

No. 10-35551

**United States Court of Appeals for the Ninth Circuit**

MONICA EMELDI,  
*Plaintiff-Appellant,*

v.

UNIVERSITY OF OREGON,  
*Defendant-Appellee.*

ON APPEAL FROM U.S. DISTRICT COURT FOR THE  
DISTRICT OF OREGON, CIVIL ACTION NO.  
6:08-CV-06346-HO, HON. MICHAEL R. HOGAN

**MOTION FOR LEAVE TO FILE  
*AMICUS CURIAE* BRIEF OF EAGLE FORUM  
EDUCATION & LEGAL DEFENSE FUND IN  
SUPPORT OF APPELLEE'S PETITION FOR  
RECONSIDERATION AND REHEARING *EN BANC***

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## INTRODUCTION

Pursuant to Ninth Cir. R. 29-2 and by analogy to FED. R. APP. PROC. 29(a), Eagle Forum Education & Legal Defense Fund (“Eagle Forum”) requests leave to file the accompanying *amicus curiae* brief in support of the defendant-appellee University of Oregon (“Oregon”). The plaintiff-appellant Monica Emeldi opposes this motion for leave to file the brief; Oregon does not oppose this motion.

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

Movant Eagle Forum is a nonprofit organization founded in 1981 and headquartered in Saint Louis, Missouri. For more than thirty 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, providing schools 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 requests leave to file its accompanying brief, 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**

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 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). As explained in the next section, the Eagle Forum brief presents relevant matters to this Court.

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

For the specific substantive reasons set forth below, the Eagle Forum brief will aid this Court both by bolstering Oregon's argument that Emeldi's showing does not amount to statutory discrimination because of sex, Pet. at 13, and by raising several issues that Oregon did not address with respect to Emeldi's Title IX claim for retaliation. The issues that Oregon did not address fall into two categories:

- (1) Issues on the merits that Oregon potentially could waive, and
- (2) Issues on subject-matter jurisdiction that cannot be waived.

*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); *see also* Eagle Forum Br. at 17-19 (discussing jurisdictional issues). In addition, to the extent that Eagle Forum raises merits issues that the Court declines to reach because it finds Oregon to have waived them, it would serve the public generally and future litigants and appellate panels specifically for this Court 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.

**A. The Panel Majority Conflates Emeldi’s Minimal and Circumstantial Showing to Make a *Prima Facie* Case with the Substantial Evidence Needed to Defeat Oregon’s Non-Discriminatory Justifications**

The most troubling aspect of the panel majority’s decision is the extent to which it lowers the bar for mere circumstantial evidence to defeat summary judgment after a school has met its burden of production to establish a non-discriminatory basis for its actions. Slip Op. at 3278. Presumably, the majority relies on a single Third Circuit decision because that is simply not the law in the Ninth Circuit for circumstantial-evidence cases like this one. *See* Eagle Forum Br. at 9-12. Under the clear law of this Circuit, plaintiffs such as Emeldi must provide “specific and substantial” evidence that “permit a reasonable trier of fact to find *by a preponderance of the evidence* that [the] decision ... was motivated” by impermissible criteria. *Id.* at 10-11 (*quoting E.E.O.C. v. Boeing Co.*, 577 F.3d 1044, 1049 (9th Cir. 2009), and *FDIC v. Henderson*, 940 F.2d 465, 473 (9th Cir. 1991)). For summary judgment to mean anything, non-moving parties must provide evidence that deflects the moving party’s motion. They cannot – as the majority

allows Emeldi to do, Slip Op. 3280 & n.8 – allow parties to rely on what they *might* explain later.

**B. Like Title VII, Advocacy-Based Title IX Retaliation Requires Advocacy with Respect to Actual Violations**

As Oregon explains with respect to numerous Title VII authorities, Pet. at 13-14, retaliation for advocacy as Emeldi claims here requires that there be underlying violations against which to advocate. It is not enough to simply discuss “gender issues.” *Id.* at 13. The Eagle Forum brief helps clarify this point and ground it in Title IX by emphasizing the differences between a summary-judgment case like this one and a pre-*Twombly*, motion-to-dismiss case like *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005). See Eagle Forum Br. at 8-9. As the Eagle Forum brief explains, the *Jackson* plaintiff could rely on a much looser pleading standard. *Id.* (comparing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 562-63 (2007) with *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

**C. With Respect to Any Regulation-Based Allegations, *Sandoval* Distinguishes this Case from Cases to Enforce the Title IX Statute**

As Oregon explains, Emeldi’s so-called advocacy on behalf of women graduate students did not allege any actual violations of Title

IX. Pet. at 13. As such, her advocacy cannot serve as the predicate for *statutorily* prohibited retaliation. To the extent that Emeldi seeks to avoid Oregon's arguments by casting her retaliation claim under the broader regulations, *see* Eagle Forum Br. at 19-20, *Alexander v. Sandoval*, 532 U.S. 275, 288-89 (2001), makes clear that Title VI and IX regulations that reach beyond the statute are unenforceable in federal court. Oregon did not press this issue. 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 Br. at 13-17 (regulatory notice requirements), 17-19 (constitutional standing as a third-party beneficiary), 13 (statutory standing), 17 (same).

**D. With Respect to Regulation-Based Allegations, Emeldi Failed to Provide Title IX's Required Notice**

On the regulatory 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 Br.* at 13-17.

**E. With Respect to Regulation-Based Allegations, Emeldi Lacks Standing as a Third-Party Beneficiary**

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.<sup>1</sup> As the *Eagle Forum* brief explains, *Eagle*

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<sup>1</sup> 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 a party] cannot be read as foreclosing an argument that they never dealt with”). “Questions which merely lurk in the record, neither brought to the

*(Footnote cont'd on next page)*

Forum Br. at 13-17, 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 third-party beneficiaries (*i.e.*, Emeldi here). Eagle Forum Br. at 17-19. Here, Emeldi lacks a vested right because she has not satisfied the conditions precedent. Eagle Forum Br. at 19-22.

### CONCLUSION

For all the foregoing reasons, movant Eagle Forum respectfully submits that the Eagle Forum brief will aid this Court in issues that this Court must consider. Accordingly, the Eagle Forum brief will provide 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).

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*(Footnote cont'd from previous page.)*

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).

WHEREFORE, movant Eagle Forum respectfully requests leave to file the accompanying *amicus curiae* brief.

Dated: April 30, 2012

Respectfully submitted,

/s/ Lawrence J. Joseph

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**CERTIFICATE OF SERVICE**

I hereby certify that on April 30, 2012 I electronically transmitted the foregoing document and the accompanying *amicus* brief and disclosure statement 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: April 30, 2012

Respectfully submitted,

/s/ Lawrence J. Joseph

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