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Voices in Education Law Advocacy

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VOICES IN EDUCATION LAW ADVOCACY

Kristen E. Murray[†]

“[T]he law is awash in storytelling.”

—Anthony G. Amsterdam & Jerome Bruner¹

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INTRODUCTION

In recent years, there has been an uptick in the number of amicus curiae briefs that tell nonparty stories in cases before the Supreme Court. These briefs, commonly called “voices briefs,” tell “stories drawn from the lives of individuals who are strangers to the case . . . [and] introduce the Court to some of the individuals who have lived the issues firsthand.”² Voices briefs “humanize[] the amici curiae”³ and the legal

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1. ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* 110 (2000).
2. Linda H. Edwards, *Telling Stories in the Supreme Court: Voices Briefs and the Role of Democracy in Constitutional Deliberation*, 29 *YALE L.J. & FEMINISM* 29, 34 (2017) [hereinafter Edwards, *Telling Stories*].
3. Paul M. Collins, Jr., *The Use of Amicus Briefs*, 14 *ANN. REV. L. & SOC. SCI.* 219, 225 (2018).

issues involved in the case by telling different kinds of stories.⁴ The stories appear in different forms: in first- and third-person narratives, in stories previously told, and in stories gathered for the specific purpose of being amici, woven into the brief's argument and included in the appendices.

To date, voices briefs have been used primarily in abortion rights and marriage equality cases.⁵ Perhaps the most famous of these briefs appeared in abortion cases beginning in the mid-1980s.⁶ These briefs are credited with “creat[ing] a new form of argument using stories.”⁷ Of late, a large number of voices briefs were filed in significant cases such as *Obergefell v. Hodges*⁸ and *Whole Woman's Health v. Hellerstedt*.⁹ The amici in these cases appeared on behalf of the petitioners and respondents in almost equal measure.¹⁰

Voices briefs are a mechanism through which nonparty stakeholders can use the power of personal narrative to bring to life the issues under consideration in a particular case. Consider, for example, the sixteen voices briefs filed by amici in *Obergefell*. Nine of the amicus briefs were pro-marriage equality and seven were anti-marriage equality. Seven were filed on behalf of individuals, eight on behalf of organizations, and

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4. Linda H. Edwards, *Hearing Voices: Non-Party Stories in Abortion and Gay Rights Advocacy*, 2015 MICH. ST. L. REV. 1327, 1352–53 (2015) [hereinafter Edwards, *Hearing Voices*].
 5. Edwards, *Telling Stories*, *supra* note 2, at 39.
 6. LINDA H. EDWARDS, *The Voices Briefs: Thornburg, Webster, and Gonzales*, in READINGS IN PERSUASION: BRIEFS THAT CHANGED THE WORLD 353, 353 (2012).
 7. *Id.* at 353.
 8. Docket, *Obergefell v. Hodges*, 576 U.S. 644 (2015) (No. 14-556), <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/14-556.html> [<https://perma.cc/ZE8H-V2BV>] (sixteen voices briefs filed on behalf of amicus); Edwards, *Telling Stories*, *supra* note 2, app. A at 89–90.
 9. Docket, *Whole Woman's Health v. Hellerstedt*, 579 U.S. 582 (2016) (No. 15-274), <https://www.supremecourt.gov/search.aspx?filename=/docketfiles/15-274.htm> [<https://perma.cc/2R2G-TFRF>] (seventeen voices briefs filed on behalf of amicus); Edwards, *Telling Stories*, *supra* note 2, app. A at 90–91.
 10. Docket, *Obergefell*, 576 U.S. 644 (No. 14-556), <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/14-556.html> [<https://perma.cc/ZE8H-V2BV>] (seven voices briefs filed on behalf of the respondents, nine on behalf of the petitioners); Docket, *Whole Woman's Health*, 579 U.S. 582 (No. 15-274), <https://www.supremecourt.gov/search.aspx?filename=/docketfiles/15-274.htm> [<https://perma.cc/2R2G-TFRF>] (six voices briefs filed on behalf of respondents, eleven on behalf of petitioners); Edwards, *Telling Stories*, *supra* note 2, app. A at 89–91.

one on behalf of an Ohio county.¹¹ The briefs seek to tell the Court about the amici's personal experiences with the issues at stake. These personal narratives include the experiences of children of LGBTQ parents,¹² of survivors of sexual orientation change therapies,¹³ and of same-sex attracted men and their wives.¹⁴

Despite this recent explosion in voices briefs, there has been little analysis of the phenomenon and almost no consideration of their potential use in other contexts.¹⁵ This Article is an initial examination into the potential that voices briefs might have in other contexts: here, a specific subset of cases involving education. As such, this is a unique, cross-disciplinary look at the advocacy potential of voices briefs beyond their original purpose.

To date, voices briefs have been used in cases that involve deeply personal issues and that involve experiences that are different from those of the Justices or judges hearing the case. They may also be useful in cases where the decision will affect non-parties whose situation differs from that of the parties and of other amici. This Article asserts that certain education-related cases share these characteristics and that, consequently, voices briefs can serve a useful purpose in these cases. However, to date, such briefs have appeared infrequently in education-related cases.

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11. Docket, *Obergefell*, 576 U.S. 644 (No. 14-556), <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/14-556.html> [<https://perma.cc/ZE8H-V2BV>]; Edwards, *Telling Stories*, *supra* note 2, app. A at 89–90.
 12. *See, e.g.*, Brief of Amicae Curiae Dawn Stefanowicz & Denise Shick in Support of Respondents at 3, 6–15, 19–21, 23–36, *Obergefell*, 576 U.S. 644 (Nos. 14–556, 14–562, 14–571, 14–574) (detailing the personal experiences of amici as adult children raised by same-sex parents and noting the negative effects of such upbringing) [hereinafter Brief of Stefanowicz & Shick]; Brief of the County of Cuyahoga, Ohio as Amicus Curiae in Support of Petitioners at 3–5, 11–13, 17–19, 26–31, *Obergefell*, 576 U.S. 644 (No. 14-556) (supplementing the brief's legal arguments with testimonials from parents and children in the state in support of marriage equality) [hereinafter Brief of Cuyahoga County, Ohio].
 13. Brief of Amici Curiae Survivors of Sexual Orientation Change Therapies in Support of Petitioners, Urging Reversal, *Obergefell*, 576 U.S. 644 (No. 14-556), [hereinafter Brief of Survivors of Sexual Orientation Change Therapies].
 14. Brief of Amici Curiae Same-Sex Attracted Men and Their Wives in Support of Respondents & Affirmance at 1–2, 7–21, 26–27, 29–32, 34–36, *Obergefell*, 576 U.S. 644 (Nos. 14-556, 14-562, 14-571, 14-574).
 15. Voices briefs occupy a space in legal discourse that is adjacent to many other significant areas of study, including feminist literature, law and narrative, unconscious bias, and judicial decision-making. This Article takes a modest first step in thinking about voices briefs and seeks only to analyze their potential future use in cases involving K-12 public education.

Part I provides essential background on what voices briefs are and their traditional uses. It also contemplates the circumstances under which voices briefs might be useful in other contexts. Part II notes the minimal role nonparty personal narratives have played in education law cases before the Supreme Court and argues that some education law cases are well-suited for this type of advocacy. Part II also looks specifically at how voices briefs might have been useful in two modern-era Supreme Court cases involving student privacy and special education, and how voices briefs function in two more recent Supreme Court cases. Part III looks at state school funding litigation. It argues that voices briefs might be especially useful in cases where the “adequacy” of state-provided education is at issue. Part IV offers some conclusions.

I. VOICES BRIEFS: AN INTRODUCTION

Traditional amicus briefs allow non-parties to introduce their own legal arguments and sources, as well as to offer social science research, policy concerns, and other implications of the Court’s decision.¹⁶ They represent a wider swath of affected persons or entities than the parties, including marginalized groups that might not otherwise be heard. The policy function of amicus briefs has existed since the “Brandeis brief” that first presented social science research to the Court in 1908.¹⁷

Voices briefs use personal narrative as policy argument.¹⁸ For purposes of this Article, “personal narrative” is defined as “somebody telling somebody else on some occasion and for some purpose(s) that something happened.”¹⁹ I use the terms “personal narrative” and “story” interchangeably.²⁰ The personal narratives and stories in voices

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16. See e.g., Helen A. Anderson, *Frenemies of the Court: The Many Faces of Amicus Curiae*, 49 U. RICH. L. REV. 361, 384–85, 404, 414 (2015); Collins, *supra* note 3, at 220–21, 223, 226, 229; Shai Farber, *The Amicus Curiae Phenomenon—Theory, Causes, and Meanings*, 29 TRANSNAT’L L. & CONTEMP. PROBS. 1, 25–26, 32–35, 39, 47–48 (2019); Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 785, 786 n.144 (2000).
 17. The Brandeis brief, named for its author, was filed in *Muller v. Oregon*. Brief for Defendant in Error, *Muller v. Oregon*, 208 U.S. 412 (1908) (No. 107). See generally Collins, *supra* note 3, at 229–30 (describing social science research on amicus briefs).
 18. Edwards, *Telling Stories*, *supra* note 2, at 48.
 19. James Phelan, *Narratives in Contest; or, Another Twist in the Narrative Turn*, 123 PUBL’NS MOD. LANGUAGE ASS’N 166, 167 (2008).
 20. See Anne E. Ralph, *The Story of a Class: Uses of Narrative in Public Interest Class Actions Before Certification*, 95 WASH. U. L. REV. 259, 267 n.39 (2020) (noting that “law-trained academics, judges, and practicing lawyers” are likely to understand and use these terms interchangeably as

briefs are “drawn from the lives of individuals who are strangers to the case” but “who have lived the issues firsthand.”²¹ These personal narratives in voices briefs tell the story of how the issue in the case has affected the storyteller(s), the effect a change in the law will have, or both.²² A classic voices brief centers on personal narratives; briefs with passing references to a single personal experience are not voices briefs.²³ Voices briefs present these stories as legislative (not adjudicative) facts. Legislative facts are broad or general facts about the world that “assist in the creation of law or the determination of policy.”²⁴ Ideally, voices briefs should introduce personal narratives that are reliable and relevant.²⁵ As others have noted, their stories should not be used to

well) (citing H. PORTER ABBOTT, *THE CAMBRIDGE INTRODUCTION TO NARRATIVE* 16 (2d ed. 2008)); *see also* Linda H. Edwards, *Speaking of Stories and Law*, 13 *LEGAL COMM. & RHETORIC: JALWD* 157, 169 (2016) (“By ‘story,’ we normally mean a series of *particular* events that happened to *particular* people in a *particular* set of circumstances.”).

21. Edwards, *Telling Stories*, *supra* note 2, at 34.
22. *See* Collins, *supra* note 3, at 225–26. The “storytelling” that is relevant to the discussion of voices briefs is applied legal storytelling, not the broader “[l]aw and [l]iterature” movement. Ruth Anne Robbins, *An Introduction to Applied Storytelling and to This Symposium*, 14 *J. LEGAL WRITING INST.* 3, 11–13 (2008).
23. The personal narrative must be central to the brief but may appear in various forms. *See, e.g.*, Edwards, *Hearing Voices*, *supra* note 4, at 1352–53:

Sometimes the stories have been told in the third-person by the brief writer; sometimes they have been told in the first-person voice of the individual who lived that story. Some of the stories supplement the stories of the parties themselves, providing additional examples of the same kind of harm the parties suffered. Some of the stories provide different kinds of examples or allow the Court to hear from groups of people not represented by the named parties. Sometimes the stories have been used to support key policy and social science arguments. Sometimes they have been used to elucidate a legal standard announced in a previous case or the particular legal question before the Court. Sometimes the stories have been used to directly rebut arguments from opposing briefs. Sometimes the stories have been meticulously attributed to sources outside the brief. Sometimes they are told for the first time, at least in that form, in the brief itself.
24. Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 *HARV. L. REV.* 364, 424 (1942); Carl A. Auerbach, *Legislative Facts in Grutter v. Bollinger*, 45 *SAN DIEGO L. REV.* 33, 33 (2008).
25. *See* Edwards, *Telling Stories*, *supra* note 2, at 76–86 (raising concerns about the reliability and relevance of voices briefs and making suggestions for improvement).

“prompt a generalized emotional reaction for or against a topic or practice.”²⁶

Practically speaking, voices briefs use nonparty stories to expand the Justices’ or judges’ understanding of the issue.²⁷ Some amici may have very different experiences than those of the parties.²⁸ While so humanizing the issues before the Court, personal narratives also disrupt the schema and stock stories that unconsciously influence the judges’ ultimate decisions.²⁹ Cognitive science studies have shown that the personal narratives communicated in voices briefs may actually be more effective at countering negative preexisting bias than the logical arguments in merits briefs.³⁰ Voices briefs might also affect the scope

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26. *Id.* at 79 (noting the irrelevance of some of the amicus filings to the central question in *Whole Woman’s Health v. Hellerstedt*—whether Texas’s restrictions on abortion providers were legitimate medical requirements).
 27. *Id.* at 64 (noting the core purpose of voices briefs is “to expand that judge’s realm of identification to include groups not previously a part of the judge’s personal world,” and to “introduce the judge to these ‘others’ in order to encourage meaningful merits analysis for all parties”).
 28. *Id.* at 47, 67 & n.211.
 29. Schemas involve our own personal experiences. *See, e.g.*, Jennifer Sheppard, *Once Upon a Time, Happily Ever After, and in a Galaxy Far, Far Away: Using Narrative to Fill the Cognitive Gap Left by Overreliance on Pure Logic in Appellate Briefs and Motion Memoranda*, 46 WILLAMETTE L. REV. 255, 259 (2009) (quoting Richard K. Sherwin, *The Narrative Construction of Legal Reality*, 18 VT. L. REV. 681, 700 (1994)) (noting that schema “serve as ‘mental blueprints’ that organize an individual’s experiences and knowledge of the world into an existing framework that allows him or her to assess new situations and ideas without having to ‘interpret things afresh’”). Stock stories are shared cultural stories, also known as “master” stories or myths. *See generally* Linda L. Berger, *How Embedded Knowledge Structures Affect Judicial Decision Making: A Rhetorical Analysis of Metaphor, Narrative, and Imagination in Child Custody Disputes*, 18 S. CAL. INTERDISC. L.J. 259, 261–62, 268, 270 (2009). Stock stories provide ways by which an entire culture might interpret certain experiences. Linda H. Edwards, *Once Upon a Time in Law: Myth, Metaphor, and Authority*, 77 TENN. L. REV. 883, 899 (2010); Berger, *supra*, at 268. Both schema and stock stories “shape [an individual’s] perceptions and reasoning processes.” Sheppard, *supra*, at 257 (quoting Berger, *supra*, at 262). In certain cases, judges may also be under the influence of implicit bias. *See generally* Jerry Kang, Mark Bennett, Devon Carbado, Pam Casey & Justin Levinson, *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1126, 1146 (2012). An in-depth exploration of implicit bias is outside the scope of this Article.
 30. Edwards, *Telling Stories*, *supra* note 2, at 59–64 (describing the cognitive science of how nonparty stories persuade); *see also* Nancy Levit, *Theorizing and Litigating the Rights of Sexual Minorities*, 19 COLUM. J. GENDER & L. 21, 39 (2010) (“Research is emerging in cognitive neuroscience that stories are the ways people best learn information.”); Ruth Anne Robbins, *Harry Potter, Ruby Slippers and Merlin: Telling the Client’s Story Using the Characters and Paradigm of the Archetypal Hero’s*

or tone of an opinion or support one step in a long-term evolution of the law.³¹

More abstractly, voices briefs allow nonparty “voices” who will be affected by the Court’s decision to be heard. This right to be heard is particularly important in cases where the decision will affect the intimate lives of people living very different lives than the judicial decision-makers.³²

This Part sets forth the history and traditional uses of voices briefs. It then summarizes the historical purpose and function of voices briefs and contemplates their use in other contexts.

A. Voices Briefs: A History

To date, voices briefs have appeared almost exclusively in abortion and marriage equality cases.³³ The first voices brief was an amicus brief filed in *Thornburgh v. American College of Obstetricians & Gynecologists*.³⁴ At issue in *Thornburgh* was Pennsylvania’s Abortion Control Act, which placed a variety of restrictions on abortion procedures.³⁵ *Thornburgh* was the first case to call for *Roe v. Wade*³⁶ to be overturned outright.

Journey, 29 SEATTLE U. L. REV. 767, 772 (2006) (“Psychologists are also moving towards the conclusion that all of our knowledge is contained in stories and in the mechanisms to construct and retrieve them.”).

31. Edwards, *Telling Stories*, *supra* note 2, at 68 (noting that a voices brief may persuade a Justice who is already entrenched in a particular position on the merits to consider and respect opposing views); Lynn M. Paltrow, *Missed Opportunities in McCorvey v. Hill: The Limits of Pro-Choice Lawyering*, 35 N.Y.U. REV. L. & SOC. CHANGE 194, 201 (2011) (“Winning in the short term . . . is not always the point.”).
32. Edwards, *Telling Stories*, *supra* note 2, at 67 n.211.
33. Only three cases not involving abortion or marriage equality have included voices briefs; two of these still involved abortion-related and contraception-related issues. See Edwards, *Telling Stories*, *supra* note 2, app. A at 88–90; *Zubik v. Burwell*, 578 U.S. 403 (2016) (including a voices brief in a case challenging the Affordable Care Act’s provisions ensuring contraception coverage); *Kiobel v. Royal Dutch Petrol. Co.*, 569 U.S. 108 (2013) (including a voices brief in a case under the Alien Tort Statute); *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012) (including three voices briefs in a case challenging Congress’s power to enact certain provisions of the Affordable Care Act).
34. 476 U.S. 747 (1986); Brief for the National Abortion Rights Action League et al. as Amici Curiae in Support of Appellees, *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747 (1986) (Nos. 84-495, 84-1379) [hereinafter *Thornburgh Brief*].
35. *Thornburgh*, 476 U.S. at 759–61.
36. 410 U.S. 113 (1973), *overruled by* *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

The lead architect of the first voices brief was Lynn M. Paltrow, who was counsel for the National Abortion Rights Action League (NARAL).³⁷ Paltrow's brief "place[d] before the Court the realities of women's situations when confronting such a profound and personal choice."³⁸ Nancy Levit has described the original voices brief as follows:

This brief was primarily a collection of stories of women from all walks of life who had abortions both legally and illegally. These were teenagers, women who were raped when they sought abortion services, women who were prosecuted when they had illegal abortions, those who had abortions in unsafe conditions when abortions were illegal, those who had abortions after *Roe v. Wade* in safe, clean, and supportive environments, women who had health problems that made childbirth dangerous, those who did not have financial resources to raise children, some who had cancer while pregnant, divorced professional women, married women with physically abusive spouses, some who suffered failed birth control methods, women who were pregnant as a result of rape (including a former nun raped by a priest), those afflicted with severe illnesses that necessitated abortion to save their lives, some who were addicted to drugs or alcohol, and some who carried fetuses with genetic diseases such as Tay-Sachs. These were not paradigm plaintiffs; they were Everywoman.³⁹

The brief was signed by sixteen organizations representing many different women, including professors, laborers, women of color, students and political activists, and women in health.⁴⁰ It stated that it sought to "place the realities of abortion in women's lives before this Court" and asked that *Roe v. Wade* be affirmed.⁴¹ The brief "concretely locat[ed] freedom of choice 'in the context of women's lives.'"⁴² It "paint[ed] a picture that gives the women not only bodies but jobs, families, schoolwork, health problems, youth, poverty, race/ethnic identity and dreams of a better life."⁴³

37. EDWARDS, *supra* note 6, at 353.

38. *Id.*

39. Levit, *supra* note 30, at 40.

40. Rosalind Pollack Petchesky, *Introduction to Lynn M. Paltrow, Amicus Brief: Richard Thornburgh v. American College of Obstetricians and Gynecologists*, 9 WOMEN'S RTS. L. REP. 3, 4 (1986). Petchesky is among the first to have written about the phenomenon of voices briefs. Edwards, *Telling Stories*, *supra* note 2, at 32 n.9.

41. Thornburgh Brief, *supra* note 34, at 5.

42. Petchesky, *supra* note 40, at 4.

43. *Id.*

The brief was organized around two main arguments and supports those arguments with social science, medical data, and excerpts from letters from NARAL's "Silent No More" campaign.⁴⁴ The letter excerpts are the voices in the brief. They included detailed firsthand accounts of illegal abortions,⁴⁵ accounts from relatives of women who died following illegal abortions (both from medical complications and by suicide),⁴⁶ stories from women who bore unwanted pregnancies,⁴⁷ contrasting

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44. Thornburgh Brief, *supra* note 34, at 5–6. The two arguments are the following: (1) "Roe v. Wade Has Dramatically Improved The Lives And Health Of American Women And This Court Should Reaffirm It"; and (2) "To 'Return The Law To The Condition' Before Roe Would Deny Women Their Fundamental Constitutional Rights." *Id.* at 7, 17 (capitalization in original).
45. *Id.* at 8–9 ("I remember Tijuana. I remember bugs crawling on walls as I waited for the "second part" of my abortion to take place. The first part was done in comparatively clean surroundings—a clinic—but I was too far along for the abortion to be done in one procedure, so I was sent to a 'hotel' to wait three hours—a stinking cesspool of urine, sweat, filthy sheets and bugs—unidentifiable crawling creatures all over the walls, floors and crevices. . . . Where else could I have gone in 1963? A name from a hairdresser passed through the underground grapevine by other desperate women seeking a life of dignity and choice.").
46. *Id.* at 10 ("On November 18, 1971, my twin sister Rose Elizabeth, died from an illegal abortion. This was after a very brutal rape. . . . The traumas of being raped and pregnant, knowing she would die if she didn't have an abortion, the embarrassment, the pain, the guilt. She called a close friend who knew of a person who would do the abortion. She decided to wait until we all had left for church, then called her friend to pick her up, (I can still remember opening the door of that old half abandoned building, and seeing her laid out on the table bleeding to death.) She never made it out alive. . . . For this reason I speak out today, for I believe if there had been a place where women, especially young women, could have gone for an abortion, where the environment was safe and clean, Rose Elizabeth, would still be with us today."). Other women resorted to suicide because no abortion was available. *Id.* at 11.
47. *Id.* at 12–13 ("I am a fifty-three-year-old librarian—middle class, Unitarian—and to all who know me, the mother of two. In fact, I am a mother of three, having had a child out of wedlock which, until recently, I have never felt able to mention to anyone for over thirty years. The fear, pain and powerlessness of an unsanctioned pregnancy, and the immeasurable anguish to living the remainder of one's life knowing somewhere there is a child irrevocably lost to you, is an experience no woman should have to undergo.").

stories from women who had legal abortions,⁴⁸ and personal accounts from women of their lives in the post-*Roe* world.⁴⁹

The *Thornburgh* brief thus humanized the abortion issue for the Justices. It used personal narrative as a way of reinforcing the legal arguments and statistics set forth in the brief. Robin West, who teaches the *Thornburgh* brief in her law school seminar courses, has noted that:

Every year at least one student, usually a man, tells me that the brief changed his mind on abortion. . . . [The brief] *shows*—illustrates—the terrible consequences of rolling back *Roe v. Wade*. Obviously, one does not have to have *been there* to understand what those consequences might be. However, one must indeed somehow be shown those consequences. The consequence that matters is that, in a world of illegal abortion, some of us, but only some of us, live out a regime of terror, torture, and unnecessary death. This is not a hard point to grasp. But, to be grasped, it must be shown. Principles and reason do not make the case.⁵⁰

A few years later, two voices briefs were filed on behalf of amici in *Webster v. Reproductive Health Services*⁵¹—one on each side of the issue.⁵² At issue in *Webster* were several provisions of a Missouri statute,

48. *Id.* at 14–15 (“I am 38 years old and have had 2 abortions—1 legal, 1 illegal. My first was when I was 19 years old. It was illegal. I had to drive from north Jersey to Philadelphia for what I understand now was an ineffective treatment . . . I almost died. My second abortion was legal. When I discovered I was pregnant, I went to my doctor, who, with much concern and sympathy, told me of all alternatives, including adoption. We both decided abortion would be best. The procedure was done in a hospital—it took three hours and I was back to work the next week. There was no trauma, other than the difficulty of making a decision that is always hard to make.”).

49. *Id.* at 17–30 (“Our decision was not a difficult one. It was not an agonizing one or a resolution of ambivalence. In contrast our decision was a clear one. We were not ready to have a child . . . Six years later our daughter, now almost three, was willfully conceived. It is difficult to adequately describe the difference between a wanted and an unwanted pregnancy. It is sometimes like the difference between darkness and despair, and light and joy. We were ecstatic. The absolute joy we experience through our daughter comes in large part because we were ready to become parents. She has certainly been worth waiting for.”).

50. Robin L. West, *The Constitution of Reasons*, 92 MICH. L. REV. 1409, 1436 (1994) (emphasis in original).

51. 492 U.S. 490 (1989).

52. Docket, *Webster*, 492 U.S. 490 (No. 88–605). The *Webster* docket can be found at *Dockets for the Supreme Court of the United States—1988 Term, Part 1 of 2*, NAT. ARCHIVES CATALOG, <https://catalog.archives.gov>

including a preamble declaring that life began at conception, a prohibition on the use of public funds or facilities for abortion, and a provision requiring that physicians perform particular tests in order to ascertain fetal viability before an abortion could be performed.⁵³

By the time *Webster* came before the Court in 1989, Paltrow was working on a brief on behalf of the ACLU Reproductive Freedom Project and so asked Sarah Burns at the National Organization for Women to file a voices brief in the case.⁵⁴ The pro-choice *Webster* brief was filed on behalf of 2,887 women who had abortions and 627 of their friends and family members.⁵⁵ One goal of the brief was to counteract the stereotype that women are not capable of thoughtful decision-making; the ultimate point of the brief was to “underscore the importance of enabling each woman . . . to decide whether she should bear a child.”⁵⁶ The voices in the brief appeared in both the argument section and the appendices to the brief (which include more than sixty letters from women who described their abortions and from friends and family who described, among other things, the experience of women they knew who died having illegal abortions).⁵⁷

The second *Webster* voices brief, filed by several pro-life organizations (including Feminists for Life of America), challenged *Roe*.⁵⁸ The goal of the brief was to “develop more influence in the antiabortion movement by attracting all those moderates on the abortion fence.”⁵⁹ The brief asserted that:

Studies and statistics cannot adequately describe the tragedy of the abortion establishment’s exploitation of women[—]only the families of abortion’s victims and the surviving victims themselves

/id/82736062 [https://perma.cc/4DZF-HPFC] (pages 1559–63 of the embedded PDF).

53. *Webster*, 492 U.S. at 500–01.
54. EDWARDS, *supra* note 6, at 354.
55. Brief for the Amici Curiae Women Who Have Had Abortions and Friends of Amici Curiae in Support of Appellees (Names of 2887 Amici Curiae and 627 Friends of Amici Curiae Set Forth in App. A) at app. A, *Webster*, 492 U.S. 490 (No. 88–605) [hereinafter *Webster* Brief I].
56. Sarah E. Burns, *Notes from the Field: A Reply to Professor Colker*, 13 HARV. WOMEN’S L.J. 189, 198–99 (1990).
57. See generally *Webster* Brief I, *supra* note 55.
58. Brief for Feminists for Life of America et al., as Amici Curiae in Support of Appellants at 1–5, *Webster*, 492 U.S. 490 (No. 88–605) [hereinafter *Webster* Brief II].
59. Mary Ziegler, *Women’s Rights on the Right: The History and Stakes of Modern Pro-Life Feminism*, 28 BERKELEY J. GENDER L. & JUST. 232, 254 (2013) (quoting Pamela Reynolds, *A Different Voice in the Abortion Debate*, BOS. GLOBE, Aug. 11, 1989, at 52).

can adequately describe the pain they have endured. Therefore, *Amici* have lodged with the Court a volume containing the testimonies of abortion's victims.⁶⁰

The women's voices were interwoven with the argument and also appeared printed in full in the appendices and in a separate volume filed with the Court.⁶¹ The brief included accounts of women's experiences during their abortions,⁶² with the mental and physical aftermath of abortions,⁶³ and of family members of women who died following abortions.⁶⁴

In 2006, another pro-life amicus voices brief was filed in *Gonzales v. Carhart*⁶⁵ on behalf of Sandra Cano, the former "Mary Doe" in *Doe v. Bolton*⁶⁶ and 180 other women "injured by abortion."⁶⁷ The voices in the brief appeared in footnotes and appendices, reinforcing the arguments made in the text by offering personal details of the women's negative post-abortion experiences.⁶⁸ Justice Kennedy cited the brief in his opinion.⁶⁹

60. Webster Brief II, *supra* note 58, at 3.

61. *Id.* at 3 n.4, 13–15, 17–18, 27–28, 1A–28A.

62. *Id.* at 27 ("I was given a saline abortion at four months and I never once was told of the pain involved during the injection of the saline solution into my womb. Neither was I told of the pain involved in labor, nor even that my body would go into labor to reject the struggling, dying baby that was being burned alive in my uterus.").

63. *Id.* at 13–15 ("I was not told what abortion itself could do to me in the years to come, only that it was 'safe and simple'. I was not told that I would *abuse myself with alcohol, try to kill myself, develop an eating disorder, and have terrible dreams.* Worst of all, I was not told that I might never have another child. It has been 14 years since my 'safe and simple' abortion and *I have never been able to have another child.*").

64. *Id.* at 15–20 ("I am the mother of Belinda A. Byrd, victim of abortionists at 426 E. 99th Street in Inglewood. I am also the grandmother of her three young children who are left behind and motherless. I cry every day when I think how horrible her death was.").

65. 550 U.S. 124 (2007).

66. 410 U.S. 179 (1973).

67. Brief of Sandra Cano, the Former "Mary Doe" of *Doe v. Bolton*, & 180 Women Injured by Abortion as Amici Curiae in Support of Petitioner, *Gonzales*, 550 U.S. 124 (No. 05-380) [hereinafter *Gonzales Brief*].

68. *See, e.g., id.* at 22–24 & nn.80–88. The brief's appendices are exclusively devoted to women's stories. *Id.* at 1A–96aa.

69. *Gonzales*, 550 U.S. at 159 ("While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained.").

More recently, *Whole Woman's Health v. Hellerstedt*⁷⁰ included seventeen voices briefs from amici: eleven on the pro-choice side and six on the pro-life side.⁷¹ Five voices briefs were filed by individuals and twelve by organizations. Among them was a pro-choice brief that attracted national media attention.⁷² The briefs included a wider variety of personal narratives offered to both challenge and defend the restrictions at issue. For example, they included personal narratives of both positive and negative experiences with abortion⁷³ and of the effects of the contested restrictions on particular groups of women in Texas.⁷⁴

Eventually, voices briefs began appearing in LGBTQ rights cases as well.⁷⁵ The first classic voices brief in this category of cases was filed in support of the challenge to the Defense of Marriage Act in *United States v. Windsor*⁷⁶ and in *Hollingsworth v. Perry*.⁷⁷ The brief presented the first-person narratives from children raised in same-sex families and of LGBTQ teenagers who were adversely affected by governmental

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70. 579 U.S. 582 (2016), *abrogated by* *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).
71. Docket, *Whole Woman's Health*, 579 U.S. 582 (No. 15-274) <https://www.supremecourt.gov/search.aspx?filename=/docketfiles/15-274.htm> [<https://perma.cc/7RXR-DSX8>].
72. See Adam Liptak, *Eyes on Kennedy, Women Tell Supreme Court Why Abortion Was Right for Them*, N.Y. TIMES (Feb. 29, 2016), <https://www.nytimes.com/2016/03/01/us/politics/abortion-supreme-court-women-explain-choices.html> [<https://perma.cc/6GQB-2KHQ>]; Ruth Marcus, *In a Supreme Court Brief, Lawyers Bravely Tell Their Own Abortion Stories*, WASH. POST (Jan. 26, 2016, 8:22 PM), https://www.washingtonpost.com/opinions/in-a-supreme-court-brief-lawyers-tell-their-own-abortion-stories/2016/01/26/19c410fa-c457-11e5-a4aa-f25866ba0dc6_story.html [<https://perma.cc/R3GW-ESDG>].
73. See, e.g., Amicus Curiae Brief of 3,348 Women Injured by Abortion and the Justice Foundation in Support of Respondents for Affirmance at 24–25, 29–30, 33, 35–36, *Whole Woman's Health*, 579 U.S. 582 (No. 15-274) (anti-*Roe*); Brief of Amici Curiae Kate Banfield et al. in Support of Petitioners at 12–34, *Whole Woman's Health*, 579 U.S. 582 (No. 15-274) (pro-*Roe*).
74. See, e.g., Brief of Amicus Curiae African-American & Hispanic-American Organizations in Support of Respondents at 5–6, 8–16, 24, *Whole Woman's Health*, 579 U.S. 582 (No. 15-274) (anti-*Roe* voices on the positive effect of the contested restrictions on African-Americans and Latinas in Texas); Brief of National Latina Institute for Reproductive Health, et al. as Amici Curiae Supporting Petitioners at 2–4, 6–16, 19–38, *Whole Woman's Health*, 579 U.S. 582 (No. 15-274) (pro-*Roe* voices on the negative effect of the contested restrictions on Latinas in Texas).
75. Edwards, *Hearing Voices*, *supra* note 4, at 1346–47 (noting that the earliest hint at nonparty storytelling in these cases was in *Lawrence v. Texas*, 539 U.S. 558 (2003)).
76. 570 U.S. 744, 749–52 (2013).
77. 570 U.S. 693 (2013).

disapproval of same-sex families.⁷⁸ It noted that these children’s stories are often omitted from the debate about marriage equality, even though children of same-sex marriages “are uniquely qualified to speak about how their families look, feel, and function and how the availability—or unavailability—of marriage as an option for their parents colors their daily lives,”⁷⁹ and the effect of marriage inequality on LGBTQ youth is to “question their own dignity and self-worth.”⁸⁰

By the time *Obergefell v. Hodges* reached the Court, the number of voices briefs increased dramatically. As noted in the Introduction, there were sixteen voices briefs filed in the case, almost equally divided between the two sides of the case.⁸¹ As in the earlier marriage equality cases, some of the briefs offered personal narratives from children of same-sex marriages.⁸² Other voices amici included individuals who had experience with sexual orientation change therapies,⁸³ individuals and organizations who are “religious dissenters” concerned about the First Amendment implications of the decision,⁸⁴ and plaintiffs from previous marriage equality cases.⁸⁵

78. Brief of Amici Curiae Family Equality Council et al. in Support of Respondents Perry, Stier, Katami, Zarrillo, City & County of San Francisco, and Edith Schlain Windsor, in her Capacity as Executor of the Estate of Thea Clara Spyer, Addressing the Merits and Supporting Affirmance at 1–3, 10–19, 23–29, 31–37, *Hollingsworth*, 570 U.S. 693 (Nos. 12-144, 12-307).

79. *Id.* at 2–3.

80. *Id.* at 3.

81. Edwards, *Telling Stories*, *supra* note 2, app. A at 89–90.

82. *See, e.g.*, Brief of Stefanowicz & Shick, *supra* note 12, at 6–14 (anti-marriage equality); Brief of Cuyahoga County, Ohio, *supra* note 12, at 11–13, 17–19 (pro-marriage equality).

83. Brief of Survivors of Sexual Orientation Change Therapies, *supra* note 13, at 9 (“Like many others who voluntarily seek out [sexual orientation change therapy] SOCE, John was initially hopeful at the prospect of changing his sexual orientation, and for a period believed that he was making progress. But it was not long before SOCE began to have negative consequences on his life. As part of his ‘reparative therapy,’ John was counseled that homosexuality was caused by a dysfunctional family life and upbringing and was encouraged to tell his parents about his struggles, which necessarily involved confronting them with what he had come to believe were their failures in raising him. This completely upended John’s relationship with his parents and their relationship with each other, as he blamed them and they blamed each other for his homosexual ‘problem.’”)

84. Brief of Amici Curiae Religious Organizations, Public Speakers, and Scholars Concerned About Free Speech in Support of Respondents at 1–10, 12–27, 29–32, *Obergefell v. Hodges*, 576 U.S. 644 (2015) (Nos. 14-556, 14-562, 14-571, 14-574).

85. Brief of Ninety-Two Plaintiffs in Marriage Cases in Alabama, Alaska, Arkansas, Indiana, Kansas, Louisiana, Mississippi, Missouri, Montana,

Only three other cases have included voices briefs among the amicus filings. Following the first three abortion-rights voices briefs, voices briefs were not used in any case for seventeen years. Four more briefs were filed from 2006 to 2012.⁸⁶ Following this came the “explosion” of these nonparty briefs⁸⁷: sixteen in *Obergefell* and seventeen in *Whole Woman’s Health v. Hellerstedt*.⁸⁸ The next Subpart analyzes the implications of this explosion.⁸⁹

B. Voices Briefs: A Potential Future

The original voices briefs were part of a long-term litigation strategy attached to a particular social movement.⁹⁰ The cases involved deeply personal constitutional issues and the briefs attempted to humanize those issues for the Court. The first voices briefs in the abortion and marriage equality cases sought to do this in specific ways: in the first abortion voices briefs, to normalize abortions and show the Court examples of women’s lives before and after *Roe*, and in the first marriage equality voices briefs, to demonstrate the harms caused by the lack of legal recognition of same-sex relationships. The more recent explosion of voices briefs represents an expansion in the number of personal narratives offered to the Court. They represent a range of personal narratives on both sides of the issues.

Nebraska, North Carolina, North Dakota, South Carolina, South Dakota, and Texas as Amici Curiae in Support of Petitioners at 1–2, 4, 18, 29–34, app. at 1a–20a., *Obergefell*, 576 U.S. 644 (No. 14-556, 14-562, 14-571, 14-574).

86. Edwards, *Telling Stories*, *supra* note 2, app. A at 88–89.

87. *Id.* at 32.

88. *Id.* app. A at 89–91.

89. At the time of writing, I was not aware of any analysis of the use of voices briefs in *Dobbs v. Jackson Women’s Health Organization*, where 140 amicus briefs were filed. See, e.g., Ellena Erskine, *We Read All the Amicus Briefs in Dobbs so You Don’t Have To*, SCOTUSBLOG (Nov. 30, 2021, 5:24 PM), <https://www.scotusblog.com/2021/11/we-read-all-the-amicus-briefs-in-dobbs-so-you-dont-have-to/> [<https://perma.cc/U5UT-DNXY>].

90. The feminist movement is rich with storytelling. See generally Kaisa Ilmonen, *Feminist Storytelling and Narratives of Intersectionality*, 45 SIGNS: J. WOMEN CULTURE & SOC’Y 347 (2020); Adichie *Captures Power of Storytelling in Feminism, Empowerment During Chancellor’s Lecture*, VAND. UNIV. (Nov. 22, 2019, 10:57 AM), <https://news.vanderbilt.edu/2019/11/22/adichie-captures-power-of-storytelling-in-feminism-empowerment-during-chancellors-lecture/> [<https://perma.cc/XVV5-9Q7Z>]; Moira Donegan, *Rebecca Solnit’s Faith in Feminist Storytelling*, NEW YORKER (Apr. 5, 2017) <https://www.newyorker.com/books/page-turner/rebecca-solnits-faith-in-feminist-storytelling> [<https://perma.cc/LT2U-AC6K>].

Despite their increasing prominence, it is difficult to assess the specific persuasive effect that voices briefs might have had.⁹¹ This is generally true of all amicus briefs.⁹² In some cases, the Court's opinions have echoes of the voices that might be indicia of their effectiveness.⁹³ For example, Justice Kennedy's opinion in *Obergefell* cites "safeguard[ing] children and families" as one of the bases for protecting the right to marry.⁹⁴

The use of voices briefs can also raise some objections. Linda Edwards characterizes the three main objections as reliability, relevance, and the concern "that non-party stories may actually be adjudicative facts in disguise."⁹⁵ However, she ultimately concludes that "preserving a role for voices briefs is preferable to limiting their use in ways that ignore modern cognitive science and ancient rhetorical principles, that silence the voices of the governed, or that secretly smuggle in the adoption of a limiting jurisprudential view."⁹⁶

The recent uptick in the number of voices briefs, and in amicus briefing overall, raises the question of whether voices briefs might be used in other contexts involving deeply personal issues.⁹⁷ One voices brief has already been used in a completely different type of case, involving the extraterritorial application of the Alien Tort Statute.⁹⁸

91. See, e.g., Edwards, *Hearing Voices*, *supra* note 4, at 1338 (noting that with respect to the Thornburgh Brief, "[w]e cannot know for certain what impact Paltrow's daring brief may have had on saving *Roe* by the narrowest of margins").

92. See, e.g., Kearney & Merrill, *supra* note 16, at 745 ("Attitudes within the legal community about the utility and impact of amicus briefs vary widely.").

93. Edwards, *Telling Stories*, *supra* note 2, at 43–46 (finding "echoes" of voices briefs in cases such as *Planned Parenthood of Southeastern Pennsylvania v. Casey*, *Gonzales v. Carhart*, and *Obergefell v. Hodges*).

94. *Obergefell v. Hodges*, 576 U.S. 644, 667 (2015).

95. Edwards, *Telling Stories*, *supra* note 2, at 76–79. Edwards goes on to note that these problems are further exacerbated by the operation of the Court's procedural rules. *Id.* at 79–81. Edwards also suggests three approaches that can function as a check on the validity of voices briefs. *Id.* at 82–86.

96. *Id.* at 81.

97. This Article does not seek to compare, contrast, or equate abortion and marriage equality with potential "other contexts," rather to evaluate whether some issues involving education might be deeply personal in their own way. This question is, in some way, tied to the availability of personal narratives. It is also worth noting that some have criticized the overall uptick in the use of amicus briefs. Kearney & Merrill, *supra* note 16, at 745–46.

98. *Kiobel v. Royal Dutch Petroleum Co.* asked the Court to consider whether the Alien Tort Statute allowed a domestic cause of action for a violation

This Article also does not seek to assert that voices briefs are necessary—that they *must* or *should* be used in other cases. It acknowledges that voices briefs *could* be useful, depending on the nature of the issues involved in the case, the availability of different types of nonparty personal narratives, and the effect the voices briefs might have. The availability of different types of personal narratives includes both stories that might be unfamiliar to the judges’ lived experiences and stories that are not represented by the parties themselves. It is possible that there are a variety of contexts in which voices briefs could be deployed to good use. This Article investigates just one: education-related cases.

II. VOICES BRIEFS IN EDUCATION-RELATED SUPREME COURT CASES

The field of education law encompasses a wide variety of issues related to the provision of education. The earliest education law cases were about expanding access to K-12 public education and higher education.⁹⁹ However, it now includes a wide range of cases including issues like school funding, student rights, teacher rights, school safety, discrimination, bullying and safety, discipline, privacy, special education, and school choice (including homeschooling and charter schools). These major topic areas, which “grow and change, are derived from some of the most volatile controversies of our times,” and “[a]lmost every education-related legal dispute is accompanied by important public policy considerations.”¹⁰⁰

Over the past twenty years, the Supreme Court has heard education-related cases involving, for example, the constitutionality of

of international law that occurred outside the United States. 569 U.S. 108, 111–13 (2013). The voices amici were eleven Jewish former residents of Iran who were forced to flee Iran because of religiously motivated persecution. Brief of Eleven Jewish Former Residents of Iran Whose Family Members “Disappeared,” as Amici Curiae in Support of Petitioners, at 1, *Kiobel*, 569 U.S. 108 (No. 10-1491). Their case against the former president of Iran was pending in the Eastern District of Virginia and was stayed pending the outcome of *Kiobel*. *Id.* The brief sets forth arguments that demonstrate the “propriety” and “limitations” of extraterritorial application of the Alien Tort Statute. *Id.* at 4–12. The appendix set forth the personal narratives of each individual amici and their families. *Id.* app. A at a1–a15.

99. See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (holding separate-but-equal doctrine unconstitutional in public education); *Sweatt v. Painter*, 339 U.S. 629, 636 (1950) (expanding admissions to law schools by holding University of Texas’s race-based admissions policy unconstitutional); *United States v. Virginia*, 518 U.S. 515, 557–58 (1996) (expanding admissions to state-run military college to women).

100. STUART BIEGEL, ROBERT KIM & KEVIN WELNER, *EDUCATION AND THE LAW* 1 (5th ed. 2019).

suspicionless drug testing,¹⁰¹ the constitutionality of school voucher programs,¹⁰² the use of race in school assignments,¹⁰³ the constitutionality of a strip search of a middle schooler,¹⁰⁴ the use of race-conscious admissions in higher education,¹⁰⁵ and the level of educational benefit school districts must provide to students with disabilities under the Individuals with Disabilities Education Act.¹⁰⁶

Party briefs in education law cases before the Court often invoke personal narratives about the main parties to the case. Modern education law cases can also draw a large number of amicus filers.¹⁰⁷ However, a review of major education law cases that made their way to the Supreme Court reveals few voices among amicus submissions.¹⁰⁸ Nothing even resembling a voices brief appears until the modern era and, even then, there are few such instances.¹⁰⁹

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101. See *Bd. of Educ. v. Earls*, 536 U.S. 822, 825 (2002).
102. See *Carson v. Makin*, 142 S. Ct. 1987, 1993 (2022); see also *Zelman v. Simmons-Harris*, 536 U.S. 639, 643–44 (2002).
103. See *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1.*, 551 U.S. 701, 709–11 (2007).
104. See *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 368 (2009).
105. See *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2156–57 (2023); see also *Fisher v. Univ. of Tex. at Austin (Fisher II)*, 579 U.S. 365, 369 (2016); *Fisher v. Univ. of Tex. at Austin (Fisher I)*, 570 U.S. 297, 300–03 (2013); *Grutter v. Bollinger*, 539 U.S. 306, 311 (2003); *Gratz v. Bollinger*, 539 U.S. 244, 249–51 (2003).
106. See *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 580 U.S. 386, 390 (2017).
107. See, e.g., Docket, *Fisher I*, 570 U.S. 297 (No. 11-345), <https://www.supremecourt.gov/search.aspx?filename=/docketfiles/11-345.htm> [<https://perma.cc/P72G-SMSV>] (101 amicus filers); Docket, *Parents Involved in Cmty. Schs.*, 551 U.S. 701 (No. 05-908), <https://www.supremecourt.gov/search.aspx?filename=/docketfiles/05-908.htm> [<https://perma.cc/479Z-YW59>] (sixty-one amicus filers); Docket, *Zelman*, 536 U.S. 639 (No. 00-1751), <https://www.supremecourt.gov/search.aspx?filename=/docketfiles/00-1751.htm> [<https://perma.cc/QDB7-Y6AP>] (fifty amicus filers).
108. These cases include *Endrew F.*, 580 U.S. 386; *Fisher I*, 570 U.S. 297; *Redding*, 557 U.S. 364; *Parents Involved in Cmty. Schs.*, 551 U.S. 701; *Grutter*, 539 U.S. 306; *Gratz*, 539 U.S. 244; *Bd. of Educ. v. Earls*, 536 U.S. 822 (2002); *Zelman*, 536 U.S. 639; *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000); *Missouri v. Jenkins*, 515 U.S. 70 (1995); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986); *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).
109. For example, of the ninety-three amici filings in *Fisher I*, which considered the constitutionality of the University of Texas’s admission program, only two could be characterized as including voices, and neither centered personal narrative as a classic voices brief would. See Brief of United States Student Association as Amicus Curiae in Support of Respondents

The earliest brief that could be considered a voices brief in a K-12 education-related case was an amicus brief in *Parents Involved in Community Schools v. Seattle School District No. 1*.¹¹⁰ Here the Court considered the constitutionality of school assignment systems in Seattle, Washington, and Louisville, Kentucky. Both districts' systems used racial classifications to achieve diversity and/or avoid racial isolation.¹¹¹ The brief in question presented social science research about the long-term benefits of K-12 integration for students and society.¹¹² It included both quantitative and qualitative research; the latter included interviews of graduates from integrated school districts, including the districts at issue in the case.¹¹³ The voices contained in the brief *are* the research results that the brief is presenting.

To date, at best, voices briefs have been underutilized in education-related cases. This Article seeks to determine where voices briefs might have been or might be used in the future to positive effect. As noted above, this involves consideration of the underlying issue(s), the availability of useful personal narratives, and the effect voices briefs could have in the case.

As an initial matter, the introduction of personal narratives into education-related cases is a tempting proposition because courts so often claim an inability to understand the everyday realities in schools.¹¹⁴ However, this alone is not enough to justify the use of voices briefs in these cases. There is a certain amount of default intimacy in K-12 education, both because of the nature of compulsory education and the doctrine of *in loco parentis*, that suggests the potential for personal issues to be involved in at least some cases. The doctrine of “[i]n *loco parentis* perceives the role of the school in dealing with a child

at 11–12, 12 n.11, *Fisher I*, 570 U.S. 297 (No. 11-345) (using two students' stories to show the effect of diversity in the classroom); *see also* Brief for Amici Curiae Current and Former Student Body Presidents of University of Texas at Austin in Support of Respondents at 1–8, *Fisher II*, 579 U.S. 365 (No. 14-981) (noting generalized/aggregate experiences of past student body presidents at the University of Texas-Austin).

110. 551 U.S. 701 (2007).

111. *Id.* at 709–11, 715–18.

112. Brief of Professors Amy Stuart Wells et al. as Amici Curiae in Support of Respondents at 8–30, *Parents Involved in Cmty. Schs.*, 551 U.S. 701 (Nos. 05-908, 05-915).

113. *Id.* at 16.

114. *See, e.g.*, *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) (“By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values.”).

as an extension of the concept of the state as *parens patrie*.”¹¹⁵ Thus, I decided to start this inquiry by looking at past Supreme Court cases involving K-12 education-related issues. I chose two cases: one involving student privacy rights¹¹⁶ and the other involving the rights of students with disabilities under the Individuals with Disabilities Education Act (IDEA).¹¹⁷

Both cases had high stakes because they involved the schools’ ability to give or take away rights and resources that affected students’ daily lives. Both have two kinds of potentially useful personal narratives: stories that are different from the judge’s own experience(s) and stories from non-parties who will be affected by the holding but whose experience is very different from the parties and other amici. Finally, both issues present a situation where voices briefs may have had a particular effect or could be used to positive effect in the future.

This is not to say that all education-related cases are as deeply personal as the types of cases in which voices briefs have typically appeared. Most are likely not. Education-related cases are probably best viewed as falling along a spectrum, one end of which includes cases where voices briefs are more appropriate.

The two Subparts that follow consider the specific issues in each of the two cases, the personal narratives invoked, the way voices briefs might have been used in the cases, and the potential for future use of voices briefs on the issue. The final Subpart considers two more recent cases involving student rights: *G.G. v. Gloucester County School Board*¹¹⁸ and *Mahanoy Area School District v. B.L.*¹¹⁹ It looks at the two cases in contrast and discusses why one case features amicus briefs that could be characterized as voices briefs while the other does not.

A. Safford Unified School District No. 1 v. Redding

In *Safford Unified School District No. 1 v. Redding*, the Court considered the constitutionality of the strip search of a middle schooler.¹²⁰ On October 8, 2003, two female school employees strip-searched eighth-grade student Savana Redding in the nurse’s office of

115. Dennis J. Christensen, *Educational Law: Democracy in the Classroom: Due Process and School Discipline*, 58 MARQ. L. REV. 705, 706 (1975) (“The school, under this concept, performs the functions of surrogate parent while the child is at school since the parent is unable to care for the child.”).

116. *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 368 (2009).

117. *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 580 U.S. 386, 390–97 (2017).

118. 822 F.3d 709 (4th Cir.), *cert. granted*, 580 U.S. 951 (2016), *vacated and remanded*, 580 U.S. 1168 (2017).

119. 141 S. Ct. 2038 (2021).

120. 557 U.S. at 368.

her Arizona middle school.¹²¹ The assistant principal called Redding to his office and told her that a classmate had indicated Redding was giving ibuprofen and naproxen pills to her fellow students.¹²² Redding denied this and consented to a search.¹²³ The strip search, which was conducted by a school secretary and the school nurse, followed a backpack search that yielded no contraband.¹²⁴ School officials testified that Redding did not appear nervous or embarrassed during the search,¹²⁵ but Redding called the search “‘the most humiliating experience’ of her life.”¹²⁶

The issue, then, was whether the school had violated Savana Redding’s Fourth Amendment rights. In addition to the personal nature of Redding’s own constitutional right, the issue of the scope of these rights while in school is tied to larger issues about school discipline and its relationship to the school-to-prison pipeline.¹²⁷

A voices brief in this case could have humanized and concretized the issue for the Court. That the Justices had a hard time understanding the human side of the issue became clear at oral argument, where the eight male justices showed a keen underappreciation of what the experience of the search must have been like for Savana Redding. Justice Stephen Breyer asked whether the search was different from asking Redding to “change into a swimming suit or your gym clothes,”¹²⁸ because, “why is this a major thing to say strip down to

121. *Id.* at 371–73.

122. *Id.* at 368.

123. *Id.*

124. *Id.* at 368–69.

125. Adam Liptak, *Strip-Search of Girl Tests Limit of School Policy*, HERALD-TRIBUNE (Mar. 24, 2009, 5:21 AM), <https://www.heraldtribune.com/story/news/2009/03/24/strip-search-girl-tests-limit/28701408007/> [<https://perma.cc/EPR7-3YFF>].

126. Dahlia Lithwick, *Search Me: The Supreme Court Is Neither Hot nor Bothered by Strip Searches*, SLATE (Apr. 21, 2009, 7:49 PM), <https://slate.com/news-and-politics/2009/04/the-supreme-court-takes-failing-to-get-it-to-a-new-level-in-a-strip-search-case.html> [<https://perma.cc/P3VP-8HCP>].

127. *See, e.g.*, Catherine Y. Kim, *Policing School Discipline*, 77 BROOK. L. REV. 861, 862 & n.8 (2012). The term “‘school-to-prison pipeline’ refers to policies and practices that push our nation’s schoolchildren, especially our most at-risk children, out of classrooms and into the juvenile and criminal justice systems.” *What Is the School-to-Prison Pipeline?*, ACLU (June 6, 2008), <https://www.aclu.org/documents/what-school-prison-pipeline> [<https://perma.cc/WWL3-52GU>].

128. Transcript of Oral Argument at 44:21–23, *Safford Unified Sch. Dist. No. 1*, 557 U.S. 364 (No. 08-479).

your underclothes, which children do when they change for gym[?]"¹²⁹ Justice Ruth Bader Ginsburg, the lone female Justice on the Court at that time, responded by saying, "It wasn't just that they were stripped to their underwear. They were asked to shake their bra out, to—to shake, stretch the top of their pants and shake that out."¹³⁰ This prompted Justice Breyer to respond, "In my experience when I was 8 or 10 or 12 years old, you know, we did take our clothes off once a day, we changed for gym, okay? And in my experience, too, people did sometimes stick things in my underwear."¹³¹ Following laughter in the courtroom,¹³² he continued, "Or not *my* underwear. Whatever. Whatever. I was the one who did it? I don't know. I mean, I don't think it's beyond human experience."¹³³

Of the Redding argument, Ginsburg later noted, "They have never been a 13-year-old girl. . . . I didn't think that my colleagues, some of them, quite understood."¹³⁴ Here it becomes clear that the Justices' personal experiences were far removed from the situation the case presented.

The broader implications of the issue also present an opportunity for inclusion of different personal narratives. Justice Ginsburg's concern about the experience of a thirteen-year-old girl is well-founded, but students of all ages and genders may have had experiences that warranted telling. The Justices might also have benefited from hearing stories about the consequences that followed similar searches where contraband was discovered.

Nevertheless, there were no voices briefs among the six amicus briefs filed in the *Redding* case. One brief, however, had a framework

129. *Id.* at 45:9–12.

130. *Id.* at 45:19–22.

131. *Id.* at 58:2–5.

132. *Id.* at 58:6. Commentator Dahlia Lithwick characterized this as "explosive laughter" and said she had never seen Justice Clarence Thomas laugh harder. Lithwick, *supra* note 126.

133. Transcript of Oral Argument, *supra* note 128, at 58:7–10 (emphasis added).

134. These comments were made in an atypical interview Justice Ginsburg gave to Supreme Court reporter Joan Biskupic while the case was still pending. Joan Biskupic, *Ginsburg: The Court Needs Another Woman*, USA TODAY, May 6, 2009, at A1, *partially reprinted at* <https://abcnews.go.com/Politics/ginsburg-court-woman/story?id=7513795> [<https://perma.cc/79GJ-6WVG9>]. These comments "had the appearance of someone who was either airing grievances publicly that tradition would have dictated remain private (at least for the moment) or attempting to use the media to reach her colleagues in the hopes of shaping a still-uncertain outcome." JUSTIN DRIVER, THE SCHOOLHOUSE GATE: PUBLIC EDUCATION, THE SUPREME COURT, AND THE BATTLE FOR THE AMERICAN MIND 221 (2018).

that could have incorporated different personal narratives. The brief, filed in support of Redding, was from a group of amici that included social workers, psychologists, and other child advocates.¹³⁵ The brief asserted that:

Social science research demonstrates that strip searches can traumatize children and adolescents and result in serious emotional damage. The effects, both acute and long-term, can be akin to those of psychological maltreatment. Likewise, states, school boards, and courts nationwide have recognized that strip-searching children is severely intrusive.¹³⁶

The brief discussed developmental differences between children and adults and social science research regarding the effect of strip searches.¹³⁷ Most of the narrative description in the brief was presented on behalf of a group and/or filtered through the evaluation of a medical professional.¹³⁸ The only personal narrative in the brief, however, is Savana Redding's.¹³⁹ The Court later cited the brief in its opinion.¹⁴⁰

The social workers' brief could have been buttressed by a brief containing recollections of anonymized, similarly situated students. It could have provided eight of the Justices—who, as Justice Ginsburg noted, had never been thirteen-year-old girls, but who also had presumably never been strip-searched by school officials at all—with a host of personal narratives that explain the impact that this particular

135. Brief of Amici Curiae The National Ass'n of Social Workers and its Arizona Chapter et al. in Support of Respondent April Redding, *Safford Unified Sch. Dist. No. 1*, 557 U.S. 364 (No. 08-479).

136. *Id.* at 3.

137. *Id.* at 6–7.

138. *Id.* at 9–10. A psychiatrist who evaluated a fifteen-year-old who had been strip-searched concluded, “Quite consistently, she showed symptoms of intense anxiety, loss of concentration, loss of sleep. She gave up her plans to go to an out-of-town college and, in fact, had to repeat a semester in school.” *Id.* at 10 (quoting Dennis Havesi, *Jury Awards \$125,000 to Student Strip-Searches at a Bronx School*, N.Y. TIMES (Nov. 24, 1988), <https://www.nytimes.com/1988/11/24/nyregion/jury-awards-125000-to-student-strip-searched-at-a-bronx-school.html> [https://perma.cc/ZR7T-F42F]).

139. *Id.* at 13 (“I was embarrassed and scared, but felt I would be in more trouble if I did not do what they asked. I held my head down so that they could not see that I was about to cry. . . . The strip search was the most humiliating experience I have ever had. Mrs. Romero and Mrs. Schwallier did not look away while I was taking off my clothes. They did nothing to respect my privacy. . . . I felt offended by the accusations made against me and violated by the strip search.”) (quoting J.A. at 24a–25a, *Safford Unified Sch. Dist. No. 1*, 557 U.S. 364 (No. 08-479)).

140. *Safford Unified Sch. Dist. No. 1*, 557 U.S. at 367, 375.

kind of search has on students of all ages and genders. Such a brief could have expanded the Court's view of who might be humiliated by a school strip search and why, as well as explained the close ties to school searches and larger policy issues about school discipline.

Of course, a voices brief wasn't necessary to change the outcome of *Redding*—the Court found in *Redding's* favor 8-1, though it also granted qualified immunity to the school officials.¹⁴¹ However, such a brief might have pushed the Court to consider whether the standard for such searches should be higher. *Redding* prohibits strip searches when school officials lack “reasonable suspicion of danger or of resort to underwear for hiding evidence of wrongdoing.”¹⁴² In *Redding's* case, this means that the search might have been justified had the contraband in question been something more potent than ibuprofen or the assistant principal had more confidence that the ibuprofen was indeed hidden in her underwear. This is purely speculative, but more nuanced consideration of the invasiveness of the search for all students *might* have led the Court to adopt a rule that required both more dangerous contraband *and* knowledge regarding its location.

At the same time, a voices brief on behalf of school administrators might have told stories similar to the one Justice Thomas found in the popular press. In his dissent from the Court's conclusion that the search was unconstitutional, Justice Thomas cited a magazine article to justify “a search extending to any area where small pills could be concealed” because the middle schooler “would not have been the first person to conceal pills in her undergarments. . . . Nor will she be the last after today's decision, which announces the safest place to secrete contraband in school.”¹⁴³ Or, such a brief might have told stories illustrating the difficult, split-second decisions school officials have to make. (Of course, given the Court's tendency to favor school administrators in this context, such a brief might not have been necessary.)

Future cases involving student searches may present the same opportunities for voices briefs as *Redding* did. For example, the Court has yet to definitively rule on the question of whether searches by school resource officers should be entitled to the lower Fourth Amendment standard extended to searches by school officials.¹⁴⁴ Most state courts

141. *Id.* at 367, 378–79.

142. *Id.* at 377.

143. *Id.* at 390, 395, 398 (Thomas, J., dissenting in part) (citing Ken Schroeder, *Get Teens Off Drugs*, 72 EDUC. DIG. 75 (2006)).

144. School resource officers are “sworn law enforcement officers responsible for safety and crime prevention in schools”; they are not school officials in the same way that a principal, nurse, or teacher are school officials. *Supporting Safe Schools*, CMTY. ORIENTED POLICING SERVS. OFFICE, U.S. DEP'T OF JUST., <https://cops.usdoj.gov/supportingsafeschools> [<https://perma.cc/ZPR9-KQKC>]. *See generally* Josh Gupta-Kagan,

hold them to a lower standard.¹⁴⁵ Should the Court decide to resolve the issue, the same or similar opportunities for voices briefs as in *Redding* should follow.

B. Endrew F. v. Douglas County School District

Endrew F. v. Douglas County School District is a 2017 case involving the Individuals with Disabilities Education Act (IDEA).¹⁴⁶ The IDEA offers federal funds to states that agree to offer a “free appropriate public education” (FAPE) to children with disabilities, subject to the terms of an “individualized education program” (IEP) in the “least restrictive environment.”¹⁴⁷ The Court’s prior consideration of the issue, in *Board of Education v. Rowley*,¹⁴⁸ led the Court to conclude that an IEP must be “reasonably calculated to enable the child to receive educational benefits.”¹⁴⁹ The question before the Court in *Endrew F.* was what kind of educational benefits the school district must provide.

Thus, at issue in the case was the everyday in-school experience of students who are protected by the IDEA. Ultimately, the *Endrew F.* Court concluded that the educational benefit must meet a “more than *de minimis*” standard.¹⁵⁰ The Court did not determine what an “appropriate” education would look like on a case-by-case basis because the appropriateness of an IEP “turns on the unique circumstances of the child for whom it was created.”¹⁵¹

The idea of “unique circumstances” immediately calls to mind an opportunity to use personal narrative to explain what those unique circumstances might be, beyond the experience of Endrew himself. But how much did the Court see the many kinds of “unique circumstances” that might be involved across a range of students? For example,

Reevaluating School Searches Following School-to-Prison Pipeline Reforms, 87 *FORDHAM L. REV.* 2013 (2019) (arguing that recent state and federal school-discipline reforms put school resource officers in a law enforcement role and, thus, require “reexamination” of permitting school searches under reasonable suspicion).

145. Gupta-Kagan, *supra* note 144, at 2024–27.

146. 580 U.S. 386 (2017).

147. 20 U.S.C. §§ 1411(e)(3)(F), 1412(a)(1), (4), (5).

148. 458 U.S. 176 (1982).

149. *Endrew F.*, 580 U.S. at 392–94 (quoting *Rowley*, 458 U.S. at 207).

150. *Id.* at 397, 402 (quoting *Endrew F. ex rel. Joseph F. v. Douglas Cnty. School Dist.* RE–1, 798 F.3d 1329, 1338 (10th Cir. 2015)) (“[A] student offered an educational program providing ‘merely more than *de minimis*’ progress from year to year can hardly be said to have been offered an education at all.”).

151. *Id.* at 404.

consider the petitioners in the two seminal cases. First, as the Court described in its decision in *Andrew F.*:

Amy Rowley was a first grader with impaired hearing. Her school district offered an IEP under which Amy would receive instruction in the regular classroom and spend time each week with a special tutor and a speech therapist. The district proposed that Amy’s classroom teacher speak into a wireless transmitter and that Amy use an FM hearing aid designed to amplify her teacher’s words; the district offered to supply both components of this system. But Amy’s parents argued that the IEP should go further and provide a sign-language interpreter in all of her classes. . . . Amy was making excellent progress in school: She was “perform[ing] better than the average child in her class” and “advancing easily from grade to grade.”¹⁵²

In contrast, consider the Court’s description of petitioner Andrew F.:

Petitioner Andrew F. was diagnosed with autism at age two. Autism is a neurodevelopmental disorder generally marked by impaired social and communicative skills, “engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences.” . . . By Andrew’s fourth grade year, however, his parents had become dissatisfied with his progress. Although Andrew displayed a number of strengths—his teachers described him as a humorous child with a “sweet disposition” who “show[ed] concern[] for friends”—he still “exhibited multiple behaviors that inhibited his ability to access learning in the classroom.” Andrew would scream in class, climb over furniture and other students, and occasionally run away from school. He was afflicted by severe fears of commonplace things like flies, spills, and public restrooms. As Andrew’s parents saw it, his academic and functional progress had essentially stalled.¹⁵³

The two students in these cases themselves were not similarly situated, nor are they representative of the millions of students covered by the IDEA.¹⁵⁴ The IDEA establishes a wide range of specific categories

152. *Id.* at 392 (quoting *Rowley*, 458 U.S. at 185).

153. *Id.* at 394–95 (internal citations omitted).

154. Consider, for example, some of the post-*Andrew F.* cases that have been decided in the federal appellate courts. They include an elementary school student with ADHD who also had “weakness in math and written expression, attention and executive functioning challenges, and problems with anxiety, depressed mood, oppositional behavior, and social skills” in addition to problems with “impulsivity, inattention, and ‘mood dysregulation’” (*Z.B. v. D.C.*, 888 F.3d 515, 520 (D.C. Cir. 2018) (internal

that qualify for special education. They include intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to as “emotional disturbance”), orthopedic impairments, autism, traumatic brain injury, other health impairments, and specific learning disabilities.¹⁵⁵ To qualify for services under the IDEA, a student must fit under one of these categories and have it adversely affect their educational performance.¹⁵⁶ Students across these many categories could have shared their personal narratives, the effect of *Rowley*, and future effect of *Endrew F.*

There were seventeen amicus briefs filed in *Endrew F.*: twelve for petitioner, four for respondent, and one for neither.¹⁵⁷ None can fairly be characterized as a voices brief, although some do deploy closely related approaches such as the use of social science research,¹⁵⁸ personal narratives of the children in significant past cases,¹⁵⁹ and stories of hypothetical students with hypothetical IEPs.¹⁶⁰

Additional personal narratives from students covered by the IDEA (and their parents) might have brought the issue to life for the Court. They could also have nudged the Court closer to a more precise standard regarding the educational benefits that must be provided. On the other side, the personal narratives of school administrators and teachers may also have made a valuable contribution in giving voice to

citations omitted)); a high school student with high functioning autism spectrum disorder who also suffered “symptoms of major depressive disorder, severe with active suicidal ideation” (*Doe v. Newton Pub. Schs.*, 48 F.4th 42, 50–51 (1st Cir. 2022)); and a child “afflicted with autism and pervasive developmental delays” whose accommodations included “instruction in the special education classroom, speech therapy, and occupational therapy, among other types of instruction” (*C.G. v. Waller Indep. Sch. Dist.*, 697 F. App’x 816, 817 (5th Cir. 2017)).

155. 20 U.S.C. § 1401(3)(A)(i).

156. *Id.* § 1401(3)(A)(ii).

157. Docket, *Endrew F.*, 580 U.S. 386 (No. 15-827), <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/15-827.html> [<https://perma.cc/JTF4-6MLN>].

158. See Amici Curiae Brief of Autism Speaks & The Public Interest Law Center, as Amicus Curiae in Support of Petitioner at 1, 6–7, 6 n.2, *Endrew F.*, 580 U.S. 386 (No. 15-827); Amici Curiae Brief of Disability Rights Organizations & Public Interest Centers in Support of Petitioner at 3, *Endrew F.*, 580 U.S. 386 (No. 15-827); Brief Amicus Curiae of the National Education Ass’n, in Support of Petitioner at 13–16, *Endrew F.*, 580 U.S. 386 (No. 15-827).

159. Brief for Advocates for Children of New York et al. as Amici Curiae in Support of Petitioner at 21, *Endrew F.*, 580 U.S. 386 (No. 15-827).

160. Amici Curiae Brief of the National School Boards Ass’n et al. in Support of Respondent at 12–16, *Endrew F.*, 580 U.S. 386 (No. 15-827).

the complicated nature of these cases and in justifying the Court's continued deference to school administrators.

Endrew F. was the first special education case to come before the Court in more than thirty years. The case may not have changed much in its immediate aftermath. In the year following the decision, in cases where the school district won before the Court's decision, 90 percent of those decisions were upheld.¹⁶¹

However, the case arguably queued up “the next step in the evolution of the FAPE standard”—“equality of educational opportunity.”¹⁶² And one scholar already noted, “District courts in the Third, Fifth, and Ninth Circuits have adopted detailed tests for determining if a child has received a FAPE, all of which move in the direction of an equal educational opportunity standard.”¹⁶³

Voices briefs could be an important part of this evolution—one can imagine an eventual circuit split and a case before the Court that seeks an answer on whether the IDEA might guarantee equal educational opportunity. In such a case, voices briefs could provide concrete examples of the experiences of students under the IDEA before and after *Endrew F.* as well as a breadth of personal narratives about what equal opportunity under the IDEA might provide.

*C. G.G. v. Gloucester County School Board and
Mahanoy Area School District v. B.L.*

Two more recent Supreme Court cases provide food for thought about the potential role for voices briefs in education-related cases: *G.G. v. Gloucester County School Board (Grimm)* and *Mahanoy Area School District v. B.L.* *Grimm* involved the rights of a transgender student to use the bathroom corresponding with his gender identity,¹⁶⁴ while *B.L.* concerned a free speech claim based on a post a cheerleader made on Snapchat.¹⁶⁵

In 2016, the Supreme Court granted certiorari in the case of *G.G. v. Gloucester County School Board*, but the case was never fully argued before the Court. In this case, G.G. (later identified as Gavin Grimm) sued his school board for his exclusion from the boys' restroom, despite

161. Perry A. Zirkel, *The Aftermath of Endrew F. One Year Later: An Updated Outcomes Analysis*, 352 EDUC. L. REP. 448, 451 (2018).

162. Richard D. Marsico, *From Rowley to Endrew F.: The Evolution of a Free Appropriate Public Education for Children with Disabilities*, 63 N.Y. L. SCH. L. REV. 29, 47 (2019).

163. *Id.*

164. *G.G. v. Gloucester County School Board*, 822 F.3d. 709, 714–15 (4th Cir. 2016).

165. *Mahanoy Area School District v. B.L.*, 141 S. Ct. 2038, 2042–43 (2021).

his identification as a male transgender student.¹⁶⁶ The case has a complicated procedural history, but at one point in the four years of litigation, the case was pending before the Supreme Court.¹⁶⁷ Of the sixty amicus briefs filed at that time, at least six could be called voices briefs.¹⁶⁸ Arguably, this was an appropriate case for voices briefs to appear because of the high personal stakes in the case, although their role remains challenging to analyze because the case was ultimately neither argued nor decided.

Grimm began presenting as a boy upon entering high school, which included using the boys' restroom.¹⁶⁹ After receiving complaints from parents, the Gloucester County School Board established a regulation restricting access to changing rooms and restrooms based on biological genders, providing an alternative facility for students with gender identity concerns.¹⁷⁰ This policy persisted even after Grimm commenced hormone therapy and obtained official documentation recognizing his male sex.¹⁷¹

In June 2015, Grimm filed a lawsuit against the school board, alleging discrimination in violation of the Equal Protection Clause and Title IX of the U.S. Education Amendments of 1972.¹⁷² Initially, the district court dismissed the Title IX claim, but the Fourth Circuit reversed this decision in April 2016, remanding the case to the district court.¹⁷³ Although the school board sought an en banc rehearing, the Fourth Circuit declined its request.¹⁷⁴ In June 2016, the district court granted a preliminary injunction permitting Grimm to use the boys' restroom.¹⁷⁵

The school board then appealed to the Supreme Court. The Supreme Court, in a 5–3 vote in August 2016, agreed to put a stay on

166. *Grimm*, 822 F.3d. at 714–15.

167. 580 U.S. 951 (2016) (granting certiorari).

168. For a list of all the amicus briefs filed in the 2016 grant of certiorari, see *Grimm v. Gloucester County School Board*, ACLU (Oct. 6, 2021), <https://www.aclu.org/cases/grimm-v-gloucester-county-school-board>, then scroll to “Legal Documents” and click “The Supreme Court of the United States (2016–17)” [<https://perma.cc/9V5W-LNYA>].

169. *Grimm*, 822 F.3d. at 715.

170. *Id.* at 716.

171. *Id.* at 715–17.

172. *Id.* at 717.

173. *Id.* at 717, 723.

174. G.G. *ex rel.* Grimm v. Gloucester Cnty. Sch. Bd., 824 F.3d 450, 452 (4th Cir. 2016).

175. G.G. *ex rel.* Grimm v. Gloucester Cnty. Sch. Bd., No. 4:15cv54, 2016 WL 3581852, at *1 (E.D. Va. June 23, 2016).

the district court's preliminary injunction while the Court decided if it would take the case.¹⁷⁶ Subsequently, in October, the Court granted certiorari in the case, with the oral arguments scheduled for spring 2017.¹⁷⁷

It is at this point in the litigation that voices briefs appeared in the case. Among the sixty amicus briefs submitted to the Supreme Court in *Gloucester County School Board v. G.G.*, at least six stood out as potential voices briefs. These unique briefs shifted the focus from legal arguments to instilling empathy and understanding regarding the daily experiences of transgender youths. They presented first- and third-person narratives to educate readers about the challenges transgender individuals face in public and school settings. These accounts were often accompanied by photographs, aiming to humanize the individuals and prompting readers to empathize with their situations. While all six voices briefs advocated for affirming the Fourth Circuit's ruling, each offered a distinct voice and perspective.

One brief conveyed the perspective of transgender students, featuring the stories of ten such students accompanied by photographs.¹⁷⁸ It highlighted the common challenges they encounter, including exclusion from both men's and women's restrooms, bullying, and locker-room exclusion,¹⁷⁹ while also discussing the positive impact of inclusive policies.¹⁸⁰

Another brief presented the viewpoint of adult transgender professionals¹⁸¹ and included numerous short testimonies that discussed the challenges they faced growing up and living in unsupportive environments.¹⁸² A different brief explored the experiences of parents of transgender students, detailing their journeys of coming to terms with raising children different from their initial expectations.¹⁸³ This brief

176. *Gloucester Cnty. Sch. Bd. v. G.G. ex rel. Grimm*, 579 U.S. 961 (2016).

177. See Amy Howe, *Court Adds Five New Cases, Including Transgender Bathroom Dispute, to Docket*, SCOTUSBLOG (Oct. 28, 2016, 5:29 PM), <https://www.scotusblog.com/2016/10/court-adds-five-new-cases-including-transgender-bathroom-dispute-to-docket/> [<https://perma.cc/XLU8-JALW>].

178. Brief of Transgender Students & Allies as Amici Curiae in Support of Respondent at 9–39, *Gloucester Cnty. Sch. Bd. v. G.G. ex rel. Grimm*, 580 U.S. 951 (2016) (No. 16-273).

179. *Id.* at 37–39.

180. *Id.* at 39–42.

181. Brief of Dr. Ben Barres et al. as Amici Curiae in Support of Respondent at 1, *Gloucester Cnty. Sch. Bd.*, 580 U.S. 951 (No. 16-273).

182. *Id.* 9–35.

183. Brief of Amici Curiae PFLAG, Inc. et al. in Support of Respondent at 8–41, *Gloucester Cnty. Sch. Bd.*, 580 U.S. 951 (No. 16-273).

included seven accounts accompanied by photographs, sharing stories of denial, shame, guilt, acceptance, and eventual advocacy.¹⁸⁴

interACT's brief departed from personal testimonies and instead focused on educating readers about the cultural and legal history concerning the recognition and acceptance of sexes beyond male and female, tracing this history from the Talmud and Rome to the passage of Title IX.¹⁸⁵ The brief included the personal narrative of Koomah, "a 30-year-old intersex individual affiliated with interACT," thus including a voice as part of the larger amicus brief.¹⁸⁶

Another brief presented the stories of veteran educators.¹⁸⁷ This practical brief debunked the irrational myths surrounding restroom-use policies and explained how state policies can send strong signals to impressionable students about who is worthy of equal treatment.¹⁸⁸

A final brief offered the perspective of transgender individuals who are not white.¹⁸⁹ It drew loud comparisons to the myths and excuses used to justify racial exclusion with those used today for transgender exclusion.¹⁹⁰ It also included an overview of transgender individuals in history and their difficulties accessing public and school facilities.¹⁹¹

Ultimately, following the briefing, the case was remanded back to the lower courts.¹⁹² The Fourth Circuit's 2016 ruling in favor of Grimm had been based on Obama administration policies related to Title IX protections.¹⁹³ By 2017, the election of Donald Trump had led to a policy shift, forcing the pending Supreme Court hearing to be vacated and the case remanded to the lower courts to be retried under the new

184. *Id.*

185. Brief of interACT: Advocates for Intersex Youth et al. as Amici Curiae in Support of Respondent at 19–23, *Gloucester Cnty. Sch. Bd.*, 580 U.S. 951 (No. 16-273).

186. *Id.* at 28–32.

187. Brief of Amici Curiae School Administrators from Thirty-One States & the District of Columbia in Support of Respondent at 1, *Gloucester Cnty. Sch. Bd.*, 580 U.S. 951 (No. 16-273).

188. *Id.* at 5–16.

189. Brief of Amici Curiae Reagan Greenberg et al. in Support of Respondent at 1, *Gloucester Cnty. Sch. Bd.*, 580 U.S. 951 (No. 16-273).

190. *Id.* at 3–4.

191. *Id.* at 4–15.

192. *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 602 (4th Cir. 2020); *Gloucester Cnty. Sch. Bd.*, 580 U.S. 951.

193. See Rebecca Hersher & Carrie Johnson, *Trump Administration Rescinds Obama Rule on Transgender Students' Bathroom Use*, NPR (Feb. 22, 2017, 7:37 PM), <https://www.npr.org/sections/thetwo-way/2017/02/22/516664633/trump-administration-rescinds-obama-rule-on-transgender-students-bathroom-use> [https://perma.cc/BRC2-R82C].

interpretation of Title IX protections.¹⁹⁴ Subsequently, due to relevant case law, including the Supreme Court’s decision in *Bostock v. Clayton County*,¹⁹⁵ both the district court and the Fourth Circuit ruled in favor of Grimm.¹⁹⁶ The Supreme Court then declined to hear the case, allowing the Fourth Circuit’s decision to stand.¹⁹⁷

Grimm’s case was education-related but is also, obviously, a transgender-rights case. As such, it involved deeply personal issues and, thus, it is perhaps not surprising to see that at least some voices briefs were filed on behalf of amicus curiae. The nature of the case, availability of personal stories, and potential effect all suggest that voices had a role to play in *Grimm*. The voices briefs here may be a natural outgrowth of the inclusion of voices briefs in the marriage equality cases, but also could represent at least some indication that voices could be useful in education-related cases.

The appearance of voices briefs in *Grimm* stands in contrast to *Mahanoy*, which was heard the following term. *Mahanoy Area School District v. B.L.* concerned a more education-specific issue—the ability of schools to regulate student speech made off-campus, including speech made on social media (here, Snapchat).¹⁹⁸ However, the case did not feature any voices briefs.

The case involved “snaps” posted by B.L. (later identified as Brandi Levy) on her personal Snapchat account outside of school hours and away from the school campus.¹⁹⁹ In the posts, she used profanity to criticize the school and her cheerleading team after she failed to make the varsity cheerleading squad.²⁰⁰ A fellow student took a screenshot of Levy’s snap and showed it to school officials; the post was also widely shared among students. As a result, Levy was suspended from the cheerleading team for a year.²⁰¹ The school argued that Levy’s snaps violated the team’s code of conduct, which required members to demonstrate respect and avoid inappropriate behavior.²⁰² Levy and her

194. *See id.*

195. 140 S. Ct. 1731 (2020).

196. *Grimm*, 972 F.3d at 618–20.

197. Gloucester Cty. Sch. Bd. v. Grimm, 141 S. Ct. 2878 (2021) (mem.); Ariane de Vogue & Chandelis Duster, *Supreme Court Gives Victory to Transgender Student Who Sued to Use Bathroom*, CNN (June 28, 2021, 12:30 PM) <https://www.cnn.com/2021/06/28/politics/gavin-grimm-supreme-court/index.html> [<https://perma.cc/T86Q-SXCU>].

198. 141 S. Ct. 2038, 2042–43 (2021).

199. *Id.*

200. *Id.* at 2043.

201. *Id.*

202. *See id.*

parents challenged the school's decision, arguing that her punishment violated her First Amendment right to freedom of speech.²⁰³ They contended that, because the snaps were created off-campus and outside of school hours, the school had no authority to punish her.²⁰⁴ The U.S. District Court and the Third Circuit Court of Appeals both ruled in favor of Levy, stating that her speech was protected by the First Amendment because it occurred outside the school's jurisdiction.²⁰⁵

Thirty-six amicus briefs were filed in the case. Two of the amicus briefs—one filed by a group of anti-bullying advocacy organizations and another by a group of organizations with an interest in free speech—hinted at voices, but the voices themselves played only a small role in the briefs.²⁰⁶ Three other briefs filed in *B.L.* could be classified as missed opportunities. These briefs were filed by a group of student journalistic organizations,²⁰⁷ student activist organizations,²⁰⁸ and the Independent Women Law Center.²⁰⁹ It is not difficult to imagine how these briefs might have included first-person narratives. For example, the brief filed by student journalistic organizations discussed how free speech is especially important to student journalism, and how student journalists are often the only ones looking into certain issues, particularly in small communities.²¹⁰ This brief could have included commentary and quotations from student journalists who either brought important issues to light or whose schools tried to silence them. The brief from the student activist organizations could have featured stories and quotations from students to show exactly what free speech meant to

203. *Id.*

204. *Id.* at 2043–44.

205. *Id.*

206. See Brief for Amici Curiae Cyberbullying Research Center et al. in Support of Petitioner at 5–7, 10–11, 16, *Mahanoy Area Sch. Dist.*, 141 S. Ct. 2038 (No. 20-255) (including stories of youths who had committed suicide due to bullying but focusing mostly on statistics to argue that schools need to be able to punish bullying speech wherever it happens); Brief of Amici Curiae Foundation for Individual Rights in Education et al. in Support of Respondents at 11–12, *Mahanoy Area Sch. Dist.*, 141 S. Ct. 2038 (No. 20-255) (including a single quote from a student who was punished for an off-campus joke about how he felt).

207. Brief of the Student Press Law Center et al. as Amici Curiae in Support of Respondents, *Mahanoy Area Sch. Dist.*, 141 S. Ct. 2038 (No. 20-255) [hereinafter Brief of the Student Press Law Center].

208. Brief of HISD Student Congress et al. as Amici Curiae in Support of Respondents, *Mahanoy Area Sch. Dist.*, 141 S. Ct. 2038 (No. 20-255).

209. Brief for the Independent Women's Law Center as Amicus Curiae Supporting Respondents, *Mahanoy Area Sch. Dist.*, 141 S. Ct. 2038 (No. 20-255).

210. Brief of the Student Press Law Center, *supra* note 207, at 7–14.

them and how they feel they had been or could be impacted by the decision. The brief by the Independent Women Law Center focused on how free speech is especially important for young female students, using modern and historical examples of young women exercising their free speech rights.²¹¹ These stories are presented factually, but the brief could have presented narratives from young women themselves.²¹²

But perhaps the non-inclusion of voices briefs was entirely appropriate given the nature of the issues in the case. *Grimm* involved transgender rights, an issue closer to the “traditional” uses of voices briefs. While issues regarding student speech are undoubtedly important, using voices in *Mahanoy* might have been less of a natural next step, or at least a premature one. Taken together, these two cases illustrate how voices briefs might have a place in some, but not all, education-related cases.

III. VOICES BRIEFS IN STATE EDUCATION CASES

Voices briefs have made at least a few appearances in state-court education-related cases. It is difficult to capture how widespread the use of voices briefs in state-court education-related litigation might be. The amount of state education-related cases is, to understate, robust. However, some recent school-funding cases have included briefs that can be classified as voices briefs. Thus, we can look at how voices briefs have been and might be used in state cases even without knowing much about the broad historical use of voices briefs in this context.

School-funding litigation is widely considered to have proceeded in three “waves,” beginning in the late 1960s. The first wave focused on federal equal protection claims in the wake of *Brown vs. Board of Education*.²¹³ Litigants sought equalized funding by claiming that funding inequalities violated the Equal Protection Clause.²¹⁴ This wave ended with the Supreme Court’s decision in *San Antonio Independent*

211. *Id.* at 7–10.

212. *See id.* It should be noted that one of the young women that the brief acknowledges is Mary Beth Tinker, who was at the center of the seminal *Tinker v. Des Moines Independent Community School District* case. *Id.* at 7. Tinker herself filed an amicus brief in *Mahanoy*, so it perhaps makes sense that she was not directly quoted in this one. Brief of Amici Curiae Mary Beth Tinker and John Tinker in Support of Respondents, *Mahanoy Area Sch. Dist.*, 141 S. Ct. 2038 (No. 20-255).

213. 347 U.S. 483 (1954).

214. William S. Koski, *Of Fuzzy Standards and Institutional Constraints: A Re-Examination of the Jurisprudential History of Educational Finance Reform Litigation*, 43 SANTA CLARA L. REV. 1185, 1188 (2003) [hereinafter Koski, *Fuzzy Standards*].

School District v. Rodriguez,²¹⁵ where the Court held that education was not a fundamental right under the federal Constitution and that the claim should not be reviewed using strict scrutiny because residents in low-funded Texas school districts were not a sufficiently discrete, definable class.²¹⁶ Texas's school finance plan survived rational basis review.²¹⁷

The second wave of lawsuits involved state courts and constitutions: litigants sought equitable funding under state equal protection and education provisions.²¹⁸ These cases featured more losses than successes: plaintiffs won in only seven of the twenty-two cases in this equity-based wave.²¹⁹

In the third wave, litigants have continued to use state constitutional education provisions but seek *adequate* funding, rather than *equitable* funding, for all students.²²⁰ These cases seek a “floor of adequacy” that constitutes an “adequate” education.²²¹

In some states this third wave continues, as litigants and courts have been able to look to data gathered as part of “standards-based” reform and accountability measures (including the 2001 No Child Left Behind Act)²²² as a way of measuring adequacy.²²³ In other states, advocates are approaching the idea of adequacy in a different way—they focus on “specific, identifiable educational ‘wrongs’ that allegedly result in specific, identifiable educational ‘harms’ to specific, identifiable students.”²²⁴ Voices briefs have made recent appearances in both types of cases.

The former category of cases (involving the introduction of data) includes the recent Connecticut Supreme Court decision in which the court overturned a trial court decision that had used test score data and standards, among other information, to rule that the state's school

215. 411 U.S. 1 (1973).

216. *Id.* at 37, 39–40, 54–56.

217. *Id.* at 55.

218. William S. Koski, *Beyond Dollars? The Promises and Pitfalls of the Next Generation of Educational Rights Litigation*, 117 COLUM. L. REV. 1897, 1903 (2017) [hereinafter Koski, *Beyond Dollars?*].

219. Koski, *Fuzzy Standards*, *supra* note 214, at 1189.

220. Koski, *Beyond Dollars?*, *supra* note 218, at 1904.

221. *Id.* at 1905.

222. No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425, *repealed by* Every Student Succeeds Act, Pub. L. No. 114-95, 129 Stat. 1802 (2015).

223. Koski, *Beyond Dollars?*, *supra* note 218, at 1906.

224. *Id.* at 1915–16.

funding system violated the state constitution's education provision.²²⁵ In finding the state funding scheme unconstitutional, the trial court had also concluded that the state should spend less money educating severely disabled children, an issue that had not been raised by the parties.²²⁶

Twelve anonymized parents and children who had experiences in the Connecticut education system filed a voices brief with the Supreme Court.²²⁷ The brief made legal and policy arguments about the education of students with severe disabilities and included twelve affidavits that tell first-person stories about the students' educational experience and progress.²²⁸

The latter class of cases (focusing on specifically identifiable wrongs and harms) includes *Vergara v. California*,²²⁹ which featured a constitutional challenge to California's teacher-tenure statutes.²³⁰ The lawsuit alleged that several California statutes regarding teacher tenure, layoffs, and dismissal violated the California constitution because they led to the retention of "grossly ineffective" teachers and thus denied equal protection to students assigned to those teachers.²³¹ Furthermore, according to the complaint, the statutes had a disparate impact on poor and minority students, who were more likely to be assigned to a grossly ineffective teacher.²³²

The case only made it as far as the Court of Appeal, as the California Supreme Court declined to hear the case.²³³ However, among the thirteen amicus filers at the appellate-court level were three briefs that could be classified as voices briefs.

The most striking of the voices briefs in *Vergara* relayed detailed narratives from parents and children regarding teachers' effect on students' academic achievement, intellectual curiosity and love of learning, and emotional well-being.²³⁴ For example, the brief described

225. Conn. Coal. for Just. in Educ. Funding, Inc. v. Rell, 176 A.3d 28, 68, 75 (Conn. 2018).

226. Con. Coal. for Just. in Educ. Funding, Inc. v. Rell, No. X07HHDCV145037565S, 2016 WL 4922730, at *27–28, 33 (Conn. Super. Ct. Sept. 7, 2016), *aff'd in part, rev'd in part*, Rell, 176 A.3d 28.

227. Amicus Curiae Brief of Twelve Individuals with Severe Disabilities, Rell, 176 A.3d 28 (S.C. 19768).

228. *Id.* at 3–10.

229. 209 Cal. Rptr. 3d 532 (Ct. App. 2016).

230. *Id.* at 538.

231. *Id.* at 539–40.

232. *Id.* at 540.

233. *Id.* at 558–70 (en banc).

234. Brief of Amici Curiae Jan Bauer et al. in Support of Plaintiffs-Respondents, *Vergara*, 209 Cal. Rptr. 3d 532 (No. B258589).

how one student's emotional well-being was negatively influenced by her teacher:

Likewise, Paula Tillotson and her daughter Savannah experienced a teacher that terrified Savannah, stunting her social interactions. Savannah's eighth grade English teacher in the Los Angeles Unified School District frequently yelled at and bullied her students. In class, the teacher once told a female student that "it looks like you ate a pig." When Savannah, a thirteen-year-old girl, first began wearing a training bra, the teacher made rude comments about the bra and Savannah's body. Understandably, Savannah became anxious and stressed about attending class every day. Paula watched this stress manifest itself as her daughter's verbal stutter worsened throughout the year, and Savannah, fearful that her teacher would make a cruel or demeaning remark about her, resorted to remaining silent in the classroom. The experience scarred Savannah so much that she asked not to go to public school anymore. Paula, seeing her daughter's emotional well-being disintegrate, had to then make the hard choice to send Savannah to a charter school, rather than the neighborhood high school with all her middle school friends, just to avoid any further humiliating experience with teachers.²³⁵

Two other briefs aggregated trial testimony to tell specific stories on appeal. In one brief, the Association of California School Administrators used the trial testimony of principals and superintendents to give voice to the short statutory timeline given to administrators to make teacher-tenure decisions²³⁶ and the time and cost associated with teacher-dismissal proceedings.²³⁷ The other brief was filed by three "high performing public-school teachers who are shielded by the statutes challenged in this appeal, but firmly believe that the education of students should come before job security for teachers."²³⁸ The brief quoted testimony from witnesses on both sides in support of its arguments about the "effects that these statutes have on the profession and the importance of attracting and retaining quality teachers."²³⁹

Both cases illustrate the potential uses of voices briefs in state-funding litigation. The underlying issues are the constitutional right to an education and the lived experience of students in the state's schools.

235. *Id.* at 11–12.

236. Brief of the Ass'n of California School Administrators as Amicus Curiae at *7–10, *Vergara*, 209 Cal. Rptr. 3d 532 (No. B258589).

237. *Id.* at *15–18.

238. Brief of Adam Kuppersmith et al. as Amici Curiae in Support of Plaintiffs-Respondents at 3, *Vergara*, 209 Cal. Rptr. 3d 532 (No. B258589).

239. *Id.* at 5, 18–22, 27.

The experience of students in underfunded or low-performing schools may be foreign to some judges. The parties' educational experiences may differ from the broader category of students who will be affected by the court's decision.

One other voices brief is worth noting if only for its novelty. The brief, filed in *Morath v. The Texas Taxpayer & Student Fairness Coalition*,²⁴⁰ was written by two Texas high school students not associated with any advocacy group or organization. The brief asserted that “[t]his case about public schools sorely lacks the input of public school students” and attempts to “put[] a human face and an insider perspective” to the quantitative data.²⁴¹

The brief was a classic voices brief in that it was organized around amici's arguments and included quantitative data that is reinforced by personal narratives from both teachers and students. For example, in support of an argument that student-teacher ratios in Texas should be smaller, the brief quoted a student:

It's unhelpful to learn from a teacher who essentially serves as a worksheet grader, akin to the answer key at the back of a textbook. Worse, it's demotivating for us to spend hours on an assignment knowing that the teacher can only afford to spend a few minutes (if even that) checking for completion before putting a grade on it. It's also demotivating for teachers to spend hours grading assignments that don't require any of their expertise.²⁴²

Similarly, the brief invoked the comments of a high school principal on the issue of teaching English language learners (ELL):

Our ELL students need more support in term [sic] of smaller class size to have more interaction and face time with their teachers. They need even more time in English classes with double and triple blocks requiring additional ESL trained English Language Arts, Reading, and Intervention teachers.²⁴³

The students were inspired to write the brief after taking a trip to Austin to lobby the state legislature about school finance reform.²⁴⁴ A

240. 490 S.W.3d 826 (Tex. 2016).

241. Amicus Brief of Zaakir Tameez & Amy Fan, Students, in Support of Fort Bend Independent School District, et al. Appellees at vi, 1, *Morath*, 490 S.W.3d 826 (No. 14-0776).

242. *Id.* at 9.

243. *Id.* at 2.

244. Lauren Isensee, *Houston Students File Brief in Texas Supreme Court School Finance Case*, HOUS. PUB. MEDIA (Sept. 28, 2015, 12:30 AM), <https://www.houstonpublicmedia.org/articles/news/2015/09/28/127124>

senior attorney at the Education Law Center noted that the brief was powerful because the students were able to “giv[e] us a window into what really goes on in schools.”²⁴⁵ The students’ voices are raw, but their voices and the other voices included in the brief bring a personal touch to the qualitative data presented. The brief, which includes primarily the voices of the two student amici, illustrates the potential of a voices brief that is able to include many more voices.

Despite this potential, many state-court litigators do not have adequate budgets to arrange for amicus filers, and many lawyers and judges are not aware of the voices briefs trend in Supreme Court amicus briefing. Low-resource state-level groups that may want to file amicus briefs might be prevented from doing so because of filing and printing fees, the inability to procure appropriate legal counsel, and other barriers related to the rules and procedures that govern amicus filings.²⁴⁶

However, the preservation of personal narrative may be particularly important in cases that are increasingly focused on data and standards as a metric for “adequacy.” If the parties become more focused on data and standards, voices briefs can allow students, parents, teachers, and administrators to tell stories that augment and underscore the personally felt effects of underfunding.

CONCLUSION

Voices briefs are amicus briefs that present personal narratives as policy arguments. Traditionally, they have been used in a limited category of cases. Recent scholarship has contemplated that voices briefs might be used as a tool of advocacy outside the traditional contexts in which they first appeared.²⁴⁷ This Article posits that this could be possible in cases involving deeply personal issues and useful personal narratives. “Useful” refers to personal narratives that help humanize an issue for judges who may lack sufficient personal experience to understand it fully and personal narratives that describe experiences different than those of the parties.

Some education-related cases meet this standard. Whether before the Supreme Court of the United States or state appellate courts, education advocates should consider whether the introduction of personal narrative as policy argument might bear fruit. Others might investigate the usefulness of this type of amicus briefs in other contexts.

[/houston-students-file-brief-in-texas-supreme-court-school-finance-case/ \[https://perma.cc/5E4T-RQEW\]](https://perma.cc/5E4T-RQEW).

245. *Id.*

246. Collins, *supra* note 3, at 230.

247. Edwards, *Telling Stories*, *supra* note 2, at 76–79.