

No. 15-2056

In the United States Court of Appeals for the Fourth Circuit

G. G., BY HIS NEXT FRIEND AND MOTHER, DEIRDRE GRIMM,
Plaintiff-Appellant,

v.

GLOUCESTER COUNTY SCHOOL BOARD,
Defendant-Appellant.

ON APPEAL FROM U.S. DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA AT NEWPORT NEWS,
NO. 4:15-CV-0054, HON. ROBERT C. DOUMAR

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

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INTRODUCTION

Pursuant to FED. R. APP. PROC. 29(a), Eagle Forum Education & Legal Defense Fund (“Eagle Forum”) requests leave to file the accompanying *amicus curiae* brief in support of the defendant-appellee Gloucester County School Board (“School Board”). The plaintiff-appellant (hereinafter, “G.G.”) consented to the filing of the Eagle Forum brief, and the School Board “do[es] not oppose [the] motion.” To the extent that the School Board’s non-opposition does not reach the level of consent required for file an *amicus* brief without the Court’s leave, movant Eagle Forum respectfully seeks this Court’s leave to file the *amicus* brief.

I. INTEREST AND IDENTITY OF *AMICUS CURIAE*

Movant Eagle Forum is a nonprofit organization founded in 1981 and headquartered in Saint Louis, Missouri. For more than thirty years, Eagle Forum has consistently defended federalism and supported autonomy in areas (like education) of predominantly local concern. 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.

Eagle Forum has a longstanding interest in applying Title IX consistent with its anti-discrimination intent, providing schools the flexibility to adopt educational programs that reflect their different interests. 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.). 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 requests leave to file its accompanying brief, which Eagle Forum respectfully submits 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 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). As explained in the next section, the Eagle Forum brief presents relevant matters to this Court.

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 set forth below, the Eagle Forum brief (hereinafter, “*Amicus Br.*”) will aid this Court both by bolstering the School Board’s arguments against this Court’s deferring to federal agencies’ views of Title IX and by addressing the merits under Title IX and the Equal Protection Clause:

- With respect to this Court’s deference to administrative interpretations of Title IX and its implementing regulations, the Eagle Forum brief emphasizes that statutes such as Title IX that delegate the same authority to multiple agencies (here, every agency that issues federal funds) are not eligible for deference under *Chevron, U.S.A., Inc. v. N.R.D.C.*, 467 U.S. 837, 843-44 (1984), and instead warrant deference only when the actions are “consistent with achievement of the objectives of the statute authorizing the financial assistance,” as indicated in 20 U.S.C. §1682. *See Amicus* Br. 9-10.
- Also on the subject of deference, the Eagle Forum brief emphasizes the “clear-notice” requirement for burdens imposed on recipients in Spending-Clause legislation like Title IX, which precludes deferring to federal agency actions that fail to provide such notice, either substantively or through the specific procedures required by 20 U.S.C. §1682. *See Amicus* Br. 11-13.
- Finally, on the subject of deference, the Eagle Forum brief argues that federal intrusions into spheres such as education that are historically the ambit of state and local governments must be evaluated under a presumption against displacing that state and local power without the clear and manifest assent of Congress; applying that presumption here would require this Court to interpret the key statutory term “sex” to mean the objective biological

criterion, not G.G.'s subjective gender identity, thereby obviating deference to federal agency constructions. *See Amicus* Br. 13-17.

- On the Title IX merits, the Eagle Forum brief argues that on top of the clear-notice rule and the presumption against preemption, *Tex. Dep't of Housing & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S.Ct. 2507, 2520 (2015), requires this Court to defer to the uniform judicial construction of the statutory term "sex" not today but at the time that Congress enacted Title IX in 1972 and amended it in 1988. *See Amicus* Br. 19-21.
- In addition, the Eagle Forum brief argues that *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S.Ct. 2566, 2602 (2012) ("*NFIB*"), prohibits even Congress from expanding the obligations of Title IX while putting the School Board's whole federal funding at risk; what Congress could not do by statute, the Eagle Forum brief argues, federal agencies cannot do by mere memoranda. *See Amicus* Br. 23-26.
- Finally, the Eagle Forum brief also analyzes the equal-protection issues to demonstrate by the School Board's restroom policy is neutral with respect to sex (*i.e.*, it applies equally to males and females), thereby triggering only a rational-basis review that the students' privacy needs readily meet. *See Amicus* Br. 26-29.

Movant Eagle Forum respectfully submits that these aspects of its proposed *amicus* brief will aid the Court's resolution of the issues presented by this litigation.

CONCLUSION

For all the foregoing reasons, movant Eagle Forum respectfully submits that the Eagle Forum brief will aid this Court's resolution of issues relevant to this appeal. WHEREFORE, movant Eagle Forum respectfully requests leave to file the accompanying *amicus curiae* brief.

Dated: November 30, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 30, 2015, after electronically filing the accompanying motion for leave to file, I electronically lodged the foregoing brief with the Clerk of the Court for transmittal of a Notice of Electronic Filing to the participants in this appeal who are registered CM/ECF users. I further certify that, on the same day, I served the following counsel not registered as CM/ECF users with a copy of the foregoing brief via Priority U.S. Mail, postage prepaid:

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