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Nos. 11-14535-CC & 11-14675-CC

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**In the United States Court of Appeals for the Eleventh Circuit**

HISPANIC INTEREST COALITION OF ALABAMA, *ET AL.*  
*Plaintiffs-Appellants & Cross-Appellees,*

v.

ROBERT BENTLEY, GOVERNOR OF ALABAMA, *ET AL.*,  
*Defendants-Appellees & Cross-Appellants,*

ON APPEAL FROM U.S. DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF ALABAMA, CIVIL ACTION  
NO. 2:11-2746-SLB, HON. SHARON L. BLACKBURN

**MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE*  
EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN  
SUPPORT OF APPELLEES/CROSS-APPELLANTS IN  
SUPPORT OF PETITION FOR REHEARING *EN BANC***

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**CERTIFICATE OF INTERESTED PERSONS AND CORPORATE  
DISCLOSURE STATEMENT**

*Hispanic Int. Coalition of Ala. v. Bentley*, Nos. 11-14535-CC & 11-14675-CC

The undersigned counsel hereby certifies, pursuant to 11th Cir. R. 26.1-1, that the following persons have such an interest:

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Alabama Education Association (AEA), *Amicus Curiae*

Alabama Fair Housing Center, et al., *Amicus Curiae*

Alabama New South Coalition, *Amicus Curiae*

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The Montgomery Improvement Association, *Amicus Curiae*

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The National Association of Latino Elected Appointed Officials, *Amicus Curiae*

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Pursuant to FED. R. APP. P. 26.1, *amicus curiae* Eagle Forum makes the following disclosures:

1) For non-governmental corporate parties please list all parent corporations: None.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock: None.

Dated: September 20, 2012

Respectfully submitted,

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## **INTRODUCTION**

Pursuant to FED. R. APP. PROC. 27 and 29(a) and 11th Cir. Rules 35-6 and 40-6, Eagle Forum Education & Legal Defense Fund (“Eagle Forum”) requests leave to file the accompanying *amicus curiae* brief in support of the petition for rehearing *en banc* filed by the defendants-appellees and cross-appellants (collectively, “Alabama”). The Alabama parties consented to this motion.

### **I. INTEREST AND IDENTITY OF *AMICUS CURIAE***

*Movant* Eagle Forum is a nonprofit Illinois corporation founded in 1981. Since its founding, Eagle Forum has consistently defended American sovereignty before the state and federal legislatures and courts. Eagle Forum promotes adherence to the U.S. Constitution and has repeatedly opposed unlawful behavior, including illegal entry into and residence in the United States. Eagle Forum supports enforcing immigration laws and allowing state and local government to take steps to avoid the harms caused by illegal aliens. Eagle Forum also has long defended federalism, including the ability of state and local governments to protect themselves and to maintain order. Finally, the members of Eagle Forum’s Alabama chapter face elevated tax and other burdens that the challenged Alabama law (hereinafter, “HB56”) seeks to redress. For these reasons, Eagle Forum has a direct and vital interest in the issues presented here.

## II. AUTHORITY TO FILE EAGLE FORUM'S BRIEF

As implicated by 11th Cir. Rules 35-6 and 40-6, Rule 29(b)'s criteria require movants to explain their 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

& 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.

### **III. FILING EAGLE FORUM’S BRIEF WILL SERVE THE COURT’S RESOLUTION OF THE ISSUES RAISED**

More than half of Eagle Forum’s brief relates to issues of Article III jurisdiction, which this Court has the obligation to consider, even for the first time on appeal. *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990). Indeed, “if the record discloses that the lower court was without jurisdiction [an appellate] court will notice the defect” and “the only function remaining to the court is that of announcing the fact and dismissing the cause.” *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94 (1998) (interior quotations omitted).

In addition, the Eagle Forum brief raises merits arguments in support of a rational basis for HB56 that the parties have not briefed. *See* Eagle Forum Br. at 11-15. With respect to merits arguments, the “matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases,” *Singleton v. Wulff*, 428 U.S. 106, 120-21 (1976), including arguments raised solely

by *amici*. *Turner v. Rogers*, 131 S.Ct. 2507, 2519-20 (2011); *see also id.* at 2521 (Thomas, J., dissenting). The issue in this appeal is Plaintiffs' likelihood of prevailing on the merits, and Alabama readily can adopt any arguments in the merits phase below. Accordingly, this Court should broadly consider even merits arguments raised by *amici*.

With that background, the following three subsections outline three main arguments in the Eagle Forum brief that will aid the Court.

**A. Plaintiffs Lack Standing for their Alleged Injuries under HB56**

The Eagle Forum brief supplements Alabama's arguments that the Plaintiffs lack standing for their self-inflicted injuries of responding to HB56. *Compare* Pet. at 8-10 *with* Eagle Forum Br. at 6-8. In particular, the Eagle Forum brief uniquely analyzes the foundation for standing under *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-79 (1982), and its Circuit progeny. *See* Eagle Forum Br. at 6-9.

In particular, the Eagle Forum brief analyzes the distinguishing feature between the *Havens Realty* statute and the statutory and constitutional provisions at issue here: the former "extend[ed] to the full limits of Art. III," so "the inquiry into statutory standing collapsed into the question of whether the injuries alleged met the Article III minimum of injury in fact." *Florida State Conference of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1165 (11th Cir. 2008) (*citing Havens*, 455 U.S. at 372) (interior quotations omitted). Because neither federal immigration law nor the



Equal Protection Clause similarly collapses courts' prudential standing doctrines, this Court must address (as *Havens Realty* did not) whether Plaintiffs' injuries lie within the statutes' zone of interests and whether Plaintiffs have third-party standing to assert the Equal Protection rights (if any) of illegal aliens and students.

As indicated *supra*, this Court has the obligation to consider these issues, and the Eagle Forum brief will aid in that effort.

**B. Even If They Have Standing, the Plaintiff Associations Lack Standing to Enforce the Equal Protection Rights of Students and Illegal Aliens**

In addition to arguing that the Plaintiffs lack standing altogether, the Eagle Forum brief also argues that the Plaintiffs associations who claim standing based on their voluntary expenditure of funds to advocate and counsel against HB56 have standing only to assert their own injuries, not standing to assert the Equal Protection injuries of students and illegal aliens. *See* Eagle Forum Br. at 9 (*quoting Village of Arlington Heights v. Metro. Housing Development Corp.*, 429 U.S. 252, 263 (1977)). Critically, this argument removes the Plaintiffs' claim to heightened scrutiny under *Plyler v. Doe*, 457 U.S. 202 (1982), which was the basis for the panel's decision. *See* Eagle Forum Br. at 9-10. As with standing generally, this Court has the obligation to assess *sua sponte* the Plaintiffs' standing for the specific relief awarded to them, and the Eagle Forum brief will aid the Court in that effort.

C. **Alabama Schools and Alabama Have a Compelling Government Interest in Not Providing Non-Core Educational Benefits to Illegal Aliens in Violation of 8 U.S.C. §1621**

In addition to supporting Alabama's argument that the collection of information under HB56 does not deny students access to the "basic public education" at issue in *Plyler*, compare Pet. at 13-14 with Eagle Forum Br. at 12-13, the Eagle Forum brief also identifies a compelling government interest that HB56 supports: compliance with 8 U.S.C. §1621, which prohibits providing public benefits unless certain criteria are met. See Eagle Forum Br. at 11-12, 13-14. Although immigration law excludes the "basic public education" that was at issue in *Plyler* from §1621's reach, see 8 U.S.C. §1643(a)(2), Alabama's schools dispense numerous benefits beyond basic education. As an example of a non-core program offered by Alabama schools, the Eagle Forum brief cites Birmingham's financial benefits for charged meals in school cafeterias. See Eagle Forum Br. at 11-12 (citing Birmingham Bd. of Educ., *Charged Meal Policy*, POLICY MANUAL, ¶8081 (June 2012)). In addition, schools across Alabama likely need HB56's information to avoid granting illegal aliens hardship- or need-based waivers of participation fees for non-core activities such as field trips, athletics, or other extra-curricular activities. See *id.* Under §1621, however, it is unlawful to provide these benefits to illegal aliens under the circumstances here.

Significantly, Congress has recognized the withholding of these benefits is a “compelling governmental interest,” *Eagle Forum Br.* at 14-15 (*citing* 8 U.S.C. §1601(6) *and* H.R. CONF. REP. NO. 104-725, at 378 (July 30, 1996)), which readily defeats the panel’s reliance on *Plyler*. *See id.* (*citing Plyler*, 457 U.S. at 224-25). For this reason, the Eagle Forum brief will aid the *en banc* Court’s consideration of the issues presented by Alabama’s petition.

### **CONCLUSION**

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

Dated: September 20, 2012

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**CERTIFICATE OF SERVICE**

I hereby certify that on September 20, 2012, I electronically transmitted the foregoing motion and the accompanying *amicus* brief to the Clerk for filing and transmittal of a Notice of Electronic Filing to the participants in this appeal, a form of service to which they have consented:

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Respectfully submitted,

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