

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

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

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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”) requests leave to file the accompanying *amicus curiae* brief in support of the defendant-appellant (hereinafter, “Kansas”). Kansas consented to the filing of the brief and to the motion, but the plaintiff-appellee Planned Parenthood of Kansas and Mid-Missouri withheld consent to the filing of the brief and opposes this motion.

I. INTEREST AND IDENTITY OF *AMICUS CURIAE*

Eagle Forum is a nonprofit corporation founded in 1981 and headquartered in Saint Louis, Missouri. For thirty years, Eagle Forum has consistently defended federalism and supported states’ autonomy from federal intrusion in areas – like public health – that are of traditionally local concern. Similarly, Eagle Forum has consistently argued for judicial restraint under both Article III and separation-of-powers principles.

In addition, Eagle Forum has a longstanding interest in protecting unborn life and in adherence to the Constitution as written. Although the challenged Kansas statute does not involve abortion *per se*, Planned Parenthood attempts to inject that issue here. Any reported decision

here could therefore profoundly affect not only the foregoing interests in federalism and judicial restraint but also substantive issues related to abortion. Because Eagle Forum has active chapters in each of the states within this Circuit except Wyoming and members in each state, the decision here likely will affect – positively or negatively – Eagle Forum members’ ability to petition their state legislatures to take action like that taken by Kansas here.

For all of the foregoing reasons, Eagle Forum has a direct and vital interest in the issues before this Court and respectfully requests leave to file its accompanying brief in support of Kansas in order to present arguments that will be directly useful to the Court’s 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 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). “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 highlighted below,¹ Eagle Forum’s brief will aid this Court by raising several issues that Kansas either did not address or addressed in less detail than Eagle Forum addresses them. The subset of issues that Kansas did not raise fall into two categories:

- (1) Merits issues that Kansas potentially could waive, although 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, to be exercised on the facts of individual cases,” *Singleton v. Wulff*, 428 U.S. 106, 120-21 (1976), including

¹ The various other sections of the Eagle Forum brief similarly expand on the issues raised by Kansas in ways that will help this Court analyze the issues presented here. The four sections highlighted here are illustrative examples.

arguments raised solely by *amici*. *Turner v. Rogers*, 131 S.Ct. 2507, 2519-20 (2011); *see also id.* at 2521 (Thomas, J., dissenting). Particularly given that Kansas can raise these issues below on the merits after the preliminary injunction is resolved, Kansas should not be deemed to have waived any arguments.

- (2) Issues on subject-matter jurisdiction that this Court has the independent obligation to consider, even if the parties do not raise them. *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). For this reason alone, the Eagle Forum brief will aid the Court’s resolution of this matter.

But even to the extent that Eagle Forum raises merits issues that the Court declines to reach because it finds Kansas waived those issues, 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.

A. Not Only Planned Parenthood But Also the United States Lack a Vested Right to Enforce Title X against Kansas without Meeting the Conditions Precedent to Such Enforcement

The Eagle Forum brief develops the argument that courts treat Spending-Clause legislation such as Title X of the Public Health Service Act as contracts between the federal government and recipients (here, states), with the public as third-party beneficiaries. *Barnes v. Gorman*, 536 U.S. 181, 186 (2002). To regulate recipients based on their accepting federal funds, Congress must express Spending-Clause conditions unambiguously, *Gorman*, 536 U.S. at 186, especially for state recipients with sovereign immunity. *Sossamon v. Texas*, 131 S.Ct. 1651, 1661 (2011). In addition, the Eagle Forum brief also analyzes the terms of Kansas' agreement with the federal government, particularly with respect to enforcement. Because even the federal government has not met the conditions precedent to enforcing Title X against Kansas, Eagle Forum's brief argues that the federal government itself does not possess a vested right to take the actions that Planned Parenthood (ostensibly a third-party beneficiary) attempts to take here. Because third-party beneficiaries "generally have no greater rights in a contract than does the promise[e]," *United Steelworkers of Am. v. Rawson*, 495 U.S. 362,

375 (1990), the Eagle Forum brief argues that Planned Parenthood lack a vested right. *See* Eagle Forum Br. at 5-7 (analyzing Title X's administrative enforcement process); 13-14 (analyzing vested rights).

B. Third-Party Beneficiaries Like Planned Parenthood Lack Standing to Enforce Non-Vested Rights of the Promisee

Under the federal common law, a uniform federal rule of decision is not required in *private enforcement* of a federal contract or program if the claim “will have no direct effect upon the United States or its Treasury.” *Miree v. DeKalb County*, 433 U.S. 25, 29 (1977), and federal courts can look to state law for third-party beneficiaries’ standing to enforce obligations under federal contracts. *Miree*, 433 U.S. at 28. Because third-party beneficiaries do not have rights greater than the promisee, *Rawson, supra*, the Eagle Forum brief analyzes the standing of third-party beneficiaries to enforce purportedly federal obligations that even the federal government does not have a vested right to enforce. *See* Eagle Forum Br. at 15-18 & n.5 (collecting Kansas and federal cases). Significantly, *plaintiffs* always bear the burden of proving jurisdiction, *Summers v. Earth Island Inst.*, 129 S.Ct. 1142, 1150 (2009), and to extent other courts have assumed jurisdiction

without addressing this issue, “drive-by jurisdictional rulings” that reach merits issues without considering a particular jurisdictional issue “have no precedential effect” on that jurisdictional issue. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94-95 (1998); *Waters v. Churchill*, 511 U.S. 661, 678 (1994) (“cases [cited by Planned Parenthood] cannot be read as foreclosing an argument that they never dealt with”). See Eagle Forum Br. at 8-9 (analyzing federal common law), 15-19 (analyzing third-party beneficiaries’ standing).

C. The *Ex Parte Young* Officer-Suit Exception to Sovereign Immunity Is Inapplicable for Want of an Ongoing Violation of Federal Law

The Eagle Forum brief also analyzes the extent to which Kansas’ submitting an annual application for continuation funding under its Title X project constitutes a “violation” of federal law sufficient to trigger the *Ex parte Young* exception to sovereign immunity for Planned Parenthood’s preemption claims, drawing on *Sossamon, supra*, *Green v. Mansour*, 474 U.S. 64, 66-67 (1985), and *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689-90 (1949), on the need for clear, ongoing violations of federal law, as opposed to mere breaches of civil-

law obligations like tort and contract law. *See* Eagle Forum Br. at 3-4, 19-20, 26-27.

D. The Presumption against Preemption Applies for Fields like Public Health that States Historically Have Occupied

The Eagle Forum brief details the “presumption against preemption” that applies in in fields traditionally occupied by state and local government, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947), which requires “the *clear and manifest purpose* of Congress” to displace state authority. *Id.* (emphasis added). When (as here) this presumption applies, courts typically select readings that avoid preemption when presented with clauses susceptible to more than one plausible meaning. *Altria Group, Inc. v. Good*, 129 S.Ct. 538, 540 (2008). As Eagle Forum then shows, Title X is more than susceptible to a non-preemptive interpretation. *See* Eagle Forum Br. at 30-34.

CONCLUSION

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

Dated: October 11, 2011

Respectfully submitted,

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CERTIFICATE OF DIGITAL SUBMISSION

1. The foregoing motion and the accompanying 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 motion, the accompanying 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 11, 2011

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CERTIFICATE OF SERVICE

I hereby certify that, on October 11, 2011, I electronically filed the foregoing motion and the accompanying 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:

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