Nos. 09-3231, 09-3233, 09-3362

United States Court of Appeals for the Eighth Circuit

PLANNED PARENTHOOD MINNESOTA, NORTH DAKOTA, SOUTH DAKOTA, AND CAROL E. BALL., M.D.,
Plaintiffs-Appellees/Cross Appellants,

v.

MIKE ROUNDS, GOVERNOR, AND MARTY JACKLEY, ATTORNEY GENERAL, IN THEIR OFFICIAL CAPACITIES,
Defendants-Appellants/Cross-Appellees,

and

ALPHA CENTER, BLACK HILLS CRISIS PREGNANCY CENTER, DOING BUSINESS AS CARE NET, DR. GLENN A. RIDDER, M.D., AND ELEANOR D. LARSEN, M.A., LSWA,,
Interveners-Appellants/Cross-Appellees,

ON APPEAL FROM U.S. DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA, SOUTHERN DIVISION, CIVIL ACTION NO. 4:05-04077, HON. KAREN SCHREIER

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

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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") requests leave to file the accompanying *amicus curiae* brief in support of the defendants-appellants ("South Dakota") and defendant-interveners-appellants ("Interveners") in support of their petitions for panel reconsideration and rehearing *en banc*.

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 as written. 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 South Dakota and Intervener petitioners, in order to present arguments that will be directly useful to the Court's consideration of their petitions.

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."

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 not fully addressed by South Dakota and the Interveners.

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 identifying splits in Circuit authority implicated here and instances where supervening Supreme Court authority undermine Circuit precedent, as well as by amplifying on jurisdictional points raised by the petitioners. Specifically, the Eagle Forum brief will aid the Court through the following arguments that the petitioners did not develop in as much depth as Eagle Forum.

A. <u>This Circuit Has a Split in Authority on How Federal Courts May Interpret State Statutes</u>

The Eagle Forum brief describes a split in Circuit precedent on whether federal courts reviewing state statutes may adopt narrowing interpretations. *Compare United Food & Commercial Workers Intern. Union, AFL-CIO, CLC v. IBP, Inc.*, 857 F.2d 422, 431 (8th Cir. 1988) ("Federal courts do not sit as a super state legislature, [and] may not impose [their] own narrowing construction ... if the state courts have not already done so") (interior quotations omitted, alterations in original) *with C.B.C. Distribution & Marketing, Inc. v. Major League*

Baseball Advanced Media, L.P., 505 F.3d 818, 821-22 (8th Cir. 2007) (courts "must 'predict how the highest court of that state would resolve the issue'" "[w]hen state law is ambiguous") (interior quotations omitted). This conflict is relevant to the panel majority's narrowing, worst-case interpretation of a state statute to invalidate South Dakota's contested warning requirement. *See* Eagle Forum Br. at 2-5.

B. This Circuit Has a Split in Authority on How to Resolve Intra-Circuit Splits in Authority

Federal courts of appeals have the duty to adopt "[a]ny procedure … which is sensibly calculated to achieve these dominant ends of avoiding or resolving intra-circuit conflicts." *Western Pacific R. Corp. v. Western Pacific R. Co.,* 345 U.S. 247, 271 (1941). This Circuit has a split in circuit authority over how to resolve splits in circuit authority. *Compare Toua Hong Chang v. Minnesota,* 521 F.3d 828, 832 n.3 (8th Cir. 2008) ("[w]hen there is an intra-circuit split, [courts] are free to choose which line of cases to follow") *with Murphy v. FedEx Nat. LTL, Inc.,* 618 F.3d 893, 902 (8th Cir. 2010) ("our general practice when dealing with intracircuit splits is to follow the earlier opinion, as it should have controlled the subsequent panels that created the conflict") (internal quotations omitted). *See* Eagle Forum Br. at 3 n.2.

C. The Plaintiffs-Appellees Lack Standing to Assert their Patients' Abortion-Related Rights

The Eagle Forum brief elaborates on the third-party standing arguments raised by the Intervener, Interveners' Pet. at 3, 13, over whether abortion providers may assert their patients' abortion rights to defeat the South Dakota's informed-consent legislation to protect those patients from abortion providers. In addition to going into more detail on this jurisdictional argument, the Eagle Forum brief discusses the Supreme Court's most recent relevant precedent on third-party standing, *Kowalski v. Tesmer,* 543 U.S. 125, 128-30 (2004), and distinguishes prior Circuit decisions implicitly abrogated by *Tesmer*. *See* Eagle Forum Br. at 7-10 (*discussing Planned Parenthood of Minnesota, Inc. v. Citizens for Community Action,* 558 F.2d 861, 865 n.3 (8th Cir. 1977)). Significantly, this Court has the obligation to police standing and other jurisdictional issues, even if the parties do not raise them. *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee,* 456 U.S. 694, 702 (1982); *Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83, 94-95 (1998).

D. The "Necessity" Prong of the *Casey* Framework Presents Issues of Exceptional Importance

Under *Planned Parenthood of Southeastern Penn. v. Casey*, 505 U.S. 833, 878 (1992), "State[s] may enact regulations to further the health or safety of a woman seeking an abortion" and only "[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right." The Eagle Forum brief analyzes the suicide warning under terms of its necessity for protecting at-risk women, as well as South Dakota's authority to do so *even under the plaintiffs' view* that the strong correlation between suicides and abortions lacks a causal relationship. *See* Eagle Forum Br. at 11-12 (*citing Williamson v. Lee Optical of Oklahoma,* 348 U.S. 483, 487-89 (1955)).

E. Federal Regulations Support – and Certainly Do Not Preempt – South Dakota's Risk Warning as Non-Misleading

Because the panel majority cites the lack of suicide label warnings for an abortion-inducing drug, the Eagle Forum brief demonstrates that some federal regulations adopt South Dakota's view of "risk," 38 C.F.R. §1.18 ("requirement … that an increased risk of disease be

"associated" with prisoner-of-war service may be satisfied by evidence that demonstrates either a statistical association or a causal association"), and more importantly that the Food & Drug Administration's risk-related policies for drug labeling would not preempt a state failure-to-warn suit by the estate of someone who committed suicide after using the abortion drug without a suicide warning. *Wyeth v. Levine,* 129 S.Ct. 1187, 1201-04 (2009). These competing federal risk provisions demonstrate the reasonableness of the petitioners' position, and in any event could not preempt state law, even if the federal agencies had so intended. *See* Eagle Forum Br. at 12-14.

F. Preemption Analysis' Presumption against Preemption Should Inform this Court's Deferential Interpretation of State Law

To counteract the panel majority's use of worst-case definitions against South Dakota, the Eagle Forum brief analogizes to the presumption against preemption under the Supremacy Clause for federal legislation is areas traditionally regulated by the states. While not controlling here as a matter of law, this deferential analysis is appropriate given that when the states ratified the Fourteenth

Amendment, it did not trammel states' rights to regulate the public safety issues implicated here. *See* Eagle Forum Br. at 14-15.

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 5, 2011 Respectfully submitted,

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CERTIFCATE OF SERVICE

I hereby certify that on this 5th day of October, 2011, 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