived of a resource that might have been of assistance.” *Id.*

Defendants’ requested “duplicative” standard has no foundation in the text of Rule 29 or this Court’s precedent. Indeed, courts often grant motions over similar objections. *E.g.*, *Prairie Rivers*, 976 F.3d at 762–64 (granting motion to file amicus brief and rejecting argument that the “brief d[id] nothing more than parrot [the supported party’s] arguments and waste the court’s time”); *Neonatology Assocs.*, 293 F.3d at 133 (granting motion for leave to file amicus brief and rejecting a “restrictive practice” for such motions even when amicus briefs “merely duplicate the arguments of the parties”). Neither does Defendants’ cited Eleventh Circuit case support their proposed standard. There, this Court rejected a *party’s* claim for attorney’s fees for time spent reviewing supporting amicus briefs *before* their filing. *Glassroth v. Moore*, 347 F.3d 916, 918–19 (11th Cir. 2003). The Court neither denied any motions to file amicus

briefs nor opined on Rule 29’s requirements. *See id.* In fact, when deciding the merits of that case, this Court relied on arguments made by no fewer than three amici. *Glassroth v. Moore*, 335 F.3d 1282, 1299 n.3 (11th Cir. 2003).

## **II. YAF’s brief meets Rule 29’s requirements under any interpretation.**

YAF’s proposed brief bears all the hallmarks of a relevant and desirable amicus brief. It collects background information and analyzes the implications of this Court’s decision for free speech on college campuses—including those within the Eleventh Circuit. YAF Br. 8–12. YAF offers a different analytical approach by discussing the original public meaning of the First Amendment and its protection of “abusive” speech. *Id.* at 13–16. And it supplements the efforts of counsel by diving deep into Supreme Court and this Court’s precedent. *Id.* at 16–23.

YAF’s brief is not “duplicative.” *Contra* Opp. 3. Defendants concede that the brief “begins with discussions” of collegiate censorship—a unique practical perspective. *See id.* at 2. Defendants also admit a further distinction from Plaintiffs by noting YAF’s argument that “[r]estrictions on ‘abusive speech’ meet the same fate as those on ‘offensive speech’” *Id.* at 3; *see* YAF Br. 21 (“[T]he dictionary sense of ‘abusive’ includes words that are offensive.” (cleaned up) (quoting *Wilson v. Gooding*, 303 F. Supp. 952, 955 (N.D. Ga. 1969), *aff’d* 431 F.2d 855 (5th Cir. 1970))). What’s more,

YAF examines the original public meaning and provides extensive analysis of cases other than those cited or examined in depth by Plaintiffs. YAF Br. 13–23 (analyzing *De Jonge v. State of Oregon*, 299 U.S. 353 (1937); *City of Houston v. Hill*, 482 U.S. 451 (1987); *Wilson*, 431 F.2d 855; *Livingston v. Garmire*, 437 F.2d 1050 (5th Cir. 1971); *Barrett v. Walker Cnty. Sch. Dist.*, 872 F.3d 1209 (11th Cir. 2017)). YAF “present[s] ideas, arguments, theories, insights, [and] facts” in addition to those discussed by Plaintiffs. *See* Opp. 3 (quoting *Voices for Choices v. Ill. Bell Tel. Co.*, 339 F.3d 542, 545 (7th Cir. 2003) (Posner, J.)); *see also* *Prairie Rivers*, 976 F.3d at 763–64 (granting motion to file amicus brief that “offer[ed] its own theory for how to best” square a recent Supreme Court case with “the existing federal scheme”). Its brief meets even Defendants’ inappropriately heightened standard.<sup>1</sup>

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<sup>1</sup> Defendants incorrectly suggest that YAF and its counsel are somehow in league with Plaintiffs to evade their page limitations. *See* Opp. 2. As YAF already certified, its proposed brief “was not authored in whole or in part by counsel for any party.” YAF Br. 1 n.1. YAF’s counsel Alliance Defending Freedom is a “nationally respected civil rights organization[] and public interest group[.]” *Gonzalez v. Trevino*, 60 F.4th 906, 913 n.4 (5th Cir. 2023) (Ho, J., dissenting from denial of rehearing en banc). Both it and YAF “have limited resources that they must deploy wisely,” but they “took the time and effort to make [YAF’s] views known” to advocate on an issue of paramount importance—“freedom of speech and tolerance for conflicting viewpoints.” *See id.* at 913.

**III. Amicus briefs advance the truth-seeking function of our adversarial system; opposing them wastes everyone’s time and resources.**

“[C]ourts should welcome amicus briefs for one simple reason: ‘[I]t is for the honour of a court of justice to avoid error in their judgments.’” *Lefebure v. D’Aquila*, 15 F.4th 670, 675 (5th Cir. 2021) (quoting *The Protector v. Geering*, 145 Eng. Rep. 394 (K.B. 1686)). Indeed, “the whole point” of the “adversarial legal system” is the “robust exchange of competing views to ensure the discovery of truth and avoid error.” *Id.* at 674. Our legal system and the First Amendment—as YAF can attest—share “the same fundamental premise”—“the best way to defeat bad ideas is not to suffocate them, but to air them out.” *Id.* Offering the “strongest arguments” in support of a position allows a court “to avoid some unnecessary catastrophes.” *Id.* at 675.

Stringent screening of amicus briefs can license something else the First Amendment emphatically rejects (as discussed in YAF’s proposed amicus brief)—viewpoint discrimination. Given the “open-ended” nature of Rule 29’s criteria, “instances of seemingly disparate treatment are predictable.” *Nenatology Assocs.*, 293 F.3d at 132–33. To avoid distortions in the marketplace of ideas, courts should grant “motions for leave to file in virtually all cases.” *See id.* at 133.

Not only does opposing relevant amicus briefs undermine courts’ truth-seeking function, it also wastes their (and the parties’) time. “[A]

restrictive practice regarding motions for leave to file seems to be an unpromising strategy for lightening a court's work load." *Id.* "[S]keptical scrutiny of proposed amicus briefs may equal, if not exceed, the time that would have been needed to study the briefs at the merits stage." *Id.* It also requires a judge or panel who may not even decide the case to spend time screening the brief and guessing at its relevance for the ultimate merits panel. *Supra* Part I. And reams of amicus briefs will not overwhelm the courts: the "vast majority" of intermediate appellate cases do not involve amicus briefs at all. *Neonatology Assocs.*, 293 F.3d at 133.

Waste of resources recently prompted the Supreme Court to eliminate its amicus consent requirement. The Court's clerk noted that "in the past," consent "may have served a useful gatekeeping function," but it "no longer d[id] so." Clerk's Comments to the Revisions to Rules of the Supreme Court of the United States 9 (Dec. 5, 2022), <https://www.supremecourt.gov/filingandrules/SummaryOfRuleChanges2023.pdf>. The consent requirement "impose[d] unnecessary burdens upon litigants and the Court." *Id.* Abolishing a consent requirement or granting leave to file in virtually all cases eliminates the need for litigation on tangential matters, advances the truth-seeking function of the adversarial process, and helps the court arrive at the correct decision. Amicus briefs like YAF's advance everyone's interests.

## CONCLUSION

This Court should grant YAF's motion for leave to file its amicus brief.

Respectfully submitted this 4th day of May, 2023.

/s/ Mathew W. Hoffmann

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## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), the undersigned certifies that this reply complies with the type-volume limitations of Fed. R. App. P. 27(d)(2)(C). Exclusive of the sections exempted by Fed. R. App. P. 32(f), the reply contains 1,691 words, according to the word count feature of the software (Microsoft Word 365) used to prepare the reply. The reply has been prepared in proportionately spaced typeface using Century Schoolbook 14 point.

/s/ Mathew W. Hoffmann  
Mathew W. Hoffmann  
Counsel for *Amicus Curiae*

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed electronically with the Court's CM-ECF system on this 4th day of May, 2023. Service will be effectuated by the Court's electronic notification system upon all parties and counsel of record.

/s/ Mathew W. Hoffmann  
Mathew W. Hoffmann  
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