

United States Court of Appeals for the Eighth Circuit

PLANNED PARENTHOOD OF THE HEARTLAND, *ET AL.*,
Plaintiffs-Appellees,

v.

DAVE HEINEMAN, GOVERNOR OF NEBRASKA, IN HIS OFFICIAL
CAPACITY, *ET AL.*,
Defendants-Appellees,

v.

EAGLE FORUM EDUCATION AND LEGAL DEFENSE FUND, *ET AL.*,
Movants,

NEBRASKANS UNITED FOR LIFE, DOING BUSINESS AS NULIFE
PREGNANCY RESOURCE CENTER,
Movant-Appellant.

ON APPEAL FROM U.S. DISTRICT COURT FOR THE
DISTRICT OF NEBRASKA, LINCOLN DIVISION,
CIVIL NO. 4:10-03122, HON. LAURIE CAMP SMITH

**MOTION OF EAGLE FORUM EDUCATION & LEGAL
DEFENSE FUND FOR LEAVE TO FILE *AMICUS
CURIAE* BRIEF IN SUPPORT OF APPELLANT'S
PETITION FOR REHEARING *EN BANC***

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 Eagle Forum
Education & Legal Defense Fund

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: January 12, 2012

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 Eagle Forum
Education & Legal Defense Fund*

INTRODUCTION

Pursuant to FED. R. APP. PROC. 27 and by analogy to FED. R. APP. PROC. 29(a), the Eagle Forum Education & Legal Defense Fund (“Eagle Forum”) respectfully requests leave to file the accompanying *amicus curiae* brief in support of the petition for rehearing *en banc* filed by the movant-appellant (hereinafter, “NuLife”).¹

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. In addition, Eagle Forum has a longstanding interest in protecting unborn life and in adherence to the Constitution

¹ The undersigned counsel represented both Eagle Forum and NuLife in the district court and, as NuLife’s counsel in district court, filed the notice of appeal to this Court. Although FED. R. APP. PROC. 29 does not apply by its terms, by analogy to FED. R. APP. P. 29(c)(5), the undersigned counsel certifies that, except as provided in the prior sentence: the undersigned counsel for the *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.

as written. Finally, Eagle Forum has an active Nebraska chapter, whose members are injured by a federal court's enjoining a duly enacted Nebraska law without the jurisdiction to do so. 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 the petition for rehearing *en banc*.

II. AUTHORITY TO FILE EAGLE FORUM'S BRIEF

Although Rule 29 does not expressly address petition-stage *amici* briefs, the rule nonetheless can apply by analogy. *See* FED. R. APP. P. 29(a) Advisory Committee Note to 1998 Amendments (“court may grant permission to file an *amicus* brief in a context in which the party does not file a ‘principal brief’; for example, an *amicus* may be permitted to file in support of a party’s petition for rehearing”). Although it does not apply expressly, Rule 29 counsels for making the recitals required by Rule 29(b), namely 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.” *Id.*

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 (3rd 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. As explained in the next section, the Eagle Forum brief meets Rule 29’s criteria.

III. FILING EAGLE FORUM’S BRIEF WILL SERVE THE COURT’S RESOLUTION OF THE ISSUES RAISED

For the specific reasons set forth below, Eagle Forum’s brief will aid this Court by exploring not only appellate courts’ jurisdiction but also their obligations with respect to jurisdictional issues.

A. Appellate Courts Must Assess Not Only their Own Jurisdiction But Also the Lower Courts’ Jurisdiction

Although Article III requires appellate courts to consider not only their own jurisdiction but also the lower courts’ jurisdiction, *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 95 (1998), the panel relied on *Bauer v. Transitional Sch. Dist. of City of St. Louis*, 255 F.3d 478, 480 (8th Cir. 2001), for the proposition that this Court lacks appellate jurisdiction to review the lower court’s jurisdiction here. Slip Op. at 5 n.3. At the outset, *Bauer* concerned a statutory limitation on jurisdiction with respect to removal orders, whereas this case involves

Article III of the Constitution. Eagle Forum Br. at 4-7. In addition to the appellate cases cited by NuLife's petition, the Eagle Forum brief discusses *Lyon v. Whisman*, 45 F.3d 758, 758-59 & n.1 (3d Cir. 1995), in which the Third Circuit remanded the defendants' partial appeal with an order to dismiss not only the appealed portion of the case, but also the plaintiff's judgment on counts that the defendants *did not even appeal*, because the district court lacked jurisdiction. Eagle Forum Br. at 7. Taken together, the extra-circuit decisions cited by Eagle Forum and NuLife in analogous appellate situations strongly suggest that the panel misinterpreted this Court's Article III jurisdiction over the underlying litigation and, thus, its Article III obligation to ensure lower-court jurisdiction in any case that reaches this Court on appeal.

B. Even If It Does Not Remand with Orders to Dismiss the Underlying Litigation, the *En Banc* Court Will Need to Trim the Injunction

Because the challenged law simply creates a state-law right of action for women victims of abortions performed without informed consent, the executive-branch state defendants cannot redress the plaintiffs' alleged injuries from future state-court actions that may, or may not, occur. Nonetheless, the district court accepted the plaintiffs'

alleged fear that the executive-branch defendants would enforce the new law against *facilities* under a prior, more-general law, NEB. REV. STAT. §71-448, that prohibits “[c]ommitting or permit[ing], aiding, or abetting the commission of any unlawful act,” notwithstanding that the new law immunizes against criminal action, disciplinary action, or revocation of a license for failure to meet its informed-consent criteria. Eagle Forum Br. at 2-3.

Even if the *en banc* Court accepts the improbable, non-imminent facility-based enforcement via §71-448 as creating an injury in fact redressable by these defendants, the Eagle Forum brief explains that the *en banc* Court nonetheless would need to enjoin only that facility-based enforcement by the defendants before the Court: “standing is not dispensed in gross,” *id.* n.2 (quoting *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996)), and plaintiffs must establish standing for all merits relief. *Id.* (citing *Summers v. Earth Island Institute*, 129 S.Ct. 1142, 1151 (2009)). In summary, the Eagle Forum brief demonstrates that the *en banc* Court must modify the lower-court judgment, which is either wholly without standing and ripeness or, *at best*, overbroad.

C. Given the Absence of Statutory Constraints Present in *Bauer*, this Court Must Respect Article III’s Limits

The Eagle Forum brief explains that, unlike the statutory jurisdictional issues in *Bauer*, the obligations that NuLife asks this Court to reach derive from Article III. Eagle Forum Br. at 6 (citing *Church of Scientology of California v. U.S.*, 506 U.S. 9, 15 (1992)). As such, the obligation to assess the lower courts’ jurisdiction in cases like this “assumes particular importance in ensuring that the Federal Judiciary respects the proper – and properly limited – role of the courts in a democratic society.” Eagle Forum Br. at 8 (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006), citations and internal quotations omitted). By exploring this Court’s jurisdictional obligations under the Constitution, the Eagle Forum brief will aid this Court.

D. If this Court *Has* Jurisdiction, this Court Has the Obligation to *Exercise* that Jurisdiction

The Eagle Forum brief explains that courts have no more right to avoid exercising the jurisdiction that they have than they have to exercise jurisdiction that they lack. *Id.* (citing *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821) and *Barzilay v. Barzilay*, 536 F.3d 844, 849-50 (8th Cir. 2008)). In part because of the foregoing principle dating back to Chief Justice Marshall, federal courts have a “virtually

unflagging obligation ... to exercise the jurisdiction given them.” *Id.* (quoting *Colorado River Water Conserv. Dist. v. U.S.*, 424 U.S. 800, 817 (1976) and citing *Royal Indem. Co. v. Apex Oil Co.*, 511 F.3d 788, 792-93 (8th Cir. 2008)). These issues relate to jurisdiction, and the Court has an obligation to consider them.

E. Post-Judgment Intervention to Challenge Jurisdiction Should Always Qualify as Timely in District Court Because Appellate Will Have to Assess Jurisdiction on Appeal in Any Event

As Eagle Forum’s brief and NuLife’s petition explain, this Court has the obligation to explore the lower courts’ jurisdiction in the underlying litigation, even if this Court affirms the denial of intervention. *See* Section III.A, *supra*. Given that, Eagle Forum’s brief proposes that this Court adopt a bright-line rule that post-judgment intervention to challenge jurisdiction always is timely. Eagle Forum Br. at 9-13. Put simply, this Court must address these jurisdictional issues on appeal in any event, so the Court should encourage the district courts in this Circuit to analyze these issues in the first instance.

Eagle Forum’s proposed bright-line rule is consistent with other circuits that lower the bar for post-judgment intervention to challenge the lower court’s jurisdiction. *See* Eagle Forum Br. at 12. Moreover,

Eagle Forum's proposed rule is consistent with the Supreme Court's guidance that "[f]or 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*." *Id.* (quoting *Steel Co.*, 523 U.S. at 101). This Court should have no qualms about voiding *ultra vires* judgments.

CONCLUSION

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

Dated: January 12, 2012

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 SERVICE

I hereby certify that on this 12th day of January, 2012, I electronically filed the foregoing motion and the accompanying brief with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

/s/ Lawrence J. Joseph

Lawrence J. Joseph