Nos. 12-15388, 12-15409 (Consolidated)

United States Court of Appeals for the Ninth Circuit

KAREN GOLINSKI,
Plaintiff-Appellee,

v.

OFFICE OF PERSONNEL MANAGEMENT, *et al.*,
Defendants-Appellees,

THE BIPARTISAN LEGAL ADVISORY GROUP OF THE U.S. HOUSE OF REPRESENTATIVES,
Intervener-Defendant-Appellant.

KAREN GOLINSKI,
Plaintiff-Appellee,

v.

OFFICE OF PERSONNEL MANAGEMENT, *et al.*,
Defendants-Appellant,

THE BIPARTISAN LEGAL ADVISORY GROUP OF THE U.S. HOUSE OF REPRESENTATIVES,
Intervener-Defendant.

ON APPEAL FROM U.S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

AMICUS CURIAE BRIEF OF EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN OPPOSITION TO PETITION FOR INITIAL HEARING *EN BANC*

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the FEDERAL RULES OF APPELLATE PROCEDURE, *amicus curiae* Eagle Forum Education & Legal Defense Fund 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: April 30, 2012

Respectfully submitted,

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IDENTITY, INTEREST AND AUTHORITY TO FILE

Amicus curiae Eagle Forum Education & Legal Defense Fund ("Eagle Forum"), a nonprofit Illinois corporation, submits this *amicus* brief with the accompanying motion for leave to file.[1] Founded in 1981, Eagle Forum has consistently defended traditional American values, including marriage defined as the union of husband and wife. For these reasons, Eagle Forum has a direct and vital interest in the issues before this Court.

STATEMENT OF THE CASE

An employee of this Court, Karen Golinski, began this case in an Employee Dispute Resolution Plan proceeding in this Court. Second Am. Compl. ¶47. As a result of that process, Chief Judge Kozinski sitting in his administrative capacity ordered the Executive defendants to allow Ms. Golinski to add her same-sex spouse to her family health plan, notwithstanding that federal law defines "spouse" and "marriage" to apply only with respect to "a legal union between one man and one

[1] By analogy to FED. R. APP. P. 29(c)(5), the undersigned counsel certifies that: counsel for *amicus* authored this brief in whole; no counsel for a party authored this brief in any respect; and no person or entity – other than *amicus*, its members, and its counsel – contributed monetarily to this brief's preparation or submission.

woman as husband and wife." 1 U.S.C. §7. He also awarded her back pay to cover the time when she paid for the additional insurance coverage as out-of-pocket costs. Second Am. Compl. ¶55. This action ensued, first as a mandamus action to enforce the Chief Judge's administrative orders and then, by amendment, via the current complaint. *Id.* ¶¶59-62. As now amended, Ms. Golinski's complaint pleads jurisdiction based in part on the "Little Tucker Act," 28 U.S.C. §1346(a)(2). *Id.* ¶¶11, 55. As is customary and for good reason, the complaint includes a general prayer for "such other and further relief as the Court may deem just and proper." *Id.* at 17:17. The District Court ruled for Ms. Golinski without addressing back pay, and the Executive defendants and the intervener-defendant both appealed to this Court.

SUMMARY OF ARGUMENT

Ms. Golinski unmistakably pleaded, and the District Court unmistakably had, jurisdiction based in part on the "Little Tucker Act," 28 U.S.C. §1346(a)(2). *See* Second Am. Compl. ¶¶11, 55. She also had an traditional action for equitable and declaratory relief, and 28 U.S.C. §1295(a)(2) requires that appeals of such "mixed" cases go to the U.S. Court of Appeals for the Federal Circuit, not the regional courts of

appeals like this Court. As such, this Court lacks jurisdiction for these appeals and should transfer them to the Federal Circuit.

Given the presence of a non-constitutional basis – and a jurisdictional one at that – to avoid the Executive defendants' proffered constitutional issue, this Court should as a practical matter and must as a jurisdictional matter resolve the jurisdictional question first. *Amicus* Eagle Forum respectfully submits that this presents the type of issue-clearing work of a three-judge panel, not an initial *en banc* panel.

ARGUMENT

I. BECAUSE THE DISTRICT COURT'S JURISDICTION RELIED IN PART ON THE LITTLE TUCKER ACT, APPELLATE JURISDICTION LIES IN THE U.S. COURT OF APPEALS FOR THE FEDERAL CIRCUIT

As summarized in the Statement of the Case, the District Court's jurisdiction over the entire dispute between Ms. Golinski and the defendants and intervener-defendant plainly relies in part on the Little Tucker Act. Indeed, Ms. Golinski specifically pleaded her complaint to that effect. Second Am. Compl. ¶11.

Of course, plaintiffs lack jurisdiction to sue the federal government without a waiver of sovereign immunity. *F.D.I.C. v. Meyer,* 510 U.S. 471, 475 (1994). Moreover, "'[i]t rests with Congress to

determine not only whether the United States may be sued, but in what courts the suit may be brought.'" *McGuire v. U.S.,* 550 F.3d 903, 913-14 (9th Cir. 2008) (*quoting Minnesota v. United States,* 305 U.S. 382, 388 (1939)). As explained in this Section, Congress authorized such "mixed" suits to begin in the U.S. District Courts, 28 U.S.C. §1346(a)(2), but required that appeals in all such cases go to the U.S. Court of Appeals for the Federal Circuit. 28 U.S.C. §1295(a)(2). Of course, if *amicus* Eagle Forum is correct in its jurisdictional analysis, the correct course is for this Court to transfer these appeals to the Federal Circuit. 28 U.S.C. §1631. That workaday jurisdictional analysis is the stuff of three-judge panels, not initial hearings *en banc.*

A. The Traditional Routes to Equitable and Declaratory Relief Do Not Provide a Waiver of Sovereign Immunity for Money Damages

Before analyzing the Little Tucker Act issues, *amicus* Eagle Forum first establishes that no other basis provides jurisdiction for the back-pay issue. Officer suits for *prospective* injunctive relief against ongoing violations of federal law can be an exception to sovereign immunity, *Ex parte Young,* 209 U.S. 123 (1908), but that exception does not allow money damages or even "retroactive payment of benefits …

wrongfully withheld." *Edelman v. Jordan,* 415 U.S. 651, 678 (1974). Similarly, 5 U.S.C. §702 "eliminates the sovereign immunity defense in all equitable actions for specific relief against a Federal agency or officer," *Sea-Land Serv., Inc. v. Alaska R.R.,* 659 F.2d 243, 244 (D.C. Cir. 1982) (*quoting* S. REP. NO. 94-996, 8 (1976)), but its express terms omit "money damages." 5 U.S.C. §702. As such, the routes to equitable and declaratory relief are foreclosed here as to monetary relief.

B. Other than the Little Tucker Act, the Routes to Monetary Relief Are Unavailable

To recover money damages, plaintiffs must proceed under a waiver of sovereign immunity for such damages. The Federal Tort Claims Act ("FTCA") waives sovereign immunity for tort-related damages, but that waiver excludes "claim[s] based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid." 28 U.S.C. §2680(a). Falling outside FTCA's waiver of sovereign immunity forecloses tort damages. *Molzof v. U.S.,* 502 U.S. 301, 304-05 (1992) (before FTCA, "sovereign immunity … prevented those injured by the negligent acts of federal employees from obtaining redress through lawsuits"). Finally, a "*Bivens*" action covers *some* equal-

protection violations, *Davis v. Passman,* 442 U.S. 228, 247-49 (1979), but only for individual-capacity defendants: "[A] Bivens action can be maintained against a defendant in his or her individual capacity only, and not in his or her official capacity." *Consejo de Desarrollo Economico de Mexicali, A.C. v. United States,* 482 F.3d 1157, 1173 (9th Cir. 2007) (*quoting Daly-Murphy v. Winston,* 837 F.2d 348, 355 (9th Cir. 1987)). Ms. Golinski sued the federal officer defendant in his official capacity.

C. 28 U.S.C. §1295(a)(2) Requires that "Mixed" Little Tucker Act Cases Go to the Federal Circuit

For damage claims not sounding in tort, the Little Tucker Act provides district-court jurisdiction for nontax claims up to $10,000, and the Tucker Act provides jurisdiction for all amounts. 28 U.S.C. §§1346(a)(2), 1491(a)(1). Unless withdrawn or duplicated by another statute, §1491(a)(1)'s jurisdiction is exclusive. *Eastern Enterprises v. Apfel,* 524 U.S. 498, 519-20 (1998); *cf. Bowen v. Massachusetts,* 487 U.S. 879, 910 n.48 (1988). For "mixed" injunctive and Little Tucker Act cases, the Federal Circuit has exclusive appellate jurisdiction "over *every appeal* from a Tucker Act or nontax Little Tucker Act claim." *U.S. v. Hohri,* 482 U.S. 64, 73 (1987) (emphasis in original). That specifically includes "mixed cases" with nontax Little Tucker Act claims coupled

with claims typically resolved in regional courts of appeals. *Hohri,* 482 U.S. at 78; 28 U.S.C. §1295(a)(2). "That [the plaintiff] also seeks declaratory and injunctive relief on grounds other than the Little Tucker Act is of no moment." *Brant v. Cleveland Nat. Forest Service,* 843 F.2d 1222, 1223-24 (9th Cir. 1988) (Kozinski, J.). Here, the District Court's jurisdiction was based – in part – on the Little Tucker Act, which is dispositive of the locus for an appeal.

One might protest that the District Court's judgment did not reach the issue of money damages or back pay, which makes the Little Tucker Act superfluous. That is not the law. By asserting the Little Tucker Act as a jurisdictional predicate, Second Am. Compl. ¶11, alleging the entitlement to back pay, *id.* ¶55, re-alleging her prior allegations in her contract-based count, *id.* ¶63, and seeking "such other and further relief as the Court may deem just and proper," *id.* at 17:17, Ms. Golinski pleaded a contractual entitlement to back pay. *Lockhart v. Leeds,* 195 U.S. 427, 436-37 (1904) (a complaint's "general prayer" for relief allows awarding relief not specifically pleaded); *Metro-North Commuter R. Co. v. Buckley,* 521 U.S. 424, 455 (1997). In any event, the plain language of the jurisdiction for appellate review applies "if the

jurisdiction of that court was based, in whole or in part, on section 1346 of this title." 28 U.S.C. §1295(a)(2). That plain language is not limited to jurisdiction for judgments, but applies instead to the underlying jurisdiction of the District Court *to entertain the action:*

> [S]ection 1295(a) makes the jurisdiction of the Federal Circuit dependent not on the claim currently before an appellate court but on the jurisdiction of the district court at the time the case was brought before the district court.

In re All Asbestos Cases, 849 F.2d 452, 453-54 (9th Cir. 1988). As such, this appeal appears to belong in the Federal Circuit. While the parties ultimately may dispute this analysis, *amicus* Eagle Forum respectfully submits that this jurisdictional analysis would obviate – indeed *prohibit* – this Court's engaging in the constitutional analysis that forms the basis for the petition for initial hearing *en banc.*

II. THE EXECUTIVE DEFENDANTS HAVE NOT SHOWN A BASIS FOR INITIAL HEARING *EN BANC*

For several reasons, the Executive defendants' petition cannot sustain initial hearing *en banc.* First, the Court has a credible jurisdictional basis to avoid reaching the constitutional merits that the petition asks this Court to reach. Obviously, if the Court has a non-constitutional basis on which to resolve the dispute before it, the Court

should not reach the constitutional merits. *City of Los Angeles v. County of Kern,* 581 F.3d 841, 846 (9th Cir. 2009); *Hagans v. Lavine,* 415 U.S. 528, 546-49 (1974). Second, that admonition rises to a prohibition when the non-constitutional issue is that the Court lacks subject-matter jurisdiction: "For a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act *ultra vires*." *Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83, 102 (1998). Third, as a practical matter, the Court will need to resolve the jurisdictional issue, which even if it resolves in favor of jurisdiction in this Court is nonetheless an issue properly decided by a three-judge panel, not the *en banc* Court. Fourth and finally, the Executive defendants do not identify a split in authority – either in this Circuit or between the circuits – that requires immediate resort to an *en banc* panel.

CONCLUSION

The petition for initial hearing *en banc* should be denied.

Dated: April 30, 2012

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the FEDERAL RULES OF APPELLATE PROCEDURE, and Circuit Rule 29-2(c)(2), I certify that the foregoing *amicus curiae* brief is proportionately spaced, has a typeface of Century Schoolbook, 14 points, and contains 1,820 words, including footnotes, but excluding this Brief Form Certificate, the Table of Citations, the Table of Contents, the Corporate Disclosure Statement, and the Certificate of Service. The foregoing brief was created in Microsoft Word 2010, and I have relied on that software's word-count feature to calculate the word count.

Dated: April 30, 2012

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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of April, 2012, I electronically filed the foregoing *amicus curiae* brief with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit – as an exhibit to the accompanying motion for leave to file – by using the appellate CM/ECF system. I further certify that, on that date, the appellate CM/ECF system's service-list report showed that none of the participants in the case were unregistered for CM/ECF use.

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