

No. 10-3595

United States Court of Appeals for the Seventh Circuit

AMBER PARKER, *ET AL.*,
Plaintiff-Appellant,

vs.

FRANKLIN COUNTY COMMUNITY SCHOOL CORPORATION, *ET AL.*,
Defendants-Appellees,

ON APPEAL FROM U.S. DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF INDIANA, CIVIL ACTION
NO. 09-CV-00885, HON. WILLIAM T. LAWRENCE

**MOTION FOR LEAVE TO FILE SUPPLEMENTAL
BRIEF OF *AMICUS CURIAE* EAGLE FORUM
EDUCATION & LEGAL DEFENSE FUND**

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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 supplemental brief in response to the first two issues raised by the Court’s post-hearing Order dated May 31, 2011. 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 defended federalism and supported autonomy in areas (like education) of predominantly local concern. In connection with Title IX specifically and federalism generally, Eagle Forum has sought to protect the ability of States (and local governments) to set their own course, free from federal control of areas that the Constitution reserves to the people and the States.

Eagle Forum has a longstanding interest in applying Title IX consistent with its anti-discrimination intent, without distortion from unreasonable feminist demands to always treat boys and girls identically or to satisfy unjustified sex-based quotas. Eagle Forum has advocated that boys' and girls' best interests are advanced by acknowledging their differences and having the flexibility to adopt educational programs that reflect their different interests.

For example, Eagle Forum participated as *amicus curiae* to support a challenge to Title IX's "Three-Part Test" in *National Wrestling Coaches Association v. Department of Education*, No. 03-5169 (D.C. Cir.), as well to limit the enforcement of regulatory disparate-impact standards in *Alexander v. Sandoval*, No. 99-1908 (U.S.). Eagle Forum's longstanding involvement, both in educating the public and in participating in litigation, bears witness to its underlying interest in the issues presented here.

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 brief to respond to the first and second issues posed by the Court's post-argument order, which Eagle

Forum respectfully submits will be directly useful to the Court in its consideration of this matter.

II. AUTHORITY TO FILE EAGLE FORUM'S BRIEF

Although no particular rule applies to amici participation in post-argument calls for supplemental briefing, no rule prohibits motions for leave to file such briefs. 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 school appellees, but which the schools cannot waive. 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 SERVE THE COURT'S RESOLUTION OF THE ISSUES RAISED

For the specific substantive reasons set forth below, the Eagle Forum's brief will aid this Court by raising several issues that the school appellees either did not address or addressed in less detail than Eagle Forum addresses them. *Cf. Schweiker v. Hogan*, 457 U.S. 569, 585 & n.24 (1982) (appellee may raise new arguments on appeal "as a basis on which to affirm ... court's judgment"). The subset of issues that the schools did not raise fall into two categories:

- (1) Issues on the merits that the schools potentially could waive, and
- (2) Issues on subject-matter jurisdiction or sovereign immunity that can be raised for the first time on appeal.

See FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 231 (1990) (every federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review, even though the parties are prepared to concede it") (interior quotations omitted); *Edelman v. Jordan*, 415 U.S. 651, 678 (1974) (States may raise sovereign immunity at any time); *see also* Eagle Forum Suppl. Br. at 13-16 (discussing jurisdictional issues), 10-11, 16

(discussing sovereign immunity).

The Eagle Forum brief (at 16-18) also discussed this Court's *discretion* to reach issues not argued below. *Singleton v. Wulff*, 428 U.S. 106, 120-21 (1976); *AAR Intern., Inc. v. Nimelias Enterprises S.A.*, 250 F.3d 510, 523 (7th Cir. 2001). For these reasons alone, the Eagle Forum brief will aid the Court's resolution of this matter. In addition, to the extent that Eagle Forum raises merits issues that the Court declines to reach because it finds the school appellees to have waived them, it would serve the public generally and future litigants and appellate panels specifically for this Court's decision clearly to identify any merits issues that the Court is not reaching. Beyond the foregoing general reasons, the Eagle Forum brief will aid the Court through the following specific arguments that the schools either did not develop in as much depth as Eagle Forum or failed to raise altogether.

A. *Sandoval* Distinguishes this Case from Cases to Enforce the Title IX Statute, without Reference to the Title IX Regulations

For reasons of their own, the schools apparently declined to press the issue that the Title IX regulations are not enforceable in federal court because they require conduct that Title IX (the statute) does not

prohibit. *Alexander v. Sandoval*, 532 U.S. 275, 288-89 (2001). Although courts are divided on whether that distinction alone goes to subject-matter jurisdiction, the issue has relevance, even if the *Sandoval* argument is waiveable on the merits. *Sandoval* creates a crucial distinction between actions to enforce the statute and actions to enforce the regulations, which undermines pre-*Sandoval* case law that did not consider that distinction. See Eagle Forum Suppl. Br. at 6-7 (regulatory notice requirements), 13-16 (constitutional standing as a third-party beneficiary), 13-14 (statutory standing), 10-11, 16 (sovereign immunity), and 5-10 (availability of cause of action).

B. Plaintiffs Failed to Provide Title IX's Required Notice

On the notice issue, the Eagle Forum brief identifies additional bases for this Court to affirm the dismissal, based on lack of the conditions precedent to enforcing the regulations under the regulations' plain terms: namely, the relevant federal agency must have determined that compliance cannot be secured by voluntary means, the recipient must have received notice of the failure to comply and of the action to be taken to effect compliance, and ten days must have passed. See 45 C.F.R. § 80.8(a), (d); 34 C.F.R. § 100.8(a), (d) (same). None of these

prerequisites occurred, which constitutes failure to provide the notice that the regulations require, regardless of whether the notice here satisfies the judge-made notice requirements for Spending Clause legislation. Eagle Forum Suppl. Br. at 5-7.

C. Plaintiffs Lack Standing as Third-Party Beneficiaries

While the notice issue arguably would go to the merits with a federal agency as the plaintiff, it also goes to constitutional standing for third-party beneficiaries. As the Eagle Forum brief explains, Eagle Forum Suppl. Br. at 13-16, not even the United States could enforce the Title IX regulations under the current circumstances, without meeting the regulatory conditions precedent. 45 C.F.R. § 80.8(a), (d); 34 C.F.R. § 100.8(a), (d). Because the promisee cannot enforce the obligation, neither can the third-party beneficiaries (*i.e.*, the plaintiffs here). Eagle Forum Suppl. Br. at 6, 13. Here, plaintiffs lack a vested right because they have not satisfied the conditions precedent. Eagle Forum Suppl. Br. at 11-12, 14-15.

D. Plaintiffs Lack Standing for Want of a Legally Protected and Individualized Right

Although constitutional standing requires “an invasion of a *legally protected interest*,” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61

(1992) (emphasis added), the plaintiffs-appellants assert only group-based rights, which are insufficiently individualized (*i.e.*, the schools could meet their regulatory obligations by benefiting another women's team altogether, which would not redress the plaintiffs' injuries). *Eagle Forum* Suppl. Br. at 15-16. Finally, even if the regulatory charges were sufficiently individualized, they are not "legally protected" because of the unmet conditions precedent to regulatory enforcement.

IV. CONCLUSION

Although some of these arguments have not been addressed in prior Title IX litigation in which courts simply assumed jurisdiction without discussing it, "drive-by jurisdictional rulings of this sort" (*i.e.*, a court's reaching the merits without even considering jurisdiction) obviously "have no precedential effect" on the jurisdictional question. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998); *Waters v. Churchill*, 511 U.S. 661, 678 (1994) ("cases [cited by Plaintiffs] cannot be read as foreclosing an argument that they never dealt with"). "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster v. Fall*, 266 U.S.

507, 511 (1925). Movant Eagle Forum respectfully submits that this Court must consider these issues. For that reason, 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).

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

Dated: June 14, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of June, 2011, a copy of the foregoing motion – together with its accompany proposed supplemental brief and Circuit Rule 26.1 Disclosure Statement – was filed electronically. Notice of this filing will be sent to the following parties by operation of the Court’s electronic filing system. Parties may access this filing through the Court’s system.

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