

No. 11-3235

United States Court of Appeals for the Tenth Circuit

PLANNED PARENTHOOD OF KANSAS AND MID-MISSOURI,
Plaintiff-Appellee,

v.

ROBERT MOSER, M.D., SECRETARY, KANSAS
DEPARTMENT OF HEALTH AND ENVIRONMENT
Defendant-Appellant,

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF KANSAS, CIVIL ACTION
NO. 11-2357-JTM-DJW, HON. J. THOMAS MARTEN

**EAGLE FORUM EDUCATION & LEGAL DEFENSE
FUND'S REPLY BRIEF IN SUPPORT OF LEAVE TO
FILE *AMICUS CURIAE* BRIEF**

Lawrence J. Joseph, D.C. Bar #464777
1250 Connecticut Ave, NW, Suite 200
Washington, DC 20036
Tel: 202-669-5135
Fax: 202-318-2254
Email: ljoseph@larryjoseph.com

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

INTRODUCTION

Pursuant to FED. R. APP. PROC. 27 and 29(a) and Tenth Circuit Rule 27.3, the Eagle Forum Education & Legal Defense Fund (“Eagle Forum”) requested leave to file an *amicus curiae* brief in support of the defendant-appellant (hereinafter, “Kansas”). Plaintiff-appellee Planned Parenthood of Kansas and Mid-Missouri opposed Eagle Forum’s motion on several inter-related grounds. Because each of these grounds is baseless, this Court should reject them.

I. PLANNED PARENTHOOD MISSTATES THE CRITERIA FOR GRANTING LEAVE TO FILE *AMICUS* BRIEFS

Not surprisingly, movant Eagle Forum and appellee Planned Parenthood cite different standards on which this Court should decide whether to allow the filing of an *amicus* brief. *Compare* Eagle Forum Mot. at 3-4 (citing FED. R. APP. PROC. 29 and *Neonatology Assocs., P.A. v. Comm’r*, 293 F.3d 128, 133 (3d Cir. 2002)) *with* Planned Parenthood Opp’n at 4 (citing *Ryan v. CFTC*, 125 F.3d 1062 (7th Cir. 1997) (Posner, J., in chambers) and its Seventh-Circuit progeny). WRIGHT & MILLER has characterized the Seventh Circuit cases on which Planned Parenthood relies as “Judge Richard Posner[‘s] ... crusade against *amicus* briefs,” 16A CHARLES ALAN WRIGHT, ARTHUR R. MILLER &

EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE: JURISDICTION §3975 (3d ed. 1998 & Supp. 2008) (Ex. 1), but found “little evidence ... that Judge Posner’s views are widely shared.” *Id.*¹ Like most appellate courts, this Court grants leave to file *amicus* briefs where movants have an adequate interest and present useful arguments. *Hydro Resources, Inc. v. U.S. E.P.A.*, 608 F.3d 1131, 1143 n.7 (10th Cir. 2010). The Eagle Forum brief easily meets this test. *See* Section II, *infra*.

Even the *amicus*-inhospitable Seventh Circuit has granted Eagle Forum leave to file a similar *amicus* brief. *Parker v. Franklin County Community Sch. Corp.*, No. 10-3595 (7th Cir. 2011) (Ex. 2);² *see also Planned Parenthood Minn., North Dakota, South Dakota v. Rounds*, No. 09-3233 (8th Cir. 2011) (leave to file similar *amicus* brief) (Ex. 3). In any event, this Court has not adopted the Seventh Circuit’s narrow approach to *amicus* briefs, and Seventh Circuit decisions are inapposite.

¹ The new edition drops the word “crusade” but still notes that other judges have not joined Judge Posner’s lonely quest. 16AA WRIGHT & MILLER, FED’L PRAC. & PROC. §3975 (4th ed. 2008 & Supp. 2011).

² The Eagle Forum brief in *Parker* is available via PACER if the Court is interested. To avoid burdening the Court with additional paper, however, Eagle Forum believes that abstaining from attaching that brief as an exhibit to this motion is the better course.

Planned Parenthood’s main extra-circuit appellate citation *outside the Seventh Circuit* involved a situation where the *amicus* “motion [was] untimely, ... the issue [the prospective *amicus*] seeks to address has been adequately briefed by [the parties], and ... granting [the *amicus*] motion would result in the needless delay of this case’s disposition.” *Ysleta Del Sur Pueblo v. El Paso County Water Improvement Dist. No. 1*, 222 F.3d 208, 209 (5th Cir. 2000). Here, by contrast, Eagle Forum’s motion is not untimely, Eagle Forum briefed issues that Kansas did not raise – but that this Court must consider – and granting Eagle Forum’s motion will not delay the proceedings.³ See Section II, *infra*.

In addition to citing the foregoing appellate authorities, Planned Parenthood also cites several district-court authorities as bases for this Court to deny leave to file Eagle Forum’s brief. At the outset, because

³ Planned Parenthood cites *Ysleta* for the proposition that a court should deny leave to file *amicus* briefs solely because they “seek[] to address [issues that have] been adequately briefed by the [parties].” Planned Parenthood Opp’n at 8 (quoting *Ysleta*, 222 F.3d at 209); cf. *Am. Coll. of Obstetricians & Gynecologists v. Thornburgh*, 699 F.2d 644, 645 (3d Cir. 1983) (denying leave where movants lacked *any* interest in the litigation *and* failed to demonstrate that proffered brief would add to issues raised by parties and other *amici*). Given the full *Ysleta* quotation in the text above, Planned Parenthood’s selective quotation presents a misleading summary of what the Fifth Circuit actually held.

there is no general district-court authority for or against the filing of *amicus* briefs, decisions (and particularly unpublished decisions) from district courts should not have any bearing here, where FED. R. APP. P. 29 plainly applies. But even if they applied, Planned Parenthood's district court citations are not relevant here.

First, *Soundkeeper* (Planned Parenthood Opp'n at 3, 5-6) involved an *amicus* brief that failed to make "clear ... why any of [the proffered brief's] information would be relevant in the Court's determination of the motions at hand." *Long Island Soundkeeper Fund, Inc. v. New York Athletic Club of City of New York*, 1995 WL 358777, 1 (S.D.N.Y. 1995). By contrast, the Eagle Forum brief is relevant to the Court's determinations here. *See* Section II, *infra*; Eagle Forum Mot. at 4-10.

Second, *Abu-Jamal* (Planned Parenthood Opp'n at 3, 6) involved a 160-page petition for a writ of *habeas corpus* where the trial court found four *amicus* briefs "unnecessary and unhelpful," in the absence of any controlling rule, because the petitioner had adequate counsel, the *amicus* briefs would overburden a court already faced with a "prodigious record," and *amici* did not cite any prejudice. *Abu-Jamal v. Horn*, 2000 WL 1100784, 1-4 (E.D. Pa.) (E.D.Pa.,2000). Further, without

basing its ruling on FED. R. APP. P. 29, the Court noted that the briefs were “too long, untimely, and lacking proper foundation” under that rule. *Id.* at 5. Here, by contrast, the Court has a manageable record and a single *amicus* brief (which meets Rule 29’s timelines and other criteria) before it. Moreover, a negative decision here would prejudice Eagle Forum’s members. *See* Eagle Forum Mot. at 2.

Third, *Hunter* (Planned Parenthood Opp’n at 8) involved “the pretrial stage of a criminal prosecution,” no rules addressed *amicus* briefs, and the proffered *amicus* brief made arguments “ably set forth by Defendant’s counsel in his briefing” and “present[ed] no new perspective to the Court.” *U.S. v. Hunter*, 1998 WL 372552, 1 (D.Vt. 1998). Here, by contrast, the rules do address *amicus* briefs and the Eagle Forum brief includes issues not adequately brief by the parties, including jurisdictional issues that this Court has the obligation to address. *See* Section II, *infra*; Eagle Forum Mot. at 4-9.

Fourth and finally, *Liberty Lincoln* (Planned Parenthood Opp’n at 6) acknowledges the difference between the trial and appellate courts:

At the trial level, where issues of fact as well as law predominate, the aid of *amicus curiae* may be less appropriate than at the appellate level where

such participation has become standard procedure.

Liberty Lincoln Mercury, Inc. v. Ford Marketing Corp., 149 F.R.D. 65, 82 (D.N.J. 1993) (quoting *Yip v. Pagano*, 606 F.Supp. 1566, 1568 (D.N.J. 1985)). Planned Parenthood's *Liberty Lincoln* criterion (namely, whether Eagle Forum is an advocate for Kansas) is irrelevant here. First, "[t]he notion of the *amicus* as 'impartial' became outdated long ago." 16AA WRIGHT & MILLER, FED'L PRAC. & PROC. §3975 (interior quotations omitted). Second and more fundamentally, the issue is not that appellate *amicus* briefs are "standard procedure" empirically, but rather that appellate courts have adopted rules for *amicus* briefs. FED. R. APP. P. 29. While district courts without rules may adopt common-law criteria for *amicus* briefs, appellate courts must follow the rules until they are changed. *Hollingsworth v. Perry*, 130 S.Ct. 705, 710-11 (2010). This Court has not adopted any local rules that limit the criteria applicable to *amicus* briefs as established by the federal rules.

For all of the foregoing reasons, movant Eagle Forum respectfully submits that this Court should disregard Planned Parenthood's citation to district court decisions on *amicus* briefs. Those decisions simply are inapposite to the appellate proceeding here.

II. FILING EAGLE FORUM'S BRIEF WILL SERVE THE COURT'S RESOLUTION OF THE ISSUES RAISED HERE

Under any standard, this Court should grant leave to file Eagle Forum's brief. Planned Parenthood's contrary arguments lack merit.

Although Planned Parenthood suggests that Eagle Forum lacks an adequate interest, Planned Parenthood Opp'n at 5-6, the interest in separation of powers and federalism would qualify Eagle Forum for *intervention* to protect its members interests, *Utah Ass'n of Counties v. Clinton*, 255 F.3d 1246, 1254 (10th Cir. 2001) (stare decisis effect of judgment may impair interests), and *a fortiori* qualifies for *amicus* status. Specifically, courts that issue judgments without jurisdiction act *ultra vires*, *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 101 (1998), and (where plaintiffs lack standing) violate separation-of-powers principles, *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006), "the aim of which is to protect ... the whole people from improvident laws." *Metro. Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise*, 501 U.S. 252, 271 (1991). As to interests, Eagle Forum could *intervene* on behalf of its members.

Planned Parenthood also implicitly suggests that Eagle Forum seeks "to inject interest group politics into the federal appeals process."

Planned Parenthood Opp'n at 4 (*quoting Voices for Choices v. Illinois Bell Tel. Co.*, 339 F.3d 542, 544 (7th Cir. 2003)). While Eagle Forum would welcome the opportunity to provide its political views on Planned Parenthood, Eagle Forum limits its brief to legal views relevant to the case before this Court. Planned Parenthood appears to suggest that because it and Eagle Forum have opposing political views, that this Court should wall Eagle Forum out of the public process before this Court. Eagle Forum respectfully submits that that would constitute viewpoint-based discrimination in violation of the First Amendment. *See Cal. Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972) ("right of access to the courts is indeed but one aspect of the right of petition"). This Court should not discriminate based on viewpoints.

Planned Parenthood does not refute that Eagle Forum's *amicus* brief raises issues of immunity and standing – not merely for contract-based claims but for *any* claims based on Spending-Clause obligations – that this Court must address. Eagle Forum Mot. at 4-9; *Steel Co.*, 523 U.S. at 94. Jurisdictional issues are an exception to courts' general hesitation to consider arguments raised only by *amici*. *Green v. Haskell County Bd. of Conm'rs*, 568 F.3d 784, 788 n.1 (10th Cir. 2009). Although

immunity can in some circumstances be waived, *Harris v. Owens*, 264 F.3d 1282, 1288 n.3 (10th Cir. 2001) (Colorado law), waiver is a question of state law. *Sosna v. Iowa*, 419 U.S. 393, 396 n.2 (1975). The officer before this Court lacks the *ability* to waive Kansas' immunity:

In Kansas, the consent to suit or waiver of sovereign immunity must be based on State action, meaning legislative enactments expressing the will of the elected officials and cannot be based on acts of agents.

Purvis v. Williams, 276 Kan. 182, 194, 73 P.3d 740, 749 (2003). Because the Kansas officer before this Court cannot waive sovereign immunity, the immunity issues that Eagle Forum raises “partake[] of the nature of a jurisdictional bar.” *Edelman v. Jordan*, 415 U.S. 651, 678 (1974). Planned Parenthood’s opposition (at 7) does not even attempt to dispute that the Eagle Forum brief raises issues that this Court must consider.

Even where the Eagle Forum brief raises merits issues – such as the presumption against preemption – that Kansas has not raised yet, the “matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals,” *Singleton v. Wulff*, 428 U.S. 106, 120-21 (1976), even ones raised solely by *amici*. *Turner v. Rogers*, 131 S.Ct. 2507, 2519-20 (2011);

id. at 2521 (Thomas, J., dissenting); *Tyler v. City of Manhattan*, 118 F.3d 1400, 1404 (10th Cir. 1997) (“it is clear that this panel has the discretion to reach arguments raised only in an *amicus curiae* brief”). Indeed, it remains entirely possible that Kansas will “adopt them by reference” in its reply, *Wyoming Farm Bureau Fed’n v. Babbitt*, 199 F.3d 1224, 1230 (10th Cir. 2000), which would justify the Court’s reaching these issues. In any event, this Court considers questions of “federalism or comity” – which include preemption – to fall within the exceptions to the general hesitation to consider arguments raised only by *amici*. *Tyler*, 118 F.3d at 1404. Finally, because Kansas can raise these arguments on the merits below, the issues go to the likelihood of Planned Parenthood’s prevailing and thus to whether to retain or reverse the preliminary injunction at issue in this appeal.⁴

CONCLUSION

This Court should grant leave to file Eagle Forum’s *amicus* brief.

⁴ In addition to complaining that Eagle Forum raises issues *not raised* by Kansas, Planned Parenthood also complains that Kansas adequately raised the issues. Planned Parenthood Opp’n at 8. Leaving aside the dissonance of this argument, Eagle Forum refrained from repeating issues that Kansas briefed. *See Eagle Forum Br.* at 35.

Dated: October 24, 2011

Respectfully submitted,

/s/ Lawrence J. Joseph

Lawrence J. Joseph, D.C. Bar #464777

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 DIGITAL SUBMISSION

1. The foregoing reply brief comply with the privacy requirements of Tenth Cir. Rule 25.5 because the motion and brief do not contain any private information that that rule would require to be redacted.

2. The foregoing reply brief, and the attached certificates have been scanned for viruses with the most recent version of a commercial virus scanning program, Norton 360, and according to the program are free of viruses.

Dated: October 24, 2011

Respectfully submitted,

/s/ Lawrence J. Joseph

Lawrence J. Joseph, D.C. Bar #464777
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*

CERTIFICATE OF SERVICE

I hereby certify that, on October 24, 2011, I electronically filed the foregoing reply brief with the Clerk of the Court for the U.S. Court of Appeals for the Tenth by using the CM/ECF system, which will send notification of such filing to the following:

James M. Armstrong
Gary L. Ayers
Foulston Siefkin LLP
1551 N. Waterfront Parkway, Suite 100
Wichita, KS 67206-4466

jarmstrong@foulston.com
gayers@foulston.com

Toby Crouse
Foulston Siefkin LLP
9225 Indian Creek Parkway, Suite 600
Overland Park, Kansas 66213-2000

tcrouse@foulston.com

Jeffrey A. Chanay, Deputy Attorney General
Steve R. Fabert, Assistant Attorney General
Office of the Attorney General Derek Schmidt
120 SW 10th Avenue, 2nd Floor
Topeka, KS 66612-1597

Jeff.Chanay@ksag.org
Steve.Fabert@ksag.org

Lee Thompson
Erin Thompson
Thompson Law Firm, LLC
106 E. 2nd Street
Wichita, Kansas 67202

lthompson@tslawfirm.com
ethompson@tslawfirm.com

Elissa J. Preheim
Sarah E. Warlick
Arnold & Porter, LLP
555 Twelfth Street, N.W.
Washington, DC 20004-1206

elissa.preheim@aporter.com
sarah.warlick@aporter.com

Grace Pickering
Arnold & Porter, LLP
399 Park Avenue
New York, NY 10022-4690

grace.pickering@aporter.com

Roger K. Evans
Planned Parenthood Fed'n of America
434 W. 33rd Street
New York, NY 10001

roger.evans@ppfa.org

Helene T. Krasnoff
Planned Parenthood Fed'n of America
1110 Vermont Avenue, N.W., Suite 300
Washington, DC 20005

helene.krasnoff@ppfa.org

Dated: October 24, 2011

Respectfully submitted,

/s/ Lawrence J. Joseph

Lawrence J. Joseph, D.C. Bar #464777
1250 Connecticut Ave, NW, Suite 200
Washington, DC 20036
Tel: 202-669-5135
Fax: 202-318-2254
Email: ljoseph@larryjoseph.com

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