

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): No. 10-3302-cv Caption [use short title]

Motion for: Leave to File Amicus Brief STEPHANIE BIEDIGER et al. v. QUINNIPIAC UNIVERSITY

Set forth below precise, complete statement of relief sought:

Eagle Forum Education & Legal Defense Fund, Inc. seeks leave to file the accompanying amicus brief. (Movant previously sought a 2-day extension of the time within which to file, based on counsel's illness since April 3.)

MOVING PARTY: Eagle Forum Educ & Legal Def. Fund OPPOSING PARTY: STEPHANIE BIEDIGER et al.

Plaintiff Defendant Appellant/Petitioner Appellee/Respondent X Movant for amicus status

MOVING ATTORNEY: Lawrence J. Joseph OPPOSING ATTORNEY: Jonathan B. Orleans [name of attorney, with firm, address, phone number and e-mail]

Law Office of Lawrence J Joseph PULLMAN & COMLEY LLC 1250 Connecticut Av, NW Suite 200 850 Main Street Washington, DC 20036 Bridgeport, CT 06601-7006 Tel: 202-669-5135; Email: ljoseph@larryjoseph.com Tel: 203 330 2129; Email: jborleans@pullcom.com

Court-Judge/Agency appealed from: District of Connecticut (Bridgeport); Hon. Stefan R. Underhill

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1): Yes No (explain):

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has request for relief been made below? Yes No Has this relief been previously sought in this Court? Yes No Requested return date and explanation of emergency:

Opposing counsel's position on motion: Unopposed Opposed Don't Know Does not

Does opposing counsel intend to file a response: consent; may file a response

Is oral argument on motion requested? Yes No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? Yes No If yes, enter date:

Signature of Moving Attorney: /s/ Lawrence J. Joseph Date: April 11, 2011 Has service been effected? Yes No [Attach proof of service]

ORDER

IT IS HEREBY ORDERED THAT the motion is GRANTED DENIED.

FOR THE COURT: CATHERINE O'HAGAN WOLFE, Clerk of Court

Date: By:

10-3302-cv

United States Court of Appeals for the Second Circuit

STEPHANIE BIEDIGER, Individually and on behalf of all those similarly situated,
KAYLA LAWLER, Individually and on behalf of all those similarly situated, ERIN
OVERDEVEST, Individually and on behalf of all those similarly situated,
KRISTEN CORINALDESI, Individually and on behalf of all those similarly
situated, L.R., Individually and on behalf of all those similarly situated, ROBIN L.
SPARKS, Individually, LOGAN RIKER, Individually and on behalf of all those
similarly situated,

Plaintiffs-Appellees,

LESLEY RIKER, on behalf of her minor daughter,

Plaintiff,

vs.

QUINNIPIAC UNIVERSITY,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF CONNECTICUT (BRIDGEPORT)

MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF OF EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND, INC., IN SUPPORT OF DEFENDANT-APPELLANT IN SUPPORT OF REVERSAL

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Counsel for *Amicus Curiae*

INTRODUCTION

Pursuant to FED. R. APP. PROC. 29(b), the Eagle Forum Education & Legal Defense Fund (“Eagle Forum”), by and through counsel, requests leave to file the accompanying *amicus curiae* brief in support of the defendant-appellant Quinnipiac University (the “University”) in support of reversing the judgment against the University. Because the parties did not consent, Eagle Forum files this motion.

I. INTEREST AND IDENTITY OF *AMICUS CURIAE*

Eagle Forum is a nonprofit organization founded in 1981 and headquartered in Saint Louis, Missouri. For thirty years, Eagle Forum has defended American sovereignty, promoted adherence to the U.S. Constitution, and defended federalism. In connection with Title IX specifically and federalism generally, Eagle Forum has sought to protect the ability of States (and local governments) to set their own course, free from federal control of areas that the Constitution reserves to the people and the States. For example, Eagle Forum participated as *amicus curiae* to support a challenge to Title IX’s “Three-Part Test” in *National Wrestling Coaches Association v. Department of Education*, No. 03-5169 (D.C. Cir.), as well to limit the enforcement of regulatory

disparate-impact standards in *Alexander v. Sandoval*, No. 99-1908 (U.S.). More recently, Eagle Forum has filed *amici* briefs in the following appellate matters on Title IX issues: *Mansourian v. Regents of the University of California*, No. 08-16330 (9th Cir.); *Doe v. Vermilion Parish School Board*, No. 10-30378 (5th Cir.); *Parker v. Franklin County School Corp.*, No. 10-3595 (7th Cir.). Eagle Forum's longstanding involvement, both in educating the public and in participating in litigation, bears witness to its underlying interest in the issues presented here.

For all of the foregoing reasons, Eagle Forum has a direct and vital interest in the issues presented before this Court, and respectfully requests leave to file its accompanying brief in support of the University, in order to present arguments that will be directly useful to the Court in its 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 (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’s brief will aid this Court by addressing issues of subject-matter jurisdiction not addressed by the University, but which the University cannot waive. Indeed, this Court has the independent duty to consider subject-matter jurisdiction, even if the parties do not.

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

For the specific substantive reasons set forth below, Eagle Forum’s brief will aid this Court by raising several issues that the University either did not address or addressed in less detail than Eagle Forum addresses them. *Cf. Schweiker v. Hogan*, 457 U.S. 569, 585 & n.24 (1982) (appellee may raise new arguments on appeal “as a basis on which to affirm ... court’s judgment”). The subset of issues that the University did not raise fall into two categories: (1) issues on the merits

that the University potentially could waive, and (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 that reason alone, the Eagle Forum brief will aid the Court’s resolution of this matter.

Further, to the extent that Eagle Forum raises merits issues that the Court declines to reach because it finds the University to have waived them, 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. Moreover, Eagle Forum’s expertise in, and familiarity with, Title IX will not only aid the Court but also will serve as a counterweight to any *amici curiae* briefs filed in support of the plaintiffs-appellants.

In addition to the foregoing general reasons, the Eagle Forum brief will aid the Court through the following specific arguments that

the University either did not develop in as much depth as Eagle Forum or failed to raise altogether.

A. Sandoval Distinguishes this Case from Cases to Enforce the Title IX Statute, without Reference to the Title IX Regulations

For reasons of its own, the University apparently has declined to press the issue that the Title IX regulations are not enforceable in federal court because they require conduct that Title IX (the statute) does not prohibit. *Alexander v. Sandoval*, 532 U.S. 275, 288-89 (2001). Although courts are divided on whether that distinction alone goes to subject-matter jurisdiction, the issue has relevance, even if the *Sandoval* argument is waiveable on the merits. *Sandoval* creates a crucial distinction between actions to enforce the statute and actions to enforce the regulations, which undermines pre-*Sandoval* case law that did not consider that distinction. See Eagle Forum Br. at 8-9, 11-16 (regulatory notice requirements), 16-21 (standing as a third-party beneficiary), and 35-36 (availability of cause of action).

B. Plaintiffs Failed to Provide Title IX's Required Notice

On the notice issue, the Eagle Forum brief identifies additional bases for this Court to affirm the dismissal, based on lack of the

conditions precedent to enforcing the regulations in court under their plain terms: namely, the relevant federal agency must have determined that compliance cannot be secured by voluntary means, the recipient must have received notice of the failure to comply and of the action to be taken to effect compliance, and ten days must have passed. *See* 45 C.F.R. § 80.8(a), (d); 34 C.F.R. § 100.8(a), (d) (same). None of these prerequisites occurred, which constitutes failure to provide the notice that the regulations require. Eagle Forum Br. at 11.

C. Plaintiffs Lack Standing as Third-Party Beneficiaries

While the notice issue goes to the merits under the regulations, it also goes to constitutional standing. As the Eagle Forum brief explains, Eagle Forum Br. at 11-16, not even the United States could enforce the Title IX regulations under the current circumstances, without meeting the regulatory conditions precedent. 45 C.F.R. § 80.8(a), (d); 34 C.F.R. § 100.8(a), (d). Because the promisee cannot enforce the obligation, neither can the third-party beneficiaries (*i.e.*, the plaintiffs here). Eagle Forum Br. at 16-21; *United Steelworkers of Am. v. Rawson*, 495 U.S. 362, 375 (1990); *BAll Banking Corp. v. UPG, Inc.*, 985 F.2d 685, 697 (2d Cir. 1993) (“third-party beneficiary ... possessed no greater right to

enforce a contract than the actual parties to the contract”). Here, plaintiffs lack a vested right because they have not satisfied the conditions precedent. See Eagle Forum Br. at 14-15 (discussing Connecticut law); *Miree v. DeKalb County*, 433 U.S. 25, 28 (1977) (federal courts look to state law for a third-party beneficiary’s standing to enforce federal obligations).

D. Plaintiffs Lack Standing for Want of a Legally Protected and Individualized Right

Although constitutional standing requires “an invasion of a *legally protected interest*,” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (emphasis added), the plaintiffs-appellants assert only group-based rights, which are insufficiently individualized (*i.e.*, the University could meet their proportionality-based regulatory complaint by elevating another women’s team altogether, which would not redress these plaintiffs’ injuries. Nor can the plaintiffs-appellants solve the problem by amending the complaint to represent all women. Aggregating individuals without standing does not create a group with standing. *Pub. Citizen, Inc. v. NHTSA*, 489 F.3d 1279, 1294 (D.C. Cir. 2007). Finally, even if the regulatory charges were sufficiently individualized, they are not legally protected for lack of the conditions

precedent to their enforcement.

CONCLUSION

While some of these arguments have not been addressed in prior Title IX litigation in which courts simply assumed jurisdiction without discussing it, “drive-by jurisdictional rulings of this sort” (*i.e.*, a court’s reaching the merits without even considering jurisdiction) obviously “have no precedential effect” on the jurisdictional question. *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 94-95 (1998); *Waters v. Churchill*, 511 U.S. 661, 678 (1994) (“cases [cited by Plaintiffs] cannot be read as foreclosing an argument that they never dealt with”). “Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.” *Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157, 170 (2004) (interior quotations omitted). Movant Eagle Forum respectfully submits that this Court must consider these issues. For that reason, the Eagle Forum brief will aid the Court by providing the “concrete adverseness ... [that] sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.” *Baker v. Carr*, 369

U.S. 186, 204 (1962).

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

Dated: April 11, 2011

Respectfully submitted,

/s/ Lawrence J. Joseph

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of April 2011, I have caused the foregoing “Motion Information Statement” and its accompanying memorandum of law and proposed *amicus* brief to be served on the following counsel via the Court’s CM/ECF System:

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/s/ Lawrence J. Joseph

Lawrence J. Joseph