

In the
Supreme Court of the United States

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JULIE ELLEN WARTLUFT,
F/K/A JULIE ELLEN BARTELS; AND
FREDERICK L. BARTELS, JR., AS
ADMINISTRATORS OF THE ESTATE OF
ABRIELLE KIRA BARTELS, DECEASED,
Petitioners,

v.

THE MILTION HERSHEY SCHOOL; AND
THE HERSHEY TRUST COMPANY, AS
TRUSTEE OF THE MILTON HERSHEY
SCHOOL TRUST.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION FOR LEAVE TO FILE AND
BRIEF OF PROTECT THE HERSEYS' CHILDREN, INC., AS
AMICUS CURIAE IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE AMICUS BRIEF

Under Supreme Court Rule 37.2(b), Amicus Curiae Protect The Hersheys' Children, Inc. ("PHC") requests leave to file the following brief in support of Petitioners in this case. In support of this motion, Amicus shows the following:

1. Amicus PHC is a nonprofit organization that advocates for needy children in the care of Respondents The Milton Hershey School, et al. ("MHS"). Amicus is comprised of MHS alumni and endeavors to protect MHS children based on shared understanding of their circumstances and long advocacy on their behalf. The interest of the Amicus is also stated in the attached brief.
2. The question presented by this case is whether MHS children providing labor as part of MHS's chore program supplies "consideration" within the meaning of the Fair Housing Act ("FHA"). Although this question focuses on the history of MHS's chore program, affects all current and future MHS students, and turns on explication, in important part, of the genesis of that chore program, no one with relevant understanding of this question with PHC's depth is party to this case.
3. Amicus PHC wishes to submit this brief because it advocates for the children most affected by this question and because PHC possesses a unique understanding of these issues that it believes will help the Court's analysis.
4. Amicus PHC, as a small nonprofit unfamiliar with the Court's rules, was tardy in retaining

counsel and requesting consent of parties to its filing. Nonetheless, such consent was requested and received of Petitioner the day before filing (September 15, 2021). The same request was made of Respondents but consent was denied by them on the same day.

For all of these reasons, Amicus respectfully requests leave to file the enclosed amicus curiae brief in support of the Petitioners in this case.

Respectfully submitted,

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CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, *amicus* Protect The Hersheys' Children, Inc. states as follows:

Protect The Hersheys' Children, Inc., as a nonprofit entity, has no parent corporation and no publicly held company owns 10% or more of its stock. Thus, this rule is inapplicable.

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INTEREST OF AMICUS CURIAE¹

Protect The Hersheys' Children, Inc. ("PHC") is a Pennsylvania nonprofit corporation formed by alumni of the Milton Hershey School ("MHS"). PHC is dedicated to protecting children cared for by MHS and advocating on their behalf. PHC works for MHS governance and program reform and is the only organization uniquely devoted to such.

¹ This brief was prepared by counsel for the amicus curiae and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief. As explained more fully in the accompanying Motion for Leave to File Amicus Brief, PHC — a small nonprofit unfamiliar with the Court's rules — was tardy in retaining counsel and seeking consent to the filing of this brief. Nonetheless, Petitioner has given consent to the filing while Respondents have withheld consent.

INTRODUCTION AND SUMMARY OF ARGUMENT

The decision below misapprehends the nature of the chore program at issue in this proceeding. That chore program is solidly rooted in the ethos of Milton & Catherine Hershey, the founders of the Milton Hershey School (“MHS”). The Hersheys sought to imbibe in children a respect for the dignity of labor and its corollary, the self-respect that comes from earning one’s keep. Thus, MHS children were never treated as objects of charity nor burdened with its stigma. The decision below erroneously suggests otherwise and, on that basis, reaches mistaken legal conclusions. These conclusions are especially harmful here because they strip vital protections from children who need them most.

ARGUMENT

I. MHS founders Milton & Catherine Hershey built a children’s home model that eschewed treating children as objects of charity.

MHS was established as an orphanage in 1909 by Milton & Catherine Hershey. It was then called the Hershey Industrial School and served only “white male orphans.”² While the facility has evolved over time to enroll minority children and girls and to change its name to MHS, its core mission remains serving children who require residential care.

² See, generally, D’Antonio, Michael, *Milton S. Hershey’s Extraordinary Life of Wealth, Empire and Utopian Dreams*, New York: Simon & Schuster, 2006.

Another MHS feature that remains unchanged is the centrality of the chore program. Beginning with the earliest MHS students, those cared for by MHS undertook labor as a condition of enrollment. While MHS students once worked on farms milking cows and in fields, this chore program also evolved over time.

Nonetheless, rooted in the philosophy of Milton S. Hershey and his abiding respect for the dignity of work, the MHS chore program has been a constant: no student has been permitted to remain at MHS unless he or she agreed to perform chores.

This agreement is expressly reflected in the MHS founding charter — its Deed of Trust — and related enrollment documents, as amended over time.

Specifically, the original Deed of Trust included provisions requiring that students be “indentured” — a formal relationship established between the student and MHS and that contemplated student labor.³ A corresponding indenture agreement was executed between MHS and the child’s parent (or sponsor if no living parent were available).⁴

As the Deed of Trust was subsequently amended, the term “indenturing” was deleted but commitment to the chore program remained.⁵

³ See, Fernandez, Bob, *The Chocolate Trust: Deception, Indenture and Secrets at the \$12 Billion Milton Hershey School*, Philadelphia, Camino Books, Inc., 2015.

⁴ An online copy of the original Hershey Industrial School [Deed of Trust](#) is hosted on Protect The Hersheys’ Children, Inc.’s website. A copy of the original [Form of Indenture](#) is also there. The [Amended \(1950\) Form of Indenture](#) can also be found there.

⁵ MHS eliminated references to indenturing in the Deed of Trust in 1970. Fernandez *op cit.*, 27.

The indenturing agreement also went away: today, parents (or sponsors) of children seeking enrollment execute an Enrollment Agreement that also binds children to comply with the obligation to perform chores.

Thus, so far as student agreement to perform work is concerned, there are parallel regimes (indenturing/indenturing agreement and modern enrollment/Enrollment Agreement) connecting MHS from past to present.

Leaving aside the pedagogical benefits of having MHS youths undertake daily labor — and *amicus* Protect The Hersheys' Children, Inc. (“PHC”) is of the view that its benefits abound — for purposes of this proceeding, PHC would note the mandatory nature of the MHS chore program because of its legal significance: to the extent that any question turns on whether MHS students are *required* to perform chores as a *condition* of remaining in MHS group homes, eating MHS food, attending MHS classes, receiving MHS medical care, and otherwise being part of the MHS institutional family — as all associated with PHC are — there is no merit to any argument that MHS students could decline to perform chores and remain at the facility.

While it is true that if a student were physically incapable of performing chores they would be excused from them — as happens, for instance, if a child suffers a fracture or gets sick — this is not because chores are not mandatory: it is because physical limitations are and always have been recognized in implementing the chore program; e.g., students whose allergies prevented them from working with hay were excused from barn chores.

Instead, they washed dishes or cleaned the MHS group homes.

Such children were not, however, permanently excused from chores; and even a student with a broken limb would be required to perform a chore of which they remained capable.

The notion that a malingeringer could remain at MHS or otherwise refuse to perform chores contravenes the ethos of what Milton & Catherine Hershey wanted: a major MHS feature was avoiding making children feel like objects of charity, as other institutions did. Instead, MHS invests in students a sense of dignity and the self-respect of knowing that MHS graduates earned their places.

It follows that the fatal flaw in the decision below is the suggestion that: “Here, by contrast, Abbie provided no consideration for her housing. Though the School made her do chores, the chores did not help Abbie get housing and were not part of a bargain. [...] *The School housed Abbie out of charity. Wartluft v. Milton Hershey School and School Trust*, 844 Fed.Appx. 499, 503 (C.A.3 (Pa.), 2021) (Emphasis added.)

That misapprehends the bargain at the heart of the MHS-student relationship — which is manifested in an Enrollment Agreement that conditions enrollment on performance of chores — and the fundamental tenets of MHS as can be traced historically from its founding to this day. Such a construction also turns MHS children into the very objects of charity that the benevolent Hersheys sought to avoid and that is stigmatizing to such children. It has no support in the history of the

Hershey model. It is, respectfully speaking, offensive in that it beggars such children.

Indeed, the District Court, in rendering the original decision at issue here, went so far as to cite at length a case analogizing MHS children to “tramps” who could be made to perform chores without any expectation of receiving something in return. *Wartluft v. Milton Hershey School and School Trust*, 844 Fed.Appx. 499, 503 (C.A.3 (Pa.), 2021) Such a construction would have profoundly troubled the MHS founders. The decision below mistakenly embraced it.

On that basis, the decision below then adds legal injury to insult: it concludes that MHS children — who are now reduced to mere objects of charity (or “tramps”) — are thereby also excluded from the protections of the Federal Housing Act (the “FHA”). As the decision below stated, “That free student-housing model falls outside the Act.” *Id.*

The decision below is certainly wrong in its factual premise of “free housing.” It follows that its legal conclusions are also in error.

II. MHS children are disproportionately harmed by the decision below.

While MHS has rescued children from crisis and poverty for 110 years, these children often face special burdens requiring accommodation. In a November 2, 2016 article in the *Philadelphia Inquirer*, MHS spokeswoman Lisa Scullin noted that: “[MHS] estimates that 60-70% of its student body has one or more physical or psychological impairments that may meet the ADA’s definition of

a disability. Many of these are attributable to the backgrounds of poverty and need.”

In other words, MHS children represent a class who need more — not less — federal law protection. Yet, the decision below also stands this upside down, stripping these children of federal protections they would otherwise be afforded.

PHC would respectfully point out that by stripping MHS children of these federal protections, the decision below facilitates MHS expelling such children more and more frequently. This not only contravenes the purpose of the FHA, it derogates from the benevolent wishes of MHS founders Milton & Catherine Hershey.

In a similar manner, MHS had a policy of denying enrollment to children who were HIV-positive until 2012. One of these children filed a federal lawsuit invoking the Americans with Disabilities Act (the “ADA”). PHC was publicly supportive of the child in that case and urged MHS to rethink its policy, with the precepts of the MHS founders in mind. Ultimately, the Department of Justice intervened and MHS was compelled to pay a large fine and agree to commit no further ADA violations.⁶

That background teaches that MHS children are particularly in need of federal law protection and that such protections will ultimately guide MHS in better fulfilling its mission. Indeed, PHC has been puzzled from the outset of this case why MHS would ever argue for *lesser* legal protections of the children in its care or seek to operate outside the ADA or the

⁶ See, Fernandez *op cit.*, 131 *et passim*.

FHA: with \$17 billion at its disposal and a mandate from the MHS founders to do all it can to rescue children in crisis, MHS should sail far above any federal disability protection hurdle. The decision below invites it to walk under.

CONCLUSION

The decision below fundamentally misapprehends the nature of the chore program at MHS in a way that diminishes the children in MHS's care. That contravenes the wishes of the MHS founders and denies important federal protections to children who disproportionately need those protections. Accordingly, the Petition should be granted and the decision below reversed.

Respectfully submitted,

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