

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

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

Lawrence J. Joseph  
Cal. State Bar No. 154908  
1250 Connecticut Ave. NW, Ste. 200  
Washington, DC 20036  
Tel: 202-669-5135  
Fax: 202-318-2254  
Email: ljoseph@larryjoseph.com

*Counsel for Amicus Curiae*

## **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 opposition to initial hearing *en banc* filed by the intervener-defendant Bipartisan Legal Advisory Group of the U.S. House of Representatives (“House”). The House takes no position on this motion. The plaintiff-appellee and the Executive-Branch defendants have consented to the filing of the brief and to 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 traditional American values, including the definition of marriage as the union of husband and wife. In addition to its educational efforts on that topic, Eagle Forum has participated as *amicus curiae* in litigation involving same-sex marriage in various state and federal courts, including this Circuit, the First Circuit, and the California Supreme Court.

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 its jurisdiction in this matter and, thus, whether initial hearing *en banc* is appropriate.

## 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**

The Eagle Forum brief raises one primary issue: this Court’s jurisdiction over these appeals. *See* Eagle Forum Br. at 3-8. As the Eagle Forum brief explains, the plaintiff received an administrative award to back pay from the Chief Judge of this Court and included that allegation in her pleadings below. *Id.* at 1-2. She also pleaded jurisdiction under the Little Tucker Act, along with other jurisdictional bases. *Id.* at 2. Under 28 U.S.C. §1295(a)(2), however, so-called “mixed” Little Tucker Act cases that incorporate equitable or declaratory actions

under other authority with a Little Tucker Act claim must be appealed to the U.S. Court of Appeals for the Federal Circuit. *See id.* at 3-4, 6-8; *U.S. v. Hohri*, 482 U.S. 64, 73 (1987); *Brant v. Cleveland Nat. Forest Service*, 843 F.2d 1222, 1223-24 (9th Cir. 1988). Because federal courts have the obligation to consider their jurisdiction *sua sponte*, and no party has briefed the jurisdictional issues that the Eagle Forum brief raises, *amicus* Eagle Forum respectfully submits that its brief will aid the Court as it considers whether to take the Executive defendants' unusual suggestion for an initial hearing *en banc*.

Because this Court has a jurisdictional and non-constitutional basis on which to resolve this litigation, without considering the constitutional question that the Executive defendants pose in their petition, *amicus* Eagle Forum respectfully submits that this case presents a prime candidate for a three-judge panel to clear these issues. *See* Eagle Forum Br. at 8-9. Under the circumstances, taking this case *en banc* now would be premature.

### CONCLUSION

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

Dated: April 30, 2012

Respectfully submitted,

/s/ Lawrence J. Joseph

Lawrence J. Joseph, Cal. Bar #154908

1250 Connecticut Avenue, NW  
Suite 200

Washington, DC 20036

Tel: (202) 669-5135

Fax: (202) 318-2254

Email: ljoseph@larryjoseph.com

*Counsel for Movant Eagle Forum  
Education & Legal Defense Fund*

**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

Lawrence J. Joseph, Cal. Bar #154908  
1250 Connecticut Ave, NW, Suite 200  
Washington, DC 20036  
Tel: 202-669-5135  
Fax: 202-318-2254  
Email: ljoseph@larryjoseph.com

*Counsel for Movant Curiae Eagle Forum  
Education & Legal Defense Fund*