

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

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

Lawrence J. Joseph
D.C. Bar No. 464777
1250 Connecticut Ave. NW, Ste. 200
Washington, DC 20036
Tel: 202-355-9452
Fax: 202-318-2254
Email: ljoseph@larryjoseph.com

Counsel for Amicus Curiae

INTRODUCTION

Pursuant to Local Rule 27 and consistent with FED. R. APP. PROC. 29, 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”). Both the School Board and plaintiff-appellant (hereinafter, “G.G.”) consented to the filing of the Eagle Forum 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 also participated as an *amicus curiae* before the three-judge panel in this case. 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

Although Rule 29 does not apply directly to *en banc* proceedings, the Advisory Committee notes indicate that its provisions can apply by analogy at this stage. 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 supplementing the School Board’s arguments against this Court’s deferring to federal agencies’ views of Title IX and by expanding on the important issues presented by the petition for rehearing.

- With respect to the importance of the issues raised here, the Eagle Forum brief emphasizes the federalism and separation-of-powers issues implicated by

federal bureaucrats intruding into a field traditionally occupied by state and local government and, moreover, doing so by purporting to amend either extant Title IX regulations or Title IX itself without the statutory process for amending Title IX regulations or the constitutional process for making law. *See Amicus* Br. 4-7.

- 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. 7-9.
- The Eagle Forum brief also 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. 10-12.
- 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. 12-13.

- With regard to deference under *Auer v. Robbins*, 519 U.S. 452, 461 (1997) – on which the panel based its decision, the Eagle Forum brief argues that this type of deference applies only when the regulatory language or test is “a creature of [an agency’s] own regulations.” *Id.* By contrast, *Auer* deference does not apply when the regulation “merely ... paraphrase[s] the statutory language,” *Gonzales v. Oregon*, 546 U.S. 243, 257 (2006), as DOE does here with the statutory term “sex.” *See Amicus* Br. 14.
- On the substance of the recent administrative interpretations, the Eagle Forum brief argues that, on top of the clear-notice rule and the presumption against preemption and deference issues, *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. 5, 14-15.

Movant Eagle Forum respectfully submits that these aspects of its proposed *amicus* brief will aid the *en banc* Court's resolution of the issues presented by the petition for rehearing.

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: May 10, 2016

Respectfully submitted,

/s/ Lawrence J. Joseph

Lawrence J. Joseph, D.C. Bar #464777

1250 Connecticut Avenue, NW
Suite 200
Washington, DC 20036
Tel: (202) 355-9452
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 May 10, 2016, I electronically filed the accompanying motion for leave to file and electronically lodged the foregoing brief with the Clerk of the Court via the CM/ECF system. 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:

Clare Patricia Wuerker
U.S. Attorney's Office
Suite 8000
8000 World Trade Center
101 West Main Street
Norfolk, VA 23510-1624

Victoria Lill
U. S. Dep't of Justice
Ed Opportunities
950 Pennsylvania Avenue, NW
Washington, DC 20530

Hon. Paul R. LePage
Office of the Governor
1 State House Station
Augusta, ME 04333

/s/ Lawrence J. Joseph

Lawrence J. Joseph, D.C. Bar #464777
1250 Connecticut Ave, NW, Suite 200
Washington, DC 20036
Tel: 202-355-9452
Fax: 202-318-2254
Email: ljoseph@larryjoseph.com

*Counsel for Movant Curiae Eagle Forum
Education & Legal Defense Fund*