No. 23-6054

IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

SPEECH FIRST, INC.,

Plaintiff-Appellant

v.

KAYSE SHRUM, *in her individual capacity and official capacity as President of Oklahoma State University*,

Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Oklahoma
Case No. 5:23-cv-00029-J

REPLY IN SUPPORT OF MOTION BY YOUNG AMERICA'S FOUNDATION AND MANHATTAN INSTITUTE FOR LEAVE TO FILE AN *AMICI CURIAE* BRIEF IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL

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INTRODUCTION

Defendant proposes a near impossible standard for amicus briefs. According to her, "repetitive" briefs violate Rule 29, but amici arguments "not duplicative" of those raised by a party "should not be considered" by the Court. Opp. 4, 10. Fortunately, Federal Rule of Appellate Procedure 29 provides nothing so contradictory. The Rule requires only that an amicus brief be "desirable" and "relevant," and courts broadly interpret its requirements to freely grant motions like the one filed by Young America's Foundation (YAF) and Manhattan Institute (MI). Their proposed brief meets both the Rule's conditions and Defendant's extreme standard. It collects background information, analyzes history, dives deep into precedent, and offers distinctive legal perspective on one of Speech First's arguments. And Defendant's concession that Amici met the Rule's disclosure belies her puzzling—and inaccurate—claim that Speech First's counsel somehow "represent[s]" Amici. Her opposition 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 not reconsider its provisional decision to grant Amici's motion.[1]

[1] On June 15, 2023, after "careful consideration of the motions, proposed amici briefs, and response," this Court provisionally granted Amici's motion "subject to reconsideration by the panel of judges that will later be assigned to decide the merits of this appeal." Nothing counsels

ARGUMENT

I. Amici meet Rule 29's requirements.

Rule 29 requires only three things: (1) "the movant's interest"; (2) why the brief is "desirable"; and (3) how the brief is "relevant." 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 N.M. Oncology & Hematology Consultants, Ltd. v. Presbyterian Healthcare Servs.*, 994 F.3d 1166, 1176 (10th Cir. 2021) (granting leave to file amicus brief about "matters relevant to the disposition of the case") *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

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in favor of reconsideration. YAF and MI submit this short reply for the merits panel emphasizing that Defendant's opposition is meritless.

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.*

Defendant attempts to establish an almost impossible standard: if an amicus brief discusses arguments similar to those raised by the parties, it is repetitive, Opp. 3, but if it offers other arguments, it improperly expands a party's word limits, *id.* at 11. Defendant can't have it both ways. And that's not what Rule 29 provides. Briefs need only be "desirable" and "relevant." Amici's brief is both. In this campus speech

case, the proposed amici brief provides helpful background by diving into statistics showing that college students fear speaking about controversial issues precisely because of the censorship policies like the one University here employs. Br. 7–12. To aid in the proper interpretation of the First Amendment, it then discusses the lengthy historical protection of anonymous speech and association. *Id.* at 13–20. By collecting background information, drawing the court's attention to relevant law, and explaining how this case implicates students throughout the Tenth Circuit and beyond, Amici serve their classic function.

Amici's brief passes through even the eye of Defendant's artificially constrained needle. Amici provide extensive support for Speech First's argument that the First Amendment protects its members' anonymity, which is only one of many arguments Speech First raises. *See* Speech First Br. 29–30. And, looking to Defendant's preferred circuit, Amici "[o]ffer[ ] a different analytical approach" from Speech First by examining empirical data on the need for anonymity and the historical record. *See Prairie Rivers*, 976 F.3d at 763. In sum, the proposed brief offers unique perspective on a relevant topic. *See id.* 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").

For similar reasons, Defendant's half-baked assertion that Amici "present new arguments foregone by the parties" fails. Opp. 11. She does not identify even a single argument made by YAF and MI that the parties have not or will not address. *See Bronson v. Swensen*, 500 F.3d 1099, 1105 (10th Cir. 2007) ("cursory statements, without supporting analysis and case law" forfeit an argument). And Speech First in fact argues that the First Amendment prohibits disclosure of the identities of its non-party members, Speech First Br. 29–30, which argument Amici analyze with empirical, historical, and precedential evidence.

II. Speech First's counsel does not "represent[ ]" Amici.

Defendant concedes that Amici have met Rule 29's disclosure requirements. Opp. 11 n.4. Yet she still criticizes presumed coordination between Speech First's counsel and Amici. *Id.* at 11–12. That provides no basis for opposing a brief. "[C]oordination between the amicus and the party whose position the amicus supports is desirable." Fed. R. App. P. 29, Advisory Committee Notes on Rules – 2010 Amendment. Even "sharing drafts of briefs[,] need not be disclosed under" the Rule. *Id.*

Undeterred by her concession, Defendant further presses that Amici are "routinely represented by [Speech First's] counsel." Opp. 12; *accord id.* at 13 (referring to Speech First's counsel as Amici's "own counsel[ ]"). The only evidence she offers for that startling and contradictory—given that she admits no disclosure violation has

occurred—assertion is that an attorney who works at the same firm as Speech First's counsel and who has never appeared in this case previously worked for Amici's counsel. *See* Opp. 11. Defendant offers no evidence to show this attorney currently represents Amici in any capacity, let alone in this case. What's more Defendant misquotes her own exhibit to claim incorrectly the attorney served as Alliance Defending Freedom's "General Counsel." Opp. 11. As the evidence demonstrates, he served as "Legal Counsel at Alliance Defending Freedom." Opp. Attachment 2. Speech First's counsel does not represent Amici here.

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'Aquilla*, 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 and MI 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. YAF, MI, and ADF all have extensive experience with First Amendment cases at all levels. *See* Motion for Leave to File Amici Curiae Brief 4–7. They "have limited resources that they must deploy wisely," but they "took the time and effort to make their views known" to advocate on an issue of paramount importance—"freedom of speech and tolerance for conflicting viewpoints." *See Gonzalez v. Trevino*, 60 F.4th 906, 913 (5th Cir. 2023) (Ho, J., dissenting from denial of rehearing en banc).

Stringent screening of amicus briefs can license something else the First Amendment emphatically rejects: 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. Defendant complains that the proposed brief "burden[s]" the University and the Court. Opp. 13. But instead of trawling the internet trying to MacGyver a connection between Speech First's counsel and Amici's, Defendant could have spent her time researching the merits of Speech First and Amici's arguments and thus helped the court arrive at the right answer. And "a restrictive practice regarding motions for leave to file

seems to be an unpromising strategy for lightening a court's work load." *Nenatology Assocs.*, 293 F.3d at 133. "[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 and MI's advance everyone's interests.

CONCLUSION

The motions panel correctly decided the issue. This Court should not reconsider its decision provisionally granting Amici's motion.

Respectfully submitted this 16th day of June, 2023.

/s/Mathew W. Hoffmann

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), the undersigned certifies that this reply complies with the type-volume limitations of Federal Rule of Appellate Procedure 27(d)(2)(C). Exclusive of the sections exempted by Federal Rule of Appellate Procedure 32(f), the reply contains 1,877 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
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed electronically with the Court's CM-ECF system on this 16th day of June, 2023. Service will be effectuated by the Court's electronic notification system upon all parties and counsel of record.

/s/ Mathew W. Hoffmann
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