

No. 09-30036

**UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

OREN ADAR, individually and as parent and next friend of J.C.A.-S. a
minor; MICKEY RAY SMITH, individually and as parent and next
friend of J.C.A.-S. a minor,
Plaintiffs-Appellees,

vs.

DARLENE W. SMITH, in her capacity as State Registrar and Director,
Office of Vital Records and Statistics, State of Louisiana Department of
Health and Hospitals,
Defendant-Appellant,

ON APPEAL FROM U.S. DISTRICT COURT FOR THE
EASTERN DISTRICT OF LOUISIANA, NO. 07-6541-JCZ,
HON. JAY C. ZAINEY, U.S. DISTRICT JUDGE

**MOTION FOR LEAVE TO FILE BRIEF FOR *AMICUS*
CURIAE EAGLE FORUM EDUCATION & LEGAL
DEFENSE FUND IN SUPPORT OF DEFENDANT-
APPELLANT IN SUPPORT OF PETITION FOR
REHEARING**

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INTRODUCTION

Pursuant to FED. R. APP. PROC. 27 and 29 and Circuit Rules 27 and 29, the Eagle Forum Education & Legal Defense Fund (“Eagle Forum ELDF”), by and through counsel, requests this Court’s leave to file the accompanying *amicus curiae* brief in support of the defendant-appellant’s petition for rehearing *en banc*. Pursuant to Circuit Rule 27.4, the undersigned counsel notified counsel for the parties of this motion. Counsel for the defendant-appellant indicated his client consents to this motion, and counsel for the plaintiffs-appellees indicated that his clients would not file an opposition to this motion. Pursuant to Circuit Rule 27.4, a Certificate of Interested Persons is attached to this motion.

I. INTEREST AND IDENTITY OF *AMICUS CURIAE*

Eagle Forum ELDF is an Illinois nonprofit corporation founded in 1981 and headquartered in Saint Louis, Missouri. For more than twenty-five years it has defended American sovereignty and promoted adherence to the U.S. Constitution, including the States’ rights under the Tenth and Eleventh Amendments to take steps to protect their communities and to maintain order, without unlawful federal

interference. Moreover, Eagle Forum ELDF's allied state chapters include an active Louisiana chapter, the members of which are concerned both with preserving Louisiana's sovereignty and with ensuring that adopted children in Louisiana have safe homes that provide the best opportunity for those children to flourish.

For all of the foregoing reasons, Eagle Forum ELDF has a direct and vital interest in the issues presented before this Court, and respectfully requests leave to file its accompanying brief in support of Louisiana's Registrar and Director, Office of Vital Records and Statistics, in order to present arguments that will be directly useful to the Court in its consideration of her pending petition.

II. AUTHORITY TO FILE EAGLE FORUM ELDF'S BRIEF

Like Federal Rule 29, the express terms of Circuit Rule 29.1 provide only for *amici* briefs in support of principal briefs. Some Circuits expressly provide for *amici* support at the post-decision petition stage, while others forbid *amici* support at that stage without the Court's leave. *Compare* NINTH CIRCUIT RULE 29-2 (allowing *amici* briefs at petition stage) with D.C. CIRCUIT RULE 35(f) (prohibiting *amici* support at petition stage without the Court's leave). Although the

Federal Rules are silent, the Advisory Committee Notes contemplate such briefs: “court may grant permission to file an *amicus* brief in a context in which the party does not file a ‘principal brief’; for example, an *amicus* may be permitted to file in support of a party’s petition for rehearing.” FED. R. APP. P. 29 Advisory Committee Note to 1998 Amendments.

Although it applies at this stage only by analogy, Rule 29(b) requires stating the movant’s interest and “the reason why an *amicus* brief is desirable and why the matters asserted are relevant to the disposition of the case.” FED. R. APP. P. 29(b). The Advisory Committee Note to the 1998 amendments to Rule 29 explain that “[t]he amended rule [Rule 29(b)] ... requires that the motion state the relevance of the matters asserted to the disposition of the case.” The Advisory Committee Note then quotes Sup. Ct. R. 37.1 to emphasize the value of *amicus* briefs that bring a court’s attention to relevant matter not raised by the parties:

An *amicus curiae* brief which brings relevant matter to the attention of the Court that has not already been brought to its attention by the parties is of considerable help to the Court.

Id. (quoting Sup. Ct. R. 37.1). “Because the relevance of the matters asserted by an *amicus* is ordinarily the most compelling reason for granting leave to file, the Committee believes that it is helpful to explicitly require such a showing.”

As now-Justice Samuel Alito wrote while serving on the U.S. Court of Appeals for the Third Circuit, “I think that our court would be well advised to grant motions for leave to file *amicus* briefs unless it is obvious that the proposed briefs do not meet Rule 29’s criteria as broadly interpreted. I believe that this is consistent with the predominant practice in the courts of appeals.” *Neonatology Assocs., P.A. v. Comm’r*, 293 F.3d 128, 133 (3rd Cir. 2002) (citing Michael E. Tigar and Jane B. Tigar, *Federal Appeals -- Jurisdiction and Practice* 181 (3d ed. 1999) and Robert L. Stern, *Appellate Practice in the United States* 306, 307-08 (2d ed. 1989)). Now-Justice Alito quoted the Tigar treatise favorably for the statement that “[e]ven when the other side refuses to consent to an *amicus* filing, most courts of appeals freely grant leave to file, provided the brief is timely and well-reasoned.” 293 F.3d at 133. As explained in the next section, the Eagle Forum ELDF’s

brief will aid this Court by addressing issues not fully addressed by Louisiana's petition for rehearing.

III. FILING EAGLE FORUM ELDF'S BRIEF WILL SERVE THE COURT'S RESOLUTION OF THE ISSUES RAISED

For the specific substantive reasons set forth below, the Eagle Forum ELDF's brief will aid this Court by squarely addressing arguments that Louisiana's petition for rehearing did not develop in as much depth as Eagle Forum ELDF's *amicus* brief:

- **Full Faith and Credit Owed the New York Decree.** The Eagle Forum ELDF brief (hereinafter, "EFELDF Br.") analyzes the preclusive effect of the plaintiffs' New York decree under both issue and claim preclusion, consistent with *Baker v. General Motors Corp.*, 522 U.S. 222, 237-38 (1998), to show that (as a mere settlement) the New York decree has no issue-preclusive effect and could not have a claim-preclusive effect on issues of Louisiana law. EFELDF Br. at 2-4.
- **Analyzes Eleventh Amendment's Impacts on *Ex parte Young* and §1983 Actions.** The Eagle Forum ELDF brief goes into further detail than Louisiana on the impact of the panel's attempts to interpret and then to enforce Louisiana law against

Louisiana in federal court, EFELDF Br. at 4-12, including sections devoted specifically to the Eleventh Amendment's impact on both *Ex parte Young* and §1983 actions, as well as citations not only to controlling Fifth Circuit and Supreme Court authorities but also to decisions from sister circuits.

- **Analyzes the Impact of Louisiana's Immunity on Plaintiffs' Standing.** In addition to elaborating on the Eleventh Amendment issue raised by Louisiana, the Eagle Forum ELDF brief also demonstrates that the Court's lack of authority to compel Louisiana to comply with state law means that this Court cannot redress the plaintiffs' purported injury. EFELDF Br. at 12-15.

All of the foregoing aspects of the Eagle Forum ELDF brief are relevant to the merits and jurisdictional issues raised by the panel decision, the latter of which this Court has an obligation to address, even at this late stage. EFELDF Br. at 6-7 (citing *McDonald v. Bd. of Miss. Levee Comm'rs*, 832 F.2d 901, 906 (5th Cir. 1987) and *Edelman v. Jordan*, 415 U.S. 651, 678 (1974)), 12 (citing *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990)).

CONCLUSION

WHEREFORE, for the foregoing reasons, movant Eagle Forum Education & Legal Defense Fund respectfully requests leave to file the accompanying *amicus curiae* brief.

Dated: March 4, 2010

Respectfully submitted,

/s/ Lawrence J. Joseph

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CERTIFICATE OF INTERESTED PERSONS

No. 09-30036, *Oren Adar et al. v. Darlene W. Smith.*

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These presentations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Status	Name	Counsel
Appellant	Darlene W. Smith	James D. “Buddy” Caldwell Kyle Duncan Carol L. Haynes
Appellees	Oren Adar Mickey Ray Smith	Kenneth D. Upton, Jr. Regina O. Matthews Spencer R. Doody
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<i>Amici Curiae</i>	American Civil Liberties Union American Civil Liberties Union of Louisiana	Katharine M. Schwartzmann
<i>Amicus Curiae</i>	Family Watch Int’l	William Duncan
<i>Amici Curiae</i>	Louisiana Conference of Catholic Bishops	Richard Arthur Bordelon Ralph Joseph Aucoin, Sr.
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Dated: March 4, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of March, 2010, I electronically filed the foregoing documents with the Clerk of the Court for the U.S. Court of Appeals for the Fifth Circuit via the appellate CM/ECF system.

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