

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

United States Court of Appeals for the Eleventh Circuit

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

v.

ROBERT BENTLEY, *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

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

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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

The undersigned counsel hereby certifies, pursuant to 11th Cir. R. 26.1-1, that – in addition to those previously identified as having an interest in the outcome of this case – the following additional persons have such an interest:

Eagle Forum Education & Legal Defense Fund, *amicus curiae* (“Eagle Forum”); and

Lawrence John Joseph, Counsel for *amicus curiae* Eagle Forum.

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.

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

Dated: January 3, 2012

Respectfully submitted,

/s/ Lawrence J. Joseph

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INTRODUCTION

Pursuant to FED. R. APP. PROC. 27 and 29(a) and Eleventh Circuit Rules 29-1 and 29-2, the Eagle Forum Education & Legal Defense Fund (“Eagle Forum”) requests leave to file the accompanying *amicus curiae* brief in support of the defendants-appellees and cross-appellants (collectively hereinafter, “Alabama”). All of the Alabama parties consented to the filing of the brief and to the motion, but the private plaintiffs-appellants and cross-appellees (collectively hereinafter, “Plaintiffs”) withheld consent to the filing of the brief but indicated that they do not oppose the motion for leave to file the brief. In addition, the same Alabama parties consented to the filing of an Eagle Forum *amicus* brief in the companion case of *United States of America v. State of Alabama*, Nos. 11-14532-CC & 11-14674-CC, as did the federal plaintiff-appellant and cross-appellee (hereinafter, “United States”). Because portions of the Eagle Forum brief relate uniquely to the private Plaintiffs in this action, Eagle Forum seeks leave to file in Nos. 11-14535-CC & 11-14675-CC, rather than in *United States of America v. State of Alabama*, Nos. 11-14532-CC & 11-14674-CC.

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

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.

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 or sovereign immunity, both of 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); *Edelman v. Jordan*, 415 U.S. 651, 678 (1974). 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 HB56 that the other parties have not briefed. *See, e.g.*, Eagle Forum Br. at 33-35 (federal courts’ deference based on separation-of-

powers principles is irrelevant to preemption of sovereign states' laws), 35 (courts do not owe deference to federal agencies' constitutional interpretations), 35-36 (HB56 does not discriminate). 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 four subsections outline four main arguments in the Eagle Forum brief that will aid the Court.

A. Plaintiffs Lack Standing for their Alleged Injuries under HB56 and the Injunction

The Eagle Forum brief supplements Alabama's arguments that the Plaintiffs lack standing for their self-inflicted injuries of responding to HB56. *Compare* Alabama Br. at 35-40 *with* Eagle Forum Br. at 8-12.

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 8-11.¹ Finally, the Eagle Forum brief addresses the instances where these particular defendants – as opposed to Alabama’s state courts – are simply unable to redress Plaintiffs’ injuries from certain provisions of HB56. See Eagle Forum Br. at 12-13. As indicated *supra*, this Court has the obligation to consider these issues, and the Eagle Forum brief will aid in that effort.

B. Plaintiffs Lack a Ripe Claim

The Eagle Forum brief addresses ripeness, which also is jurisdictional and which Alabama does not brief. See Eagle Forum Br.

¹ In particular, the Eagle Forum brief analyzes the distinguishing feature between the *Havens Realty* statute and this statute: the former “extend[ed] to the full limits of Art. III, 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 federal immigration law does not similarly collapse courts’ prudential standing doctrines, this Court must address (as *Havens Realty* did not) whether Plaintiffs’ injuries lie within the statutes’ zone of interests. The Eagle Forum brief will aid that effort.

at 13-16. As with standing, this Court has the obligation to assess ripeness *sua sponte*, *Wendy's Intern., Inc. v. City of Birmingham*, 868 F.2d 433, 435 (11th Cir. 1989), and the Eagle Forum brief will aid the Court in that effort.

C. Plaintiffs Lack a Cause of Action for Many of their Claims

The Eagle Forum brief analyzes whether Plaintiffs have a cause of action to bring their facial preemption claims under either *Ex parte Young* for ongoing violations of federal law or Section 1983, where federal law does not create rights in these Plaintiffs. *See* Eagle Forum Br. at 16-21. Because of the quasi-jurisdictional nature of immunity, these also are issues that the Court must address, and which Eagle Forum's brief helps to analyze.

D. The Plaintiffs Have Sought Relief in the Wrong Court Because – unlike an Alabama Court – the Federal Courts Cannot Adopt Limiting Interpretations of State Law

The Eagle Forum brief describes an important issue of federalism in which federal courts cannot adequately redress the private Plaintiffs' injuries because – unlike state courts – federal courts lack authority to adopt narrowing interpretations of Alabama's new law. *See* Eagle Forum Br. at 26-27. This fundamental difference between federal and

state courts emphasizes the institutional and jurisdictional weaknesses of seeking to overturn state laws based on hypothetical conflicts. *See* Eagle Forum Br. at 16-17, 29-30.

CONCLUSION

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

Dated: January 3, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 3, 2012 I electronically transmitted the foregoing document and the accompanying *amicus* brief to the Clerk for filing and transmittal of a Notice of Electronic Filing to the participants in this appeal, all of whom are registered CM/ECF users, and I understand that service will be accomplished by the appellate CM/ECF system.

Dated: January 3, 2012

Respectfully submitted,

/s/ Lawrence J. Joseph

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