

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

WASHINGTON ALLIANCE OF)
TECHNOLOGY WORKERS,)
)
Plaintiff,)
)
v.)
)
UNITED STATES DEPARTMENT OF)
HOMELAND SECURITY, *et al.*,)
)
Defendants.)
_____)

Civil Action No. 1:16-cv-1170 (RBW)

**AMICI CURIAE INSTITUTIONS OF HIGHER EDUCATION’S
OPPOSITION TO PLAINTIFF’S MOTION TO STRIKE**

On November 21, 2019, over one hundred colleges and universities from around the country joined together to submit an amici curiae brief in this action supporting intervenors. *See* ECF No. 63. None of the parties or intervenors in this action opposed Amici’s motion for leave to file the brief, *id.* at 4, and this Court accepted the brief as filed days later. *See* Minute Order (Nov. 25, 2019). Now, three months after Amici filed their brief, and several weeks after summary-judgment briefing concluded, Plaintiff Washington Alliance of Technology Workers has filed a motion to strike Amici’s brief in its entirety, based on a handful of first-person accounts contained within the brief about the importance of the optional practical training (OPT) program. *See* ECF No. 93 (“Mot.”). This Court should reject Plaintiff’s belated effort to attack and exclude the perspective of U.S. institutions of higher education. Amici are one of several groups providing information to the Court about OPT, and Plaintiff cannot seriously dispute that American colleges and universities—including their leaders, educators, students, and graduates—have valuable insight into the history, operation, and importance of this program.

“Motions to strike are a drastic remedy, which courts generally disfavor.” *Naegele v. Albers*, 355 F. Supp. 2d 129, 142 (D.D.C. 2005) (citing *Stabilisierungsfonds Fur Wein v. Kaiser Stuhl Wine Distribs. Pty. Ltd.*, 647 F.2d 200, 201 (D.C. Cir. 1981)). Plaintiff comes nowhere close to justifying this drastic and disfavored remedy here. Indeed, Plaintiff has not mustered any authority for the proposition that this Court should strike Amici’s brief *in its entirety* based on Plaintiff’s challenge to certain specific statements contained within the brief. Nor are Amici aware of any such authority. Moreover, even as to the specific statements that Plaintiff challenges, there is no basis to strike. Plaintiff’s arguments to the contrary are based on a fundamental misunderstanding of the established and important role amicus briefs play in litigation, including amicus briefs filed in challenges brought under the Administrative Procedure Act (“APA”) as is the case here.

This Court has “broad discretion to permit . . . participation in this suit as an *amicus curiae*.” *Nat’l Ass’n of Home Builders v. U.S. Army Corps of Eng’rs*, 519 F. Supp. 2d 89, 93 (D.D.C. 2007). This Court permits amicus briefs when they provide “timely and useful” information. *Ellsworth Assocs., Inc. v. United States*, 917 F. Supp. 841, 846 (D.D.C. 1996) (quotation marks omitted). Amicus briefs aid the Court “by presenting ideas, arguments, theories, insights, facts or data that are not to be found in the parties’ briefs.” *N. Mariana Islands v. United States*, No. 08-CV-1572, 2009 WL 596986, at *1 (D.D.C. Mar. 6, 2009) (quotation marks omitted); *see also, e.g., Neonatology Assocs., P.A. v. Comm’r*, 293 F.3d 128, 132 (3d Cir. 2002) (Alito, J.) (emphasizing value of amicus briefs from “entities with particular expertise not possessed by any party to the case” and entities with insight into “the impact a potential holding might have on an industry or other group” (internal quotation marks omitted)). Such briefs are particularly welcome where, as here, the amicus has “a special interest in [the] litigation as well as a familiarity and knowledge of

the issues raised . . . that could aid in the resolution of [the] case.” *Ellsworth Assocs.*, 917 F. Supp. at 846.

Amici are institutions of higher education “with relevant expertise and a stated concern for the issues at stake in this case”—namely, a program with tremendous importance to their campuses, communities, and the education sector as a whole. *District of Columbia v. Potomac Elec. Power Co.*, 826 F. Supp. 2d 227, 237 (D.D.C. 2011). Specifically, Amici’s brief demonstrates: (a) international students are an integral part of the fabric of American higher education and a cancellation of OPT would seriously impact the educational experience of international students in the United States; (b) real-world training complements and enhances classroom learning and is a key component of higher education; and (c) the availability of OPT is an important advantage for U.S. colleges and universities in the increasingly competitive global market for higher education. These perspectives can, and should, aid the Court as it considers the case. Plaintiff may wish the Court were not aware of the substantial interests at stake in this litigation, but that is no basis to countenance Plaintiff’s improper attempt to strike the brief.

The well-established reasons for permitting amicus briefs apply with equal force in the context of litigation under the APA. Whether in the district court, the court of appeals, or the Supreme Court, amicus briefs supply the decision-makers with important perspective as they evaluate the administrative record against the applicable legal standard.¹ For example, in *Department of Commerce v. New York*, a case brought under the APA challenging a citizenship

¹ Plaintiff’s cited cases are not to the contrary. *See* Mot. at 4-5. Those cases stand for the basic principle that “an agency is entitled to a presumption that it properly designated the administrative record,” and that parties to an APA action face a heavy burden if they seek to supplement the administrative record with additional evidence. *E.g.*, *Calloway v. Harvey*, 590 F. Supp. 2d 29, 37 (D.D.C. 2008). Amici are not parties to this action, and they are not seeking to supplement the administrative record at issue here.

question on the 2020 Census questionnaire, the Supreme Court received and considered dozens of amicus briefs that used historical details, statistical data, and personal experiences to illuminate issues not readily discernible in the merits briefs. Justice Breyer cited four of those briefs in his concurring opinion, including two from “[o]rganizations with expertise in this area” that provided information to the Court demonstrating “that asking the citizenship question will not help enforce the [Voting Rights] Act.” *Dep’t of Commerce v. New York*, 139 S. Ct. 2551, 2594 (2019) (Breyer, J., concurring in part and dissenting in part); *see also id.* at 2586, 2590. Similarly, each of the six other amicus briefs submitted in this very case present factual content beyond that contained in the administrative record. *See* ECF Nos. 62, 74, 75, 76, 78, 79. Plaintiff does not challenge any of those briefs, and for good reason: they contain perspectives this Court is entitled to consider as it adjudicates the APA claim at issue here.

Plaintiff’s attack on personal accounts presented in Amici’s brief, including anonymous accounts, is unavailing. Anecdotes and narratives provide courts with valuable insight into the application and importance of programs like OPT. For instance, several organizations filed an amicus brief in the D.C. Circuit voicing opposition to the Department of Defense’s 2018 policy barring transgender service members from serving openly in the military. *Br. of American Veterans Alliance, et al. as Amici Curiae in Support of Plaintiffs-Appellees* at 7-8, *Doe 2 v. Shanahan*, 755 F. App’x 19 (D.C. Cir. 2019) (No. 1:17-cv-01597), 2018 WL 5619818. Their brief contains several statements from anonymous veterans and service members whose stories helped inform the court about the impact of the challenged policy. *Id.* at 8-21, 23-25. Similarly, in *Garza v. Azar*, Immigrant Rights Advocates filed an amicus brief that recounted experiences of individuals affected by the challenged policy precluding unaccompanied alien minors from obtaining an abortion. *Br. of Immigrant Rights Advocates as Amici Curiae Supporting Plaintiffs-*

Appellees at 12-14, *J.D. v. Azar*, 925 F.3d 1291 (D.C. Cir. 2019) (No. 18-5093), 2018 WL 3740599. The D.C. Circuit cited this brief multiple times in its opinion. *See Jane Doe v. Azar*, 925 F.3d 1291, 1330-31 (D.C. Cir. 2019). These are two examples among many, and they refute Plaintiff's argument that this Court is not permitted to consider the challenged statements because they are presented anonymously.

That leaves only Plaintiff's complaint that certain statements contained within Amici's brief constitute "hearsay" statements that were not "made under oath." Mot. at 4-5. Once again, the statements in Amici's brief are no different from the statements contained in each of the amicus briefs filed in this case and in hundreds if not thousands of amicus briefs filed in this Court each year. Plaintiff does not even attempt to explain why the statements in Amici's brief are improper, yet similar statements in the amicus briefs *supporting* Plaintiff's position in this case are permissible. *See, e.g.*, ECF No. 78 at 5 (Amicus Brief of Congressman Paul A. Gosar stating without support that OPT "does not serve the[] interests" of unidentified constituents in his district); ECF No. 62 (Amicus Brief of Center for Immigration Studies citing and discussing studies outside the administrative record to support its arguments). Plaintiff's reliance on cases addressing the evidentiary standards for sworn testimony is misplaced. *See* Mot. at 4. Plaintiff fails to provide a single example where those standards have been applied to amicus briefs.

Simply put, there is no basis to strike any statement contained in Amici's brief, much less the brief in its entirety. Amici's brief adds a critical perspective to this litigation. U.S. institutions of higher education are among the most important stakeholders in this longstanding government program. They benefit firsthand from OPT, which attracts the best and brightest students, researchers, and professors from around the world to American campuses. And their brief speaks powerfully to the benefits of this program and the real and measurable ways that our colleges and

universities, and our economy as a whole, would suffer without OPT. Plaintiff may dislike Amici's perspective, but that is no basis for this Court to discount it.

CONCLUSION

Amici respectfully request that the Court deny Plaintiff's Motion to Strike and Objections to Evidence.

Respectfully submitted:

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March 2, 2020

Counsel for Amici Curiae
Institutions of Higher Education

CERTIFICATE OF SERVICE

I hereby certify that on March 2, 2020, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will provide electronic notice and an electronic link to this document to all attorneys of record.

By: /s/ Ishan K. Bhabha
Ishan K. Bhabha

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[PROPOSED] ORDER

This matter is before the Court on Plaintiff Washington Alliance of Technology Workers’ Motion to Strike the brief of amici curiae Institutions of Higher Education. Accordingly, upon its consideration, it is hereby ORDERED that the Motion is DENIED.

SO ORDERED.

Reggie B. Walton
United States District Judge

Dated: _____