
Nos. 10-2204, 10-2207, 10-2214 (Consolidated)

United States Court of Appeals for the First Circuit

COMMONWEALTH OF MASSACHUSETTS,
Plaintiff-Appellee,

vs.

U.S. DEP'T OF HEALTH & HUMAN SERVICES, *et al.*,
Defendants-Appellants.

DEAN HARA,
Plaintiff-Appellee / Cross-Appellant,

NANCY GILL, *et al.*,
Plaintiffs-Appellees,

vs.

OFFICE OF PERSONNEL MANAGEMENT, *et al.*,
Defendants-Appellants / Cross-Appellees.

ON APPEAL FROM U.S. DISTRICT COURT FOR THE
DISTRICT OF MASSACHUSETTS
CIVIL CASE NOS. 1:09-10309-JLT, 1:09-11156-JLT
HON. JOSEPH L. TAURO

**MOTION FOR LEAVE TO FILE RESPONSE OF
AMICUS CURIAE EAGLE FORUM EDUCATION &
LEGAL DEFENSE FUND TO THE PETITION FOR
HEARING *EN BANC***

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the FEDERAL RULES OF APPELLATE PROCEDURE, *movant* Eagle Forum Education & Legal Defense Fund (“Eagle Form”) makes the following corporate disclosure statement: No publicly held company owns 10% or more of Eagle Forum’s stock, and Eagle Forum has no parent company.

Dated: July 6, 2011

Respectfully submitted,

/s/ Lawrence J. Joseph

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INTRODUCTION

Pursuant to FED. R. APP. PROC. 27 and by analogy to FED. R. APP. PROC. 29(b), the Eagle Forum Education & Legal Defense Fund (“Eagle Forum”) requests leave to file the accompanying response to the Gill plaintiffs-appellees’ petition for initial hearing *en banc*. By analogy to FED. R. APP. P. 29(c)(5), the undersigned counsel certifies that: counsel for *amicus* authored this brief in whole; no counsel for a party authored this brief in any respect; and no person or entity – other than *amicus*, its members, and its counsel – made a monetary contribution to the preparation or submission of this brief.

I. INTEREST AND IDENTITY OF *AMICUS CURIAE*

Eagle Forum is a nonprofit organization founded in 1981 and headquartered in Saint Louis, Missouri. For more than twenty-five years, Eagle Forum has consistently traditional American values, including the definition of marriage as the union of husband and wife. In addition to its educational efforts on that topic, Eagle Forum has participated as *amicus curiae* in litigation involving same-sex marriage in various state and federal courts, including an *amicus curiae* brief filed with consent in the prior briefing cycle in these consolidated cases before this Court.

For all of the foregoing reasons, Eagle Forum has a direct and vital interest in the issues presented before this Court, and respectfully requests leave to file its accompanying response to the Gill plaintiffs-appellees' petition for initial hearing *en banc*. Eagle Forum respectfully submits that its response will be directly useful to the Court in its consideration of this matter by focusing on basic, threshold jurisdictional issues that the Executive-Branch defendants have uncharacteristically elected not to raise in this litigation.

II. AUTHORITY TO FILE EAGLE FORUM'S BRIEF

Although no particular rule applies to *amici* participation in petitions for hearing or rehearing *en banc*, no rule prohibits motions for leave to file such briefs. Indeed, the Advisory Committee Note to the 1998 amendments to Rule 29 indicate that Rule 29(e) can apply by analogy to petitions for rehearing. By analogy, motions under Rule 29(b) must explain 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 (3d 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’s brief will aid this Court by addressing issues of subject-matter jurisdiction and sovereign immunity not addressed by the parties or the lower court. Indeed, this Court has the independent duty to consider subject-matter jurisdiction, even if the parties do not.

III. FILING EAGLE FORUM’S BRIEF WILL AID THE COURT ON THE NEED FOR INITIAL HEARING *EN BANC*

The Gill plaintiffs-appellees base their petition for hearing *en banc* on the premise that “[t]his Court *must* adjudicate a fundamental constitutional issue of first impression” “[a]ffecting *more than 1,100 federal statutes*.” Pet. at 1, 2 (emphasis added). To the contrary, as made clear in Eagle Forum’s accompanying response (“Eagle Forum Resp.”) to the petition for initial hearing *en banc*, this litigation lacks jurisdictional predicates for federal courts to reach the merits of a dispute. Because appellate courts have the obligation to determine jurisdiction before determining the merits, *FW/PBS, Inc. v. City of*

Dallas, 493 U.S. 215, 231 (1990), *amicus* Eagle Forum respectfully submits that winnowing out the claims for which the plaintiffs or the courts lack jurisdiction is a task for a three-judge panel, not the Court *en banc*, and certainly not an *initial* hearing before the Court *en banc*.

A. Plaintiffs Lack Standing

Standing involves a tripartite test of a cognizable injury to the plaintiff, caused by the defendant, and redressable by the court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992). The Plaintiffs lack standing for several claims in their respective complaints as well as for the vast majority of the 1,000-plus federal laws wholly outside those complaints. *See* Eagle Forum Resp. at 4-9.

Notwithstanding their claim that this litigation addresses over a thousand federal statutes, the various plaintiffs here challenge application of the Defense of Marriage Act (“DOMA”) to only a handful of laws. Specifically, the Commonwealth of Massachusetts challenges DOMA’s application to the State Cemetery Grants Program, Medicaid and its implementation in Massachusetts as “MassHealth,” and the Medicare tax, *Commonwealth v. HHS*, 698 F.Supp.2d 234, 239-44 (D. Mass. 2010), and the private plaintiffs challenge DOMA’s application to

federal-employee health-benefit programs, Social Security retirement and survivor benefits, and tax filing-status issues. *Gill v. OPM*, 699 F.Supp.2d 374, 379-83 (D. Mass. 2010). These plaintiffs' claims therefore implicate only a few statutes, not a thousand statutes. See *Eagle Forum Resp.* at 4-6.

The Commonwealth seeks to recover for the self-inflicted injury occasioned by implementing Medicare under MASS. GEN. LAWS Ch. 118E, §61 ("MassHealth Equity Act") to align with the state Supreme Judicial Court's recognizing same-sex couples' right to marry under state law. *Goodridge v. Dep't of Pub. Health*, 440 Mass. 309, 798 N.E.2d 941 (Mass. 2003). The Commonwealth, of course, could amend its constitution or laws to deny that state-law right and even could abolish the Supreme Judicial Court: "doctrine of separation of powers embodied in the Federal Constitution is not mandatory on the States." *Whalen v. U.S.*, 445 U.S. 684, 689 (1980); *Tarrant v. Ponte*, 751 F.2d 459, 464 (1st Cir. 1985). Instead, "States are free to allocate the lawmaking function to whatever branch of state government they may choose." *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 463 n.6 (1981). The Commonwealth cannot assert its own voluntary actions to manufacture

a case or controversy with the United States. *Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976) (no standing to redress “self-inflicted” injuries); *see also* Eagle Forum Resp. at 6-8.

The Commonwealth also seeks to avoid federal recoupment proceedings under the State Cemetery Grants Program, 38 U.S.C. §2408 (“SCGP”), but nothing mandates such proceedings. 38 U.S.C. §2408(b)(3) (entitling, not requiring, recovery of SCGP grants); 38 C.F.R. §39.10(c) (same). To have standing to avoid *future* enforcement, plaintiffs must face a “credible threat” of enforcement. *Babbitt v. United Farm Workers Nat’l Union*, 442 U.S. 289, 298 (1979). Faced with an Executive branch that favors repealing DOMA, Fed’l Opening Br. at 23 n.14, and that repealed the “Don’t Ask, Don’t Tell” law (“DADT”). PUB. L. NO. 111-321, 124 Stat. 3515 (2010), it is inconceivable that the current Administration would exercise *discretion* to demand reimbursement for military cemeteries. The Commonwealth therefore lacks – and has lacked during the entire pendency of this litigation – a sufficiently imminent injury for purposes of standing. *See* Eagle Forum Resp. at 8-9.

B. Plaintiffs Lack Jurisdiction for Tax Claims

Under the Anti-Injunction Act (“AIA”) and Declaratory Judgment Act, with exceptions inapplicable here, “no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.” 26 U.S.C. §7421(a); *see also* 28 U.S.C. §2201(a). By the same token, district courts lack jurisdiction to order the abatement of tax liability, *McMillen v. U.S. Dept. of Treasury*, 960 F.2d 187, 188-89 (1st Cir. 1991), even for constitutional claims. *U.S. v. Clintwood Elkhorn Mining Co.*, 553 U.S. 1, 10 (2008) (“unmistakably clear that the constitutional nature of a taxpayer’s claim ... is of no consequence”) (alteration in original, interior quotations omitted). The tax laws’ time bars – which also are jurisdictional – further preclude Plaintiffs’ claims. *U.S. v. Dalm*, 494 U.S. 596, 602 (1990); *see also* Eagle Forum Resp. at 9-11.

C. Sovereign Immunity Precludes a Damage Award

Plaintiffs lack jurisdiction to sue the federal government without a waiver of sovereign immunity. *F.D.I.C. v. Meyer*, 510 U.S. 471, 475 (1994). Officer suits for *prospective* injunctive relief against ongoing violations of federal law are an exception to sovereign immunity, *Ex*

parte Young, 209 U.S. 123 (1908), but that exception does not allow money damages or even “retroactive payment of benefits ... wrongfully withheld.” *Edelman v. Jordan*, 415 U.S. 651, 678 (1974). Similarly, the Administrative Procedure Act’s waiver of sovereign immunity excludes “money damages” by its express terms, 5 U.S.C. §702, and a “*Bivens*” action – if available – applies only to individual-capacity defendants. *Chiang v. Skeirik*, 582 F.3d 238, 243 (1st Cir. 2009). Although the “Little Tucker Act” provides district-court jurisdiction for nontax claims up to \$10,000, and the Tucker Act provides jurisdiction for all amounts, 28 U.S.C. §§1346(a)(2), 1491(a)(1), those acts do not apply by their terms to discrimination claims because such claims “sound in tort.” *See Eagle Forum Resp.* at 12-13 (citing cases). Finally, with respect to tort claims, the Federal Tort Claims Act’s waiver of sovereign immunity excludes “claim[s] based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid.” 28 U.S.C. §2680(a); *see also Eagle Forum Resp.* at 11-14.

D. Plaintiffs’ Adequate Alternate Remedies Preclude Relief

Whether proceeding equitably under *Ex parte Young* or §702’s

waiver of sovereign immunity, Plaintiffs must exhaust any alternate legal remedies (*e.g.*, under tax and benefit laws). *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 506-07 (1959); 5 U.S.C. §704 (limiting waiver to actions “for which there is no other adequate remedy in a court”); *see also* Eagle Forum Resp. at 14.

E. Medicare and Social Security Require Exhaustion

Where they seek relief from Social Security or Medicare, Plaintiffs first must present their claims administratively under those statutes’ administrative-channeling mechanisms. 42 U.S.C. §§405(g)-(h), 1395ii. Under the circumstances presented here, “Section 405(g) contains the nonwaivable and nonexcusable requirement that an individual present a claim to the agency before raising it in court,” *Shalala v. Ill. Council on Long Term Care*, 529 U.S. 1, 15 (2000), which withdraws district courts’ jurisdiction under 28 U.S.C. §§1331, 1346 for claims outside that channeling process. 42 U.S.C. §§405(g)-(h), 1395ii; *see also* Eagle Forum Resp. at 14-15.

IV. CONCLUSION

For the foregoing reasons, the Eagle Forum brief will aid the Court by providing the “concrete adverseness ... [that] sharpens the presentation of issues upon which the court so largely depends for

illumination of difficult constitutional questions.” *Baker v. Carr*, 369 U.S. 186, 204 (1962). Here, however, the constitutional issues that Eagle Forum raises go to *threshold* jurisdictional issues, not to the merits issues on which the Gill plaintiffs-appellees seek initial hearing *en banc*. Because three-judge panels typically resolve these workaday jurisdictional issues, there is no reason to consider hearing this matter *en banc* until a three-judge panel resolves the jurisdictional thresholds.

Wherefore, for the foregoing reasons, movant Eagle Forum Education & Legal Defense Fund respectfully requests leave to file the accompanying *amicus curiae* response to the petition for hearing *en banc*.

Dated: July 6, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of July, 2011, I electronically filed the foregoing “Motion for Leave to File Response of *Amicus Curiae* Eagle Forum Education & Legal Defense Fund to the Petition for Hearing *En Banc*,” together with the accompanying proposed response to the petition for hearing *en banc* and a Corporate Disclosure Statement, with the U.S. Court of Appeals for the First Circuit by using the CM/ECF system. I certify that counsel of record for all participants in the case are registered CM/ECF users and that service on all participants will be accomplished by the Appellate CM/ECF System.

/s/ Lawrence J. Joseph
Lawrence J. Joseph