

Nos. 14-14061-AA & 14-14066-AA

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JAMES BRENNER, et al.,

APPELLEES,

v.

JOHN H. ARMSTRONG, CRAIG J. NICHOLS, AND HAROLD BAZZELL, IN
THEIR RESPECTIVE OFFICIAL CAPACITIES AS: SEC’Y, FLA. DEP’T OF
HEALTH; SEC’Y, FLA. DEP’T OF MGMT. SERVS.; AND CLERK OF CT.
AND COMPTROLLER FOR WASHINGTON CNTY. FLA.,

APPELLANTS.

SLOAN GRIMSLEY, et al.,

APPELLEES,

v.

JOHN H. ARMSTRONG AND CRAIG J. NICHOLS, IN THEIR RESPECTIVE
OFFICIAL CAPACITIES AS: SEC’Y, FLA. DEP’T OF HEALTH; AND SEC’Y,
FLA. DEP’T OF MGMT. SERVS.,

APPELLANTS.

**MOTION OF AMICUS CURIAE DAVID BOYLE FOR LEAVE TO FILE
AMICUS CURIAE BRIEF FOR ROBERT OSCAR LOPEZ, SUPPORTING
APPELLANTS AND REVERSAL**

Appeal Nos. 14-14061-AA, 14-14066-AA

Brenner v. Sec’y, Fla. Dep’t of Health, Grimsley v. Sec’y Dep’t of Health

**CERTIFICATE OF INTERESTED PERSONS AND CORPORATE
DISCLOSURE STATEMENT (names start on next page)**

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Brenner v. Sec'y, Fla. Dep't of Health, Grimsley v. Sec'y Dep't of Health

**CERTIFICATE OF INTERESTED PERSONS AND CORPORATE
DISCLOSURE STATEMENT**

Amicus Curiae Robert Oscar Lopez, pursuant to 11th Cir. R. 26.1-1, certifies that the following is a list of those who have an interest in the outcome of this case and/or appeal:

16 Scholars of Federalism and Judicial Restraint

Alvare, Helen M.

American Civil Liberties Union of Florida, Inc., The

American Civil Liberties Union Foundation, Inc.

American Civil Liberties Union Foundation of Florida, Inc.

American College of Pediatricians

Albu, Joyce

Alliance Defending Freedom

Anderson, Ryan T.

Andrade, Carlos

Armstrong, Dr. John H.

Ausley McMullen

Appeal Nos. 14-14061-AA, 14-14066-AA

Brenner v. Sec'y, Fla. Dep't of Health, Grimsley v. Sec'y Dep't of Health

Babione, Byron J.

Bazzell, Harold

Becket Fund for Religious Liberty

Bledsoe, Jacobson, Schmidt, Wright & Wilkinson

Bondi, Pamela Jo, Attorney General of Florida

Boyle, David

Bradley, Gerard V.

Brenner, James Domer

Church of Jesus Christ of Latter-day Saints

Citro, Anthony

Collier, Bob

Concerned Women for America

Cooper, Leslie

Crampton, Stephen M.

Del Hierro, Juan

DeMaggio, Bryan E.

Dewart, Deborah J.

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Brenner v. Sec'y, Fla. Dep't of Health, Grimsley v. Sec'y Dep't of Health

Duncan, William C.

Emmanuel, Stephen C.

Ethics & Religious Liberty Commission of the Southern Baptist Convention

Fitschen, Steven W.

Fitzgerald, John

Florida Conference of Catholic Bishops, Inc.

Florida Family Action, Inc.

Gantt, Thomas, Jr.

George, Robert P.

Gibbs, David C. III

Girgis, Sherif

Goldberg, Arlene Goldwasser, Carol (deceased)

Goldberg , Suzanne B.

Goodman, James J., Jr.

Graessle, Jonathan W.

Grimsley, Sloan

Hankin, Eric

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Hinkle, Hon. Robert L.

Hueso, Denise

Humlie, Sarah

Hunziker, Chuck

Jacobson, Samuel

Jeff Goodman, PA

Jones, Charles Dean

Kachergus, Matthew R.

Kayanan, Maria

Liberty Counsel, Inc.

Liberty Counsel Action, Inc.

Liberty, Life, and Law Foundation

Lopez, Robert Oscar

Loupo, Robert

Loukonen, Rachael Spring

Lutheran Church-Missouri Synod

Marriage Law Foundation

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McAlister, Mary

McHugh, Dr. Paul

Mihet, Horatio G.

Milstein, Richard

Myers, Lindsay

National Association of Evangelicals

Newson, Sandra

Nichols, Craig J.

North Carolina Values Coalition

Picarello, Anthony

Podhurst Orseck, P.A.

Rosenthal, Stephen F.

Russ, Ozzie

Sauer, D. John

Save Foundation, Inc.

Schaerr, Gene C.

Schlairet, Stephen

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Brenner v. Sec'y, Fla. Dep't of Health, Grimsley v. Sec'y Dep't of Health

Scholars of the Institution of Marriage

Scott, Rick

Sevier, Chris

Sheppard, White, Kachergus and DeMaggio, P.A.

Sheppard, William J.

Smith, Michael F.

Smith, Hannah

Snider, Kevin T.

Stampelos, Hon. Charles A.

Staver, Anita L.

Staver, Mathew D.

Stevenson, Benjamin James

Tanenbaum, Adam S.

Tilley, Daniel B.

Trent, Edward

Ulvert, Christian

United States Conference of Catholic Bishops

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White, Elizabeth L.

Winsor, Allen C.

This amicus does not know all the people above, or their positions, but is partially drawing on the interested-persons lists of others, and also adding in, e.g., new amici he did not see on others' lists. If anyone is missing from the list, or anyone is there but should not be, please feel free to let this amicus know.

This amicus is an individual who issues no stock, and who has or is no parent corporation, or any publicly held corporation that owns 10% or more of stock of that nonexistent parent corporation.

INTRODUCTION/STATEMENT OF INTEREST

The present amicus curiae, David Boyle (hereinafter, “Amicus”), respectfully submits this Motion for Leave to File Amicus Curiae Brief for Robert Oscar Lopez, Supporting Appellants and Reversal, in *Brenner v. Sec’y, Fla. Dep’t of Health* and *Grimsley v. Sec’y, Fla. Dep’t of Health*, Nos. 14-14061-AA and 14-14066-AA (4:14-CV-00107-RH-CAS & 4:14-CV-138-RH-CAS, 999 F. Supp. 2d 1278 (N.D. Fla. 2014)): the case information just mentioned, providing a “brief recitation of prior actions of this or any other court”, if needed. (If the Court would like more information, please let Amicus know.) Amicus contacted the parties’ counsel; neither Appellants nor Appellees oppose this Motion.

Amicus is a California lawyer who is filing his own *pro se* amicus brief in *Brenner* and *Grimsley*, *supra*, but is also sending in another, separate amicus brief for a client, Robert Oscar Lopez. The Court’s staff (here unnamed for privacy’s sake), when Amicus contacted them by telephone to ask about various brief-filing issues, told Amicus that he could file only one amicus brief, not two, following the “one attorney, one brief” Internal Operating Procedure of the Court, #2, following Federal Rule of Appellate Procedure 28, “Briefs”, in the Court’s Rules and Internal Operating Procedures as of August 1, 2014. However, Robert Oscar Lopez’s brief would be highly informative to the Court in regard to the issue of children raised

by homosexuals, as he was, so Amicus files this Motion to allow Lopez's brief to be filed in this Court.

SUMMARY OF ARGUMENT

While the IOP in question says "one attorney, one brief", it is in the "Briefs" section of the rules, not the "Brief of an Amicus Curiae" section, which covers a different situation. Also, there are issues here of clients' free choice of counsel, free speech, and freedom of association. Various other Circuits have allowed multiple associated groups to file separate briefs instead of one combined brief, or allowed one counsel to file multiple amicus briefs in one case; in fact, some Circuits have allowed Amicus and Lopez to file separate amicus briefs in the same case, with Amicus as lawyer. The State of Florida will be disadvantaged if the hard work of Lopez is not honored and his brief is not filed, a brief which is informative on relevant issues, as per Lopez's statement herein. Amicus does not object to Appellees filing several amicus briefs through one lawyer. If the Court opposes one lawyer filing several amicus briefs, it could clarify the Circuit's written rules and procedures to say so explicitly, though permission to permit filing several amicus briefs through one lawyer may be a better idea, since it would promote free speech and greater knowledge about relevant issues.

I. THERE IS APPARENTLY NOT *PER SE* A PUBLISHED INTERNAL OPERATING PROCEDURE OR RULE IN THIS CIRCUIT, PREVENTING

ONE COUNSEL FROM FILING SEVERAL SEPARATE AMICUS BRIEFS FOR SEPARATE CLIENTS IN ONE CASE

While the Court staff were helpful, Amicus respectfully notes that the written policy in this Circuit re “one attorney, one brief” seems to cover the issue of having *full* parties, e.g., appellants and appellees, not file multiple briefs. This is a sensible rule, since, say, a class-action suit with 10,000 plaintiffs could have 10,000 separate appellant’s (or appellants’) briefs filed, which would be a ridiculous situation. However, Amicus is trying to file one additional amicus brief, not 9,999 appellant’s briefs.

IOP #2 following FRAP 28 in the Court rulebook says, in pertinent part, “Unless otherwise directed by the court, an attorney representing more than one party in an appeal may only file one principal brief (and one reply brief, if authorized), which will include argument as to all of the parties represented by that attorney in that appeal, and one (combined) appendix.” *Id.* So, *prima facie* at least, IOP #2 seems to be talking only about the appellant’s or appellee’s briefs, since an amicus curiae is normally not going to be filing a reply brief, or an appendix. Thus, IOP #2 arguably does not prevent one lawyer from filing multiple *amicus* briefs, even if that lawyer could not submit more than one appellant or appellee brief.

With amicus briefs, there is just not the same problem as with allowing every plaintiff or defendant, every appellant or appellee, to file a separate brief. There are only going to be so many amici. But some of them, like Mr. Lopez, are not

lawyers, and may be hard put to file a brief if they cannot use their lawyer of choice to file a brief. —A hypothetical example: the “Save the Fish Foundation” files an amicus brief in an environmental case, about legal issues re the exotic and endangered Zooba fish; but then Old Salty the sailor, who has a lifetime of personal experience with the characteristics and environment of the Zooba fish, comes to the SFF Foundation and wonders if he can write a brief to the Court about his unique personal experience, in order to help out in the controversial environmental case. Old Salty is not a lawyer, so he needs the Foundation’s lawyer to have his, Old Salty’s, say—and his say may be long enough that he cannot consolidate all of his wisdom with that of the SFF’s own amicus brief. (I.e., SFF have their own 7000 words to say, and Old Salty has at least 6999 words to say, so that they cannot just cram all their ideas and testimony together into one combined 7000-word brief.) If the old salt has something to say which can help the Court decide the issue in an informed way, perhaps it would be wise to let him say it.

By the way, the Court could have given public warning if it wanted amici, in particular, to combine their efforts into one single amicus brief; *see, e.g.*, D.C. Cir. R. 29(d), “Single Brief.”: “Amici curiae on the same side must join in a single brief to the extent practicable. . . . Any separate brief . . . must contain a certificate of counsel plainly stating why the separate brief is necessary.” *Id.* (Note that the D.C. Circuit rule, *see id.*, still *allows* separate briefs, even if it discourages them.) But

the Eleventh Circuit apparently has no such circuit rule, *see* the Eleventh Cir. Rules/ IOP. Given the lack of previous written notice against multiple amicus briefs being submitted by one lawyer, Amicus respectfully asserts that it would be fair to allow Lopez to file his brief. (The Court can always amend its rules/ procedures in the future to add written notice, as noted *infra*.)

II. CLIENTS HAVE SOME MORAL RIGHT TO COUNSEL OF THEIR CHOICE, PURSUANT TO THE SIXTH AMENDMENT, FIRST AMENDMENT, FREE SPEECH, AND FREEDOM OF ASSOCIATION

After all, for Americans to have counsel of their choice just reflects fairness and common sense. While the legal profession is regulable, e.g., disallowing felons admission to the bar, or preventing price-gouging of lawyers' clients, counsel should still have a substantial right to take on clients of their choice (either for profit or the public interest), and clients conversely should have a right to be represented by counsel and to choose counsel. If this Court somehow forces every separate amicus brief to have a separate lawyer, that right is effectively infringed. (While the Sixth Amendment right to counsel may only technically be for criminal defendants, *see id.*: a court interested in justice would presumably be interested in letting parties or amici in civil proceedings also have freedom to choose.)

Lopez, like Amicus, lives in California, so it may not be easy for Lopez to hunt around in order to find a lawyer who is part of the Eleventh Circuit bar like Amicus is. (Not all Californian lawyers are even members of the *Ninth* Circuit bar,

much less the Eleventh.) Also, if Lopez tried to find some other lawyer besides Amicus, that other lawyer would likely be one whom Lopez has never met before and may know little about, and who may not work for Lopez *pro bono*, either, and may simply not be amenable to Lopez's style or thoughts. Again, freedom of choice in lawyers can be very crucial.

Obviously, the First Amendment is strongly implicated as well. If Amicus' client is not allowed to file his brief just because his lawyer is also filing a *pro se* amicus brief, Lopez's free speech in *Brenner/Grimsley* will be reduced to zero.

Freedom of association is also at issue. Clients should have a right to associate with a lawyer of their choice. (See Lopez's statement, *infra* at 11, on the difficulty of finding inexpensive counsel who will help defend, re gay marriage, a child's right to a mother and father, as Amicus is doing.)

(If the Court were worried about "profiteering", e.g., one lawyer taking away paying business from other lawyers if he files more than one amicus brief: Amicus is representing Lopez in this case *pro bono*. Amicus is essentially losing money by doing so, since he could have used the time he spent on the *pro bono* work to find other, paying work; so he is not "profiteering" here.)

III. SOME PRECEDENT FROM THE *HOBBY LOBBY* CASE ON ALLOWING ASSOCIATED PEOPLE TO FILE SEPARATE AMICUS BRIEFS

After all, there is a substantial history of allowing people to file separate amicus briefs even if a court could argue that they are all associated and should stuff their separate ideas into just one brief. For example, in the recent U.S. Supreme Court *Burwell v. Hobby Lobby* case (573 U.S. ___, 134 S. Ct. 2751 (2014)), one may see at the Becket Fund link *Amicus History: Hobby Lobby Supreme Court Amicus Briefs Among Record Levels* (undated), <http://www.becketfund.org/hobbylobbyamicus/> (last visited November 20, 2014, as with the other Internet link herein), that: the Catholic Medical Association; the Knights of Columbus; the U.S. Catholic Bishops; 67 Catholic theologians and ethicists; and the Ryan Institute for Catholic Social Thought, all filed separate amicus briefs, five in total, on the side of the Hobby Lobby company. The Supreme Court could, say, have forced those five groups *supra*, who are all presumably part of the association which is the Roman Catholic Church, to combine their efforts and write one “Catholic” brief together. But the five groups decided to write separate briefs, which the High Court allowed.

IV. AMICUS AND ROBERT OSCAR LOPEZ FILED SEPARATE AMICUS BRIEFS IN THE SAME CASE, WITH AMICUS AS COUNSEL, IN TWO OTHER CIRCUITS; AND OTHER COUNSEL HAVE ALSO FILED SEPARATE AMICUS BRIEFS IN THE SAME CASE

Moreover, some other Circuits have not made any arbitrary restriction, or any restriction, on Amicus’ filing separate amicus briefs.

In the in the Fourth Circuit *Bostic v. Schaefer* case (760 F.3d 352 (4th Cir. 2014)), Amicus filed, supporting that case's Appellants, a *pro se* amicus brief and also another amicus brief as counsel for Robert Oscar Lopez: both were filed, April 4, 2014. There was no problem. (Needless to say, the Fourth Circuit did not require that Lopez and Amicus cram our two separate briefs into one single brief, which would have been basically impossible.) Similarly, in the Sixth Circuit *DeBoer v. Snyder* case (-- F.3d --, 2014 U.S. App. LEXIS 21191 (6th Cir. Nov. 6 2014)), Amicus filed, supporting that case's Appellants, a *pro se* amicus brief and also another amicus brief as counsel for Robert Oscar Lopez: both were filed, May 14, 2014. Again, there was no problem.

And in the Fifth Circuit, in *De Leon v. Perry*, No. 14-50196 (No. 5:13-cv-982, 975 F. Supp. 2d 632 (W.D. Tex. Feb. 12, 2014)) Amicus had to file a motion like this present one, but to allow *four* more amicus briefs, from four separate clients, to be submitted, in addition to his own *pro se* amicus brief. It was successful; all five briefs were filed. By contrast, in the instant case, Amicus is only asking to file one more brief, Lopez's brief.

Actually, not just Amicus, but other lawyers, such as the Christian public-interest law group Liberty Counsel, have also served as amicus counsel not only for themselves but also simultaneously for others. *See, e.g., Liberty Counsel Defends Virginia Marriage Amendment*, Liberty Counsel, Apr. 4, 2014, <http://>

www.lc.org/index.cfm?PID=14102&AlertID=1758, showing, *see id.*, that Liberty Counsel represented a group called WallBuilders, LLC in one amicus brief of April 4, 2014, and also submitted another brief the same day, combining themselves (Liberty Counsel) and the American College of Pediatricians, all in *Bostic*, the Fourth Circuit same-sex-marriage case *supra*. So Liberty Counsel represented multiple, separate parties as amici in separate briefs in one case, which should be perfectly legal.

The Fourth and the Sixth Circuits' common-sense acceptance, *supra*, of the notion that an amicus should be able to choose his own lawyer; or at least the Fifth Circuit's granting of Amicus' motion to file additional amicus briefs (four in that case): should be followed by this Circuit and Court as well, at least in this compelling instance where Lopez has so much insight to offer.

V. UNFAIRNESS TO THE STATE OF FLORIDA IF THE LOPEZ BRIEF IS KEPT OUT OF *BRENNER/GRIMSLEY*

Additionally, not only will Lopez himself be penalized by the Court keeping his brief out of the instant cases; the State of Florida and its People, who voted to ban same-sex marriage, will also be penalized by the forced absence of the Lopez brief. The issue of mandatory legalized same-sex marriage in every State is one of the most momentous legal issues ever, one may fairly say. And Florida has a right to what aid and counsel it can get in presenting its case re the issue. For the State of Florida to be forced to present a weaker, more inferior and under-informed case

than it could have, because one of its amici is completely silenced, is not something that the Court should not permit to occur.

VI. CORRESPONDING COURTESY TO THE SIDE OF APPELLEES

Of course, in the interest of consistency and equity, Amicus shall not object if the other side, the Appellees, use one lawyer to submit multiple briefs from multiple amici.

VII. A STATEMENT BY ROBERT OSCAR LOPEZ, IN SUPPORT OF THE FILING OF HIS BRIEF

Robert Oscar Lopez made a brief statement, sent to Amicus in an e-mail, *see id.*, concerning the unique point of view he can offer, and the importance of allowing his brief to be filed. (It is the same statement he made in the motion to the Fifth Circuit, *see id.* at 15, to submit a brief, but Amicus has contacted him and he reiterates the statement.) His perspective has a great deal to offer to this case, especially since he has considerable experience researching and writing about same-sex-marriage related issues, as his brief notes. Thus, even if exclusion of multiple amicus briefs from one lawyer were regular Court policy, that policy should be waived in this case.

Without over-repeating Lopez' brief itself: he is a tenured professor, Yale graduate, military veteran, and children's-rights activist who was raised by lesbians and suffered immensely thereby, including separation from a male parent, with all

the anguish that caused. In an era when the popular thing to say is that “It’s great for kids to have same-sex parents”, Lopez’ personal experience and eyewitness testimony will help balance versus that “popular” point of view, by indicating that there can be a serious downside for children who live under same-gender, instead of gender-diverse, parenting.

Here is his statement, which helps show why the Court should grant requested relief:

I request that the Court permit my attorney to submit multiple briefs for this case, for a few reasons. Currently the climate for children of gay parents is very dangerous when such children speak out in favor of a child’s right to a mother and father. It is difficult to find legal representatives willing to take on our cause, and we are generally not wealthy enough to have independent funds. Our voices are nonetheless crucial to this debate and have not been given sufficient attention.

VIII. ANY CIRCUIT PROCEDURE THAT NO COUNSEL CAN SUBMIT MORE THAN ONE AMICUS BRIEF, IF NOT ABROGATED, SHOULD BE INSERTED INTO PUBLISHED INTERNAL OPERATING PROCEDURES

By the way, in the event that the Court does not abrogate any policy it may have which prevents amici from choosing a lawyer who is submitting another amicus brief, the Court should at least consider amending the published Eleventh Circuit Internal Operating Procedures, not to mention the Circuit Rules, to include clear and transparent language such as, “No attorney may serve as counsel of record to more than one amicus brief.” That statement, *see id.*, is only 14 words, yet would

give unmistakably overt notice and warning that a lawyer can't submit more than one amicus brief as counsel of record.

Again, there is usually little good reason to impair citizens' free speech/freedom-of-association by forbidding them the counsel of their choice, in this Court or other courts. Amicus would politely suggest that instead of adding language to the rules that explicitly prohibits more than one amicus brief from a lawyer, it could be helpful to free speech and an increased flow of valuable information to the Court, to put language into the rules that actually supports the ability of amici to have whatever lawyer they want, even one who is submitting another (or even several) amicus briefs.

* * *

“[T]he right to counsel of choice is the right to a particular lawyer[.]”
United States v. Gonzalez-Lopez, 548 U.S. 140, 148, 126 S. Ct. 2557, 2563 (2006) (Scalia, J.). While that quote refers to criminal cases, *see id.*, the spirit of free choice, *see id.*, should obtain in civil cases as well when it can. This Court would act fairly by allowing Robert Oscar Lopez his choice of counsel and the filing of his brief. And his voice, drawing on personal experience instead of mere legalisms and theory, has a great deal to add to the controversial and difficult debate before this Court.

CONCLUSION

Amicus respectfully asks the Court to allow the filing of Robert Oscar Lopez's amicus brief; and humbly thanks the Court for its time and consideration.

November 21, 2014 Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that he electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system on November 21, 2014.

He also certifies that all parties or their counsel of record will be served through the CM/ECF system if they are registered CM/ECF users:

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