

11-2288

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

GERALDINE A. FUHR,  
*Plaintiff-Appellant,*

v.

HAZEL PARK SCHOOL DISTRICT,  
*Defendant-Appellee.*

ON APPEAL FROM U.S. DISTRICT COURT FOR THE  
EASTERN DISTRICT OF MICHIGAN, CIVIL ACTION  
NO.2:08-11652-BAF, HON. BERNARD A. FRIEDMAN

**MOTION FOR LEAVE TO FILE  
BRIEF FOR *AMICUS CURIAE* EAGLE FORUM  
EDUCATION & LEGAL DEFENSE FUND IN  
SUPPORT OF DEFENDANT-APPELLEE  
IN SUPPORT OF AFFIRMANCE**

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## **INTRODUCTION**

Pursuant to FED. R. APP. PROC. 29(a), the Eagle Forum Education & Legal Defense Fund (“Eagle Forum”) requests leave to file the accompanying *amicus curiae* brief in support of the defendant-appellee School District of the City of Hazel Park (the “School”). The plaintiff-appellant Geraldine Fuhr (“Fuhr”) withheld consent to the filing of the brief.

### **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). “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**

For the specific substantive reasons set forth below, the Eagle Forum’s brief will aid this Court by raising several issues that the School did not address with respect to Fuhr’s Title IX claim for retaliation. The issues that the School did not address fall into two categories:

- (1) Issues on the merits that the School potentially could waive, and
- (2) Issues on subject-matter jurisdiction or sovereign immunity that can be raised at any time.

*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 11-19 (discussing jurisdictional issues).

Significantly, the School argues that Fuhr has appealed only her Title VII retaliation claim (Count II), School Br. at 30, notwithstanding

that the district court reached retaliation under both Title VII and Title IX (Count VII). Slip Op. at 16. To the extent that Fuhr argues otherwise and this Court reaches the Title IX merits, *amicus* Eagle Forum briefs those merits. Eagle Forum Br. at 22-26. Insofar as this Circuit analyzes the two statutes under the same substantive analysis, Eagle Forum Br. at 22-23 (collecting cases), the School plainly briefed the Title IX merits substantively in its briefing of the Title VII merits. School Br. at 29-31.

In addition, to the extent that Eagle Forum raises merits issues that the Court declines to reach because it finds the School 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 School did not develop. Further, the Eagle Forum brief collects Circuit precedents on the question whether the Title VII and Title IX standards are the same, Eagle Forum Br. at 23 n.10, which goes the non-waiver by the School of its rebuttal to Fuhr's Title IX retaliation claim (Count VII).

**A. With Respect to Fuhr’s Regulation-Based Allegations, *Sandoval* Distinguishes this Case from Cases to Enforce the Title IX Statute**

As incorporated into each of her complaint’s specific counts, Fuhr’s “common allegations” assert that the School retaliated against her not only for her prior litigation against the School, First Am. Compl. at 3, ¶11, but also because she “complained of unequal facilities for ... female athletes.” *Id.* at 4, ¶11(H).<sup>1</sup> Under *Alexander v. Sandoval*, 532 U.S. 275, 288-89 (2001), Title VI and IX regulations that reach beyond the statute are unenforceable in federal court. The School 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 11-15

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<sup>1</sup> Without an allegation of intentional sex-based discrimination, “unequal facilities” might violate the Title IX regulations but would not violate Title IX. 45 C.F.R. §86.41(c)(7); 34 C.F.R. §106.41(c)(7).

(regulatory notice requirements), 15-19 (constitutional standing as a third-party beneficiary), 10-11, 21-22 (statutory standing).

**B. With Respect to her Regulation-Based Allegations, Fuhr 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 Br. at 11-15.

**C. With Respect to her Regulation-Based Allegations, Fuhr 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. As the Eagle Forum brief explains, Eagle

Forum Br. at 15-19, 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 Br. at 11-15. Here, Fuhr lacks a vested right because she has not satisfied the conditions precedent. Eagle Forum Br. at 15-19.

**D. With Respect to her Statute-Based Allegations, Fuhr's Evidence Fails to Qualify as Direct Because She Does Not Indicate that Retaliators Had Authority over her Dismissal**

The district court dismissed Fuhr's retaliation claim because her testimony fails to qualify as "direct," given that it requires the factfinder to make inferences (*e.g.*, who "they" are, what "this" they did). The Eagle Forum brief collects Circuit decisions on how direct evidence for retaliation requires that the alleged retaliator had authority over the plaintiff. *See* Eagle Forum Br. at 25-26. Significantly, this Title IX outcome differs from the Title IX outcome in *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005), based on the difference between summary judgment here and motion to dismiss there. Eagle Forum Br. at 19-20.

## 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: March 28, 2012

Respectfully submitted,

/s/ Lawrence J. Joseph

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**CERTIFICATE OF SERVICE**

I hereby certify that on March 28, 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: March 28, 2012

Respectfully submitted,

/s/ Lawrence J. Joseph

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