

No. 23-3265

IN THE
United States Court of Appeals for the Third Circuit

Alexander Smith,
Plaintiff-Appellant,

vs.

City of Atlantic City, et al.,
Defendants-Appellees.

On Appeal From the United States District Court for the
District of New Jersey
Case No. 19-cv-6865
(Honorable Christine P. O'Hearn)

**Motion by Christian Legal Society and National Association of Evangelicals
for Leave to File *Amici Curiae* Brief in Support of Appellant**

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I. Nature of Motion

Christian Legal Society (CLS) and National Association of Evangelicals (NAE) respectfully move for an order pursuant to Federal Rule of Appellate Procedure 29(a)(3) granting leave to file a brief as *amici curiae* in support of the Appellant Mr. Alexander Smith.

II. Legal Standard

When a motion to file an amicus brief is filed, such motion “must be accompanied by the proposed brief and state: (A) the movant’s interest; and (B) 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).

The Advisory Committee Note to the 1998 amendments to Rule 29 quotes Sup. Ct. R. 37.1 for the proposition that “[a]n amicus curiae brief which brings relevant matter to the attention of the Court that has not already been brought to its attention by the parties is of considerable help to the Court.”

When he sat as a judge on this Court, now-Justice Alito wrote that “our court would be well advised to grant 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) (citing Michael E. Tigar and Jane B. Tigar, *Federal Appeals – Jurisdiction*

and Practice 181 (3d ed. 1999) and Robert L. Stern, *Appellate Practice in the United States* 306, 307–08 (2d ed. 1989)).

Justice Alito’s interpretation of Rule 29 as a permissive standard endures to this day in this jurisdiction, and that interpretation has been influential on other courts around the country. *See, e.g., Lefebure v. D’Aquila*, 15 F.4th 670, 676 (5th Cir. 2021) (citing *Neonatology Assocs.* in granting leave to file an *amicus* brief); *Arias v. DynCorp*, 2011 WL 13377371, at *1 (D.D.C. Nov. 21, 2011) (same).

III. Argument

CLS is a nonprofit, non-denominational association of Christian attorneys, law students, and law professors. Its Center for Law & Religious Freedom has long defended the First Amendment in the courts, the legislatures, and the public square.

CLS is a leading advocate for the constitutional rights of people of faith in the United States – regardless of whether they are Christian. CLS has frequently litigated for American Christians but has also filed *amicus* briefs on behalf of Buddhists, *see* Br. of *Amicus Curiae* Christian Legal Society *et al.*, *Thai Meditation Ass’n of Alabama, Inc. v. City of Mobile*, 83 F.4th 922 (11th Cir. 2023) (No. 22-11674), as well as Native American religious practitioners, *see* Br. of *Amicus Curiae* Church of Jesus Christ of Latter-Day Saints *et al.*, *Apache Stronghold v. United States*, 95 F.4th 608 (9th Cir. 2024) (No. 21-15295).

As a frequent litigant in First Amendment cases generally and in religious freedom issues specifically, CLS is well situated to provide a unique and expert perspective to the case at bar. CLS has often provided its perspective as *amicus curiae* in landmark Establishment Clause or Free Exercise Clause cases before the United States Supreme Court. *See, e.g., Amicus Curiae Br. of Christian Legal Society et al., Carson v. Makin*, 596 U.S. 767 (2022) (No. 20-1088); *Amicus Curiae Br. of Christian Legal Society et al., Fulton v. City of Philadelphia*, 593 U.S. 522 (2021) (No. 19-123). The proposed *amici* brief in the instant case provides perspectives about the law sourced from CLS's expertise in these matters.

NAE is the largest evangelical network in the United States. It serves as the convener and collective voice for 40 member denominations, charities, schools, missions, and health ministries, with a constituency of tens of millions. Religious liberty is recognized by government but given by God and is vital to the limited government which is our American constitutional republic. Like CLS, NAE is a frequent litigant in First Amendment cases bearing on issues of religious freedom, making NAE well-situated to provide a unique and expert perspective in the case before this Court. NAE has often informed the Supreme Court of its perspective via *amicus* briefs in Free Exercise Clause cases. *See, e.g., Br. of Amicus Curiae National Association of Evangelicals, et al., National Religious Broadcasters Noncommercial Music License Committee v. Copyright Royalty Board*, No. 23-927

(U.S. Mar. 28, 2024); Br. of *Amicus Curiae* National Association of Evangelicals, et al., 303 *Creative LLC v. Elenis*, 600 U. S. 570 (2023) (No. 21-476). The proposed brief in the present case provides perspective for this Court reflective of NAE's expertise.

In addition, this case significantly implicates CLS and NAE as it concerns the issue of religious exemptions, which has become an increasingly common topic of religious freedom litigation since the Supreme Court issued its decision in *Fulton v. City of Philadelphia*, 593 U.S. 522 (2021). The proposed *amici* brief that CLS and NAE have prepared directly addresses First Amendment issues that would be dispositive to the outcome of this case.

Prior to filing this Motion, CLS and NAE attempted to secure consent from all parties to this case such that the filing of the proposed *amici* brief could be certified as uncontested pursuant to Third Circuit Local Appellate Rule 27.3. Appellee City of Atlantic City declined to consent to the filing of the proposed *amici* brief.

Given CLS's and NAE's interest in the case, CLS's and NAE's expertise in these matters, the dispositive nature of the issues upon which CLS and NAE seek to opine, and the liberal standard for granting leave to file *amicus* briefs established in the Third Circuit, this Court should grant CLS and NAE leave to file the proposed *amici* brief.

IV. Conclusion

CLS and NAE respectfully request that this Court permit CLS and NAE to file a brief as *amici curiae* in support of the Appellant Mr. Alexander Smith.

Date: April 10, 2024

Respectfully Submitted,

/s/ Michael H. McGinley

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CERTIFICATE OF COMPLIANCE

1. This Motion complies with the type-volume limitation in Fed. R. App. P. 27(d)(2)(A) and 32(c)(1) because it contains 953 words, excluding the parts of the Motion exempted by Fed. R. App. P. 32(f).
2. Pursuant to Fed. R. App. P. 27(d)(1)(E), this Motion also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this Motion has been prepared in a proportionately spaced typeface using Microsoft Word Times New Roman 14-point font.

Dated: April 10, 2024

/s/ Michael H. McGinley
Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on April 10, 2024, I caused the foregoing Motion by Christian Legal Society and National Association of Evangelicals for Leave to File the Proposed *Amici Curiae* Brief in Support of Appellant to be filed electronically with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: April 10, 2024

/s/ Michael H. McGinley
Counsel for Amici Curiae