

No. 10-10751

United States Court of Appeals for the Fifth Circuit

VILLAS AT PARKSIDE PARTNERS d/b/a Villas at Parkside;
LAKEVIEW AT PARKSIDE PARTNERS, LIMITED, d/b/a
Lakeview at Parkside; CHATEAU RITZ PARTNERS, d/b/a
Chateau de Ville; MARY MILLER SMITH,
Plaintiffs-Appellees,

vs.

THE CITY OF FARMERS BRANCH, TEXAS,
Defendant-Appellant.

VALENTIN REYES; ALICIA GARCIA; GINGER EDWARDS;
JOSE GUADALUPE ARIAS, AIDE GARZA,
Plaintiffs-Appellees,

vs.

THE CITY OF FARMERS BRANCH, TEXAS,
Defendant-Appellant.

ON APPEAL FROM U.S. DISTRICT COURT FOR THE
NORTHERN DISTRICT OF TEXAS, NOS. 3:08-CV-1551-B,
3:03-CV-1615, HON. JANE J. BOYLE, DISTRICT JUDGE

**MOTION FOR LEAVE TO FILE BRIEF FOR *AMICUS*
CURIAE EAGLE FORUM EDUCATION & LEGAL
DEFENSE FUND IN SUPPORT OF APPELLANT IN
SUPPORT OF PETITION FOR REHEARING**

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INTRODUCTION

Pursuant to FED. R. APP. PROC. 27 and 29(a), Eagle Forum Education & Legal Defense Fund (“Eagle Forum”) requests leave to file the accompanying *amicus curiae* brief in support of the defendant-appellant City of Farmers Branch, Texas (the “City”). The City consented to Eagle Forum’s brief and motion, but the plaintiffs withheld consent.

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. 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).

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 THE EAGLE FORUM’S BRIEF WILL SERVE THE COURT’S RESOLUTION OF THE ISSUES RAISED

The Eagle Forum brief elaborates on the conflict-preemption issues raised in the City’s petition, as well as the subsidiary issue of the presumption against preemption that the City does not address. The Eagle Forum brief also highlights how the panel majority’s reasoning is based – not so much on *conflict preemption* arising from any particular congressional enactment – but on *field preemption* from the constitutional power of Congress to regulate immigration, contrary to controlling Supreme Court decisions. All of these issues warrant the *en banc* Court’s review.

A. The Presumption of Preemption Applies

In one considerable deviation from controlling Supreme Court precedent, the panel majority finds the presumption against preemption not to apply “when the State regulates in an area where there has been a history of significant federal presence.” Slip Op. at 9 (*quoting U.S. v. Locke*, 529 U.S. 89, 90 (2000)). As the Eagle Forum brief explains, however, “federal courts ‘rely on [the presumption against preemption] because respect for the States as independent sovereigns in our federal system leads [federal courts] to assume that Congress does not cavalierly pre-empt [state law].” Eagle Forum Br. at 8 (*quoting Wyeth v. Levine*, 555 U.S. 555, 565 n.3 (2009) (internal quotations omitted)). Thus, “[t]he presumption ... accounts for the historic presence of state law but does not rely on the absence of federal regulation.” *Id.* (*quoting Wyeth*, 555 U.S. at 565 n.3). By relying on *Locke*, without addressing the supervening decision in *Wyeth*, the panel majority’s decision is inconsistent with controlling authority.

B. The Panel Majority’s Conflict Analysis Relies on Policy Differences Rather Than Inconsistencies with Congressional Enactments

Because the City’s Ordinance does not literally conflict with federal immigration law, the Plaintiffs necessarily rely on the “prevent-

or-frustrate” branch of conflict preemption. See Eagle Forum Br. at 11. The Eagle Forum brief emphasizes the Supreme Court’s most recent analysis of these issues, which cautions against “a freewheeling judicial inquiry into whether a state statute is in tension with federal objectives” and thereby “undercut[ting] the principle that it is Congress rather than the courts that preempts state law.” Eagle Forum Br. at 12 (*quoting Chamber of Commerce of U.S. v. Whiting*, 131 S.Ct. 1968, 1985 (2011) (interior quotations omitted)). Movant Eagle Forum respectfully submits that its proposed *amicus* brief will aid the Court in evaluating the proper focus of the judicial inquiry for conflict preemption.

C. The Panel Majority Relies on Field Preemption from the Power of Congress under the Constitution – Not on Conflict with Congressional Enactments – Which Is Inconsistent with *DeCanas* and *Whiting*

The panel majority finds that the federal interest in immigration is so strong – owing to its being “vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government,” Slip Op. at 23 (*quoting Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952) – that the “national problem ... need[s] a national solution.” *Id.* The Eagle Forum brief emphasizes that

Harisiades involved the federal judiciary's declining to review federal deportation proceedings involving Communist Party members during the height of the Cold War, which is a federal separation-of-powers issue between two branches of the federal sovereign. Eagle Forum Br. at 14-15. That, of course, is an entirely different issue than actions of the *federal* sovereign's preempting the independent *state* sovereigns and their political subdivisions. The Eagle Forum brief also recognizes that this rationale would have found the state laws at issue in *Whiting, supra*, and *DeCanas v. Bica*, 424 U.S. 351 (1976), to be preempted, as well. *Id.* In essence, the panel majority argues for field preemption of state immigration-related laws. The *en banc* Court must correct the panel majority's excessive assertion of federal power, which is well beyond the controlling precedents of the Supreme Court.

CONCLUSION

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

Dated: May 2, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of May, 2012, I electronically filed the foregoing document, together with the accompanying amicus brief, with the Clerk of the Court for the U.S. Court of Appeals for the Fifth Circuit via the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that I have mailed the foregoing document by Priority U.S. Mail, postage prepaid, on the following participants in the case who are not registered CM/ECF users:

R. David Broiles
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Dated: May 2, 2012

Respectfully submitted,

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