No. 13-15691

In the United States Court of Appeals for the Ninth Circuit

ROY FISHER; JOSIE FISHER; MARIA MENDOZA; EDWARD A. CONTRERAS,
Plaintiffs/Appellees,

and

UNITED STATES OF AMERICA,
Plaintiff-Intervener/Appellee,

v.

STATE OF ARIZONA,
Proposed Intervener/Appellant,

and

TUCSON UNIFIED SCHOOL DISTRICT,
Defendant/Appellee.

ON APPEAL FROM U.S. DISTRICT COURT FOR THE DISTRICT OF ARIZONA, CIVIL ACTION NO. 4:74-CV-0090, HON. DAVID C BURY

BRIEF FOR *AMICUS CURIAE* EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF APPELLANT IN SUPPORT OF REVERSAL

Lawrence J. Joseph, Cal. S.B. #154908
1250 Connecticut Ave, NW, Suite 200
Washington, DC 20036
Tel: 202-355-9452
Fax: 202-318-2254
Email: ljoseph@larryjoseph.com

Counsel for *Amicus Curiae* 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: August 26, 2013

Respectfully submitted,

/s/ Lawrence J. Joseph

Lawrence J. Joseph, Cal. S.B. #154908
1250 Connecticut Ave, NW, Suite 200
Washington, DC 20036
Tel: 202-355-9452
Fax: 202-318-2254
Email: ljoseph@larryjoseph.com

Counsel for Amicus Curiae Eagle Forum Education & Legal Defense Fund

TABLE OF CONTENTS

Corporate Disclosure Statement i

Table of Contents ii

Table of Authorities iv

Identity, Interest and Authority to File 1

Statement of the Case 1

Statement of Facts 2

Standard of Review 2

Summary of Argument 4

Argument 4

I. The District Court Erred in Denying Arizona's Intervention 4

A. Arizona's Intervention Was Needed to Ensure the Adversity Required for a Federal Court to Rule on the Curriculum Issue 5

B. Arizona Meets All of the Criteria for Intervention as of Right 7

1. Arizona's Motion Was Timely 8

2. Arizona Has a Significant, Protectable Interest in the Educational Success of Each Student and in Avoiding Race-Based Incitement 9

3. The Unitary Status Plan Impaired Arizona's Interests 10

4. The Existing Parties Did Not Represent Arizona's Interests 10

C. Arizona Meets All of the Criteria for Permissive Intervention 11

II. Curriculum Remedies Excedes the Relief Allowable in School Desegregation Cases 12

Conclusion 13

TABLE OF AUTHORITIES

CASES

Arakaki v. Cayetano,
324 F. 3d 1078 (9th Cir. 2003) 10-11

Chicago & G.T. Ry. Co. v. Wellman,
143 U.S. 339 (1892).. 6-7

Coalition for Gov't Procurement v. Fed. Prison Indus.,
365 F.3d 435 (6th Cir. 2004) 9

Cooter & Gell v. Hartmarx Corp.,
496 U.S. 384 (1990)..3

Delta Found. v. U.S.,
303 F.3d 551 (5th Cir. 2002) 9

Ellis v. District of Columbia,
84 F.3d 1413 (D.C. Cir. 1996)..9

Engine Mfrs. Ass'n v. South Coast Air Quality Management Dist.,
498 F.3d 1031 (9th Cir. 2007) 3

Epperson v. Arkansas,
393 U.S. 97 (1968)..4

Gambill v. Shinseki,
576 F.3d 1307 (Fed. Cir. 2009) 9

Goldberg v. Kelly,
397 U.S. 254 (1970)..9

GTE Sylvania, Inc. v. Consumers Union of the United States, Inc.,
445 U.S. 375 (1980)..5

Haywood v. Drown,
556 U.S. 729 (2009)..7

Horne v. Flores,
557 U.S. 433 (2009)..5

Ionian Shipping Co. v. British Law Ins. Co.,
426 F.2d 186 (2d Cir. 1970) 11

Keyes v. Sch. Dist. No. 1,
521 F.2d 465 (10th Cir. 1975) 6, 12

Lewis v. Casey,
518 U.S. 343 (1996)..6

Milliken v. Bradley,
433 U.S. 267 (1977).. 12-13

Monterey Mechanical Co. v. Wilson,
125 F.3d 702 (9th Cir. 1997) 12

Moore v. Charlotte-Mecklenburg Bd. of Educ.,
402 U.S. 47 (1971).. 5-6

NAACP v. New York,
413 U.S. 345 (1973)..11

New York City Transit Authority v. Beazer,
440 U.S. 568 (1979)..6

Ohio Forestry Ass'n, Inc., v. Sierra Club,
523 U.S. 726 (1998)..9

Rescue Army v. Municipal Court of City of Los Angeles,
331 U.S. 549 (1947)..6

Singleton v. Wulff,
428 U.S. 106 (1976)..3

Southwest Ctr. for Biological Diversity v. Berg,
268 F.3d 810 (9th Cir. 2001) 7-8

Stone v. San Francisco,
968 F.2d 850 (9th Cir. 1992) 3

Summers v. Earth Island Institute,
555 U.S. 488 (2009)..6

Swan v. Peterson,
6 F.3d 1373 (9th Cir. 1993) 3

Turner v. Rogers,
131 S.Ct. 2507 (2011)..3

U.S. v. City of Yonkers,
197 F.3d 41 (2d Cir. 1999) 6, 12

U.S. v. Hooker Chem. & Plastics Corp.,
749 F.2d 968 (2d Cir. 1984) 8

STATUTES

U.S. CONST. art. III.. 5-6, 11
U.S. CONST. art. VI, cl. 2 10
U.S. CONST. amend. XIV, §1, cl. 4 ....4, 12
A.R.S. §15-111...2
A.R.S. §15-112...2

RULES AND REGULATIONS

FED. R. APP. P. 29(c)(5) 1
FED. R. CIV. P. 24(b) 11

IDENTITY, INTEREST AND AUTHORITY TO FILE

Amicus curiae Eagle Forum Education & Legal Defense Fund ("Eagle Forum"), a nonprofit Illinois corporation, submits this *amicus* brief with the accompanying motion for leave to file.[1] Founded in 1981, Eagle Forum has consistently defended federalism and supported state autonomy in areas – such as public education – of traditional state concern. In addition, Eagle Forum has long advocated for adherence to the Constitution as written and against inventing new rights by creative interpretation. The relief granted by the district court cuts at the very heart of the nation, contrary to the national concept of *e pluribus unum.* For these reasons and those set forth in the accompanying motion for leave to file, Eagle Forum has a direct and vital interest in the issues before this Court.

STATEMENT OF THE CASE

The disputed part of the underlying litigation involves an effort by class plaintiffs[2] – who originally filed their desegregation against the Tucson school system (now, the Tucson Unified School District) suit *in 1974* – to include in the Unitary Status Plan a requirement that "culturally relevant core courses" replace

---

[1] Pursuant to FED. R. APP. P. 29(c)(5), the undersigned counsel certifies that: counsel for *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.

[2] There are two groups of class plaintiffs: the Fisher class consisting of African-Americans, and the Martinez class, consisting of Latinos. The United States intervened in the litigation as a plaintiff long ago.

certain courses, such as history and literature, that Arizona requires, notwithstanding that the proposed courses appear to lack the academic rigor of the state courses they would replace, Arizona Br. at 38, and are designed to restore the notoriously divisive economic, political, and cultural race-based analysis of the former Mexican-American Studies program, *id.* at 2-9, which was discontinued after Arizona successfully challenged it in an administrative proceedings as a violation of A.R.S. §§15-111 to 15-112. Section 111 requires "that public school pupils should be taught to treat and value each other as individuals and not be taught to resent or hate other races or classes of people," *id.* §15-111, and Section 112 prohibits, *inter alia,* curricula that "[p]romote resentment toward a race or class of people," "[a]re designed primarily for pupils of a particular ethnic group," or "[a]dvocate ethnic solidarity instead of the treatment of pupils as individuals." *Id.* §15-112(A)(2)-(4). Arizona moved to intervene in the district court proceedings to challenge the backdoor attempt to revive racially divisive instruction in Tucson, and the district court denied that request. Arizona timely appealed.

STATEMENT OF FACTS

Eagle Forum adopts Arizona's Statement of the Facts. *See* Opening Br. at 1-9, 13-19.

STANDARD OF REVIEW

As Arizona explains, this Court reviews denials of intervention as of right *de*

novo, except that it reviews findings on the timeliness of intervention for an abuse of discretion. Arizona Br. at 22. Similarly, this Court reviews denial of permissive intervention and approval of school-desegregation orders for abuse of discretion. *Id.* at 39, 41. Because a "court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law," *Cooter & Gell v. Hartmarx Corp.,* 496 U.S. 384, 405 (1990), federal appellate courts review district courts' underlying legal conclusions *de novo* even in contexts reviewed for abuse of discretion.

The "matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases," *Singleton v. Wulff,* 428 U.S. 106, 120-21 (1976), including arguments raised solely by *amici. Turner v. Rogers,* 131 S.Ct. 2507, 2519-20 (2011); *accord id.* at 2521 (Thomas, J., dissenting). With respect to arguments raised only in an *amicus* brief, this Court considers such an argument "where it involves a jurisdictional question or touches upon an issue of federalism or comity that could be considered *sua sponte.*" *Swan v. Peterson,* 6 F.3d 1373, 1383 (9th Cir. 1993); *Stone v. San Francisco,* 968 F.2d 850, 855-56 (9th Cir. 1992); *Engine Mfrs. Ass'n v. South Coast Air Quality Management Dist.,* 498 F.3d 1031, 1044 (9th Cir. 2007) (reaching *amicus* arguments that are readily answered and go the central legal questions presented by the parties). The issues raised by this litigation unquestionably touch upon issues of federalism and comity.

SUMMARY OF ARGUMENT

Amicus Eagle Forum fully supports Arizona's comprehensive brief and offers three additional arguments to complement Arizona's arguments. First, the addition of a curriculum-based claim to this litigation is a new form of relief for which federal courts must assess their jurisdiction and the prudence of hearing friendly claims that seek to bypass the legislative process without any semblance of a case or controversy (Section I.A). Second, *amicus* Eagle Forum challenges the district court's suggestion that Arizona's intervention was unripe (*i.e.,* premature), given that the denial precluded Arizona from exercising Due Process rights such as cross examination of the claims that the race-based curricula are necessary and not counterproductive (Section I.B.1). Third, *amicus* Eagle Forum argues that the Equal Protection Clause both does not require these race-based remedies and indeed prohibits them (Section II). In addition, *amicus* Eagle Forum also demonstrates that Arizona meets the tests for intervention as of right (Section I.B) and permissive intervention (Section I.C).

ARGUMENT

I. THE DISTRICT COURT ERRED IN DENYING ARIZONA'S INTERVENTION

With education's traditional regulation by states and localities, *Epperson v. Arkansas,* 393 U.S. 97, 104 (1968), courts should hesitate before using an ancient desegregation case to inject new claims – here, a racially divisive curriculum that

will re-segregate the school system – into what is in essence a friendly suit with no adverse parties. While education is not a fundamental right, states nonetheless have the obligation to ensure – and an important governmental interest in ensuring – that children develop the skills that they will need to function productively in society.

A. Arizona's Intervention Was Needed to Ensure the Adversity Required for a Federal Court to Rule on the Curriculum Issue

As Arizona explains, curriculum issues were dismissed from the underlying litigation decades ago, Arizona Br. at 26, only to reappear recently when Arizona prevailed upon the Tucson Unified School District to cease its divisive Mexican-American Studies program in a contested administrative proceeding, after which an election turned the majority on the District's governing board. In circumstances where the defendants support the plaintiffs, there is a real question whether federal courts have jurisdiction or prudentially should take jurisdiction over such friendly lawsuits: "those policies were supported by the very officials who could have appealed them – the state defendants – and, as a result, were never subject to true challenge." *Horne v. Flores* (2009) 557 U.S. 433, 453 (2009).

Simply put, "there is no Art. III case or controversy when the parties desire precisely the same result." *GTE Sylvania, Inc. v. Consumers Union of the United States, Inc.,* 445 U.S. 375, 383 (1980) (interior quotations omitted). When the parties agree, "[t]here is, therefore, no case or controversy within the meaning of Art. III." *Moore v. Charlotte-Mecklenburg Bd. of Educ.,* 402 U.S. 47, 47-48 (1971)

(*per curiam*). If Arizona's intervention fails here, this Court should review not only appellate jurisdiction but also the jurisdiction for the underlying curriculum relief.[3]

Even beyond the limits posed by Article III, federal courts long have recognized that actual adversity *prudentially* limits constitutional adjudication:

> *The policy, however, has not been limited to jurisdictional determinations.* For, in addition, the Court [has] developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision. Thus, as those rules were listed in support of the statement quoted, *constitutional issues affecting legislation will not be determined in friendly, non-adversary proceedings[.]*

Rescue Army v. Municipal Court of City of Los Angeles, 331 U.S. 549, 568-69 (1947) (citations, footnotes, and interior quotations omitted, emphasis added); *accord New York City Transit Authority v. Beazer,* 440 U.S. 568, 583 (1979). "It never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the

---

[3] Although *amicus* Eagle Forum neither questions nor affirms the plaintiffs' Article III or prudential standing to pursue their desegregation claims, any such standing would not automatically extend to curriculum relief, which not only is not generally subsumed into school desegregation cases, *Keyes v. Sch. Dist. No. 1,* 521 F.2d 465, 482 (10th Cir. 1975); *U.S. v. City of Yonkers,* 197 F.3d 41, 52 (2d Cir. 1999), but also represents a distinct form of relief for which federal courts must assess their jurisdiction independently of other discrete forms of relief. Plaintiffs must establish their standing for each form of relief they seek: "standing is not dispensed in gross." *Lewis v. Casey,* 518 U.S. 343, 358 n.6 (1996); *Summers v. Earth Island Institute,* 555 U.S. 488, 497-98 (2009).

legislative act." *Chicago & G.T. Ry. Co. v. Wellman,* 143 U.S. 339, 344-45 (1892). Instead, "an honest and actual antagonistic assertion of rights by one individual against another" serves as a prudential prerequisite for "the ultimate and supreme function of courts" to "determine whether [an] act be constitutional or not." *Wellman,* 143 U.S. at 344-45. Accordingly, without Arizona's intervention, this Court must dismiss the curriculum-based claims to avoid allowing plaintiffs and their allies in federal and local government to use the federal courts to subvert the laws of Arizona.[4] Given the issues and impacts that this litigation would unleash, *amicus* Eagle Forum respectfully submits that this Court should remand with instructions to dismiss the claims for curriculum-based relief if it declines to allow Arizona to intervene.

B. Arizona Meets All of the Criteria for Intervention as of Right

This Court follows the familiar four-part test for intervention as of right:

> (1) the application for intervention must be timely; (2) the applicant must have a "significantly protectable" interest relating to the property or transaction that is the subject of the action; (3) the applicant must be so situated that the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect that interest; and (4) the applicant's interest must not be adequately represented by the existing parties in the lawsuit.

---

[4] Denying a federal forum for this "friendly" suit would not deny all relief, as the doctrine of concurrent jurisdiction would allow the plaintiffs to bring their federal claims in state court. *Haywood v. Drown,* 556 U.S. 729, 735 (2009).

Southwest Ctr. for Biological Diversity v. Berg, 268 F.3d 810, 817 (9th Cir. 2001). Arizona meets each criterion.

1. <u>Arizona's Motion Was Timely</u>

When an election tipped the balance of its governing board, the Tucson Unified School District changed sides in this litigation. Arizona Br. at 18. As a result, the District no longer represented Arizona's interests in compliance with Arizona law. When a party that previously represented a putative intervener ceases to do so, a renewed request for intervention is timely. *U.S. v. Hooker Chem. & Plastics Corp.,* 749 F.2d 968, 993 (2d Cir. 1984). In pertinent part, the district court agreed that Arizona's requested intervention was timely, but the district court viewed Arizona's intervention as premature with respect to the contents of the curriculum.

Without elaborating, the district court found Arizona's challenge to the as-yet undeveloped (or at least undisclosed) curriculum to be unripe:

> While the request is timely in respect to the State's ability to affect the terms and provisions contained in the USP, the Court finds there is no issue ripe for resolution until the culturally relevant courses are developed.

Slip Op. at 17 (Dkt. #1436, Fed. 6, 2013). While that ripeness argument might be plausible with respect to the curriculum itself, it is obviously wrong with respect to Arizona's ability to challenge whether the Unitary Status Plan would include any curriculum requirements at all. If this Court affirms the denial of intervention,

Arizona will not have the opportunity to exercise the procedural rights – such as cross examination[5] – that are the hallmarks of Due Process. In previously refusing Arizona's intervention, the district court promised inclusion on the one hand, but then sprung the Unitary Status Plan's curriculum requirements on Arizona contemporaneously with the order approving the Plan and denying intervention. *See* Arizona Br. at 37. Arizona has a right to challenge the need for (and lawfulness of) curriculum requirements *before* Arizona must challenge their specifics. When a procedural right is denied, a plaintiff "may complain at the time… that [procedural] failure… takes place, for the claim can never get riper." *Ohio Forestry Ass'n, Inc., v. Sierra Club,* 523 U.S. 726, 737 (1998). The district court erred in deeming Arizona's challenge unripe.

2. <u>Arizona Has a Significant, Protectable Interest in the Educational Success of Each Student and in Avoiding Race-Based Incitement</u>

Plaintiffs and their allies in local government are attempting to use this ancient desegregation case as a vehicle to reintroduce curriculum changes that violate state law, both with respect to their divisiveness and their displacement of

---

[5] An "adversary proceeding [includes] the attendant rights to … confrontation, cross-examination, and compulsory process." *Ellis v. District of Columbia,* 84 F.3d 1413, 1422 (D.C. Cir. 1996); *see also Delta Found. v. U.S.,* 303 F.3d 551, 561-62 (5th Cir. 2002); *Coalition for Gov't Procurement v. Fed. Prison Indus.,* 365 F.3d 435, 465-66 (6th Cir. 2004); *Gambill v. Shinseki,* 576 F.3d 1307, 1326 (Fed. Cir. 2009) (Bryson, J., concurring) (collecting cases); *Goldberg v. Kelly,* 397 U.S. 254, 269 (1970).

Arizona's nondiscriminatory "core" requirements. Arizona has a protectable interest in ensuring that all Arizona schoolchildren receive a quality education that will prepare them to be productive citizens and to prevent divisive race-based incitement. Even accepting *arguendo* that the plaintiffs have a defensible pedagogical point, so too does Arizona.

3. <u>The Unitary Status Plan Impaired Arizona's Interests</u>

Arizona identifies several ways in which the Unitary Status Plan will impair the State's interests. *See* Arizona Br. at 24-30. Once plaintiffs and their defendant-allies prevail in memorializing their race-based curriculum in a federal court order, they will argue that the Supremacy Clause precludes Arizona from contesting the order under state law. *See* U.S. CONST. art. VI, cl. 2. At the same time, however, Arizona legitimately seeks to ensure that its schoolchildren are not denied a quality education based on circumstances beyond their control (here, the political agenda of racial separatists). Plainly, requiring race-based instruction and particularly race-based instruction that supplants Arizona's core curriculum impairs Arizona's interests, both procedurally and substantively.

4. <u>The Existing Parties Did Not Represent Arizona's Interests</u>

Insofar as no party defends Arizona's interests, this point hardly bears any argument. As Arizona explains, the other parties do not meet this Circuit's three-part *Arakaki* test for adequacy of representation. Arizona Br. at 32-35 (*citing*

Arakaki v. Cayetano, 324 F. 3d 1078, 1086 (9th Cir. 2003)). For the foregoing reasons, the Court should allow Arizona's intervention as of right.

C. Arizona Meets All of the Criteria for Permissive Intervention

To intervene permissively pursuant to FED. R. CIV. P. 24(b), a movant must (1) timely file for intervention; and (2) have a claim or defense that has "question[s] of law or fact in common" with the main action. Even if Arizona should fail the test for intervention as of right, that would not preclude its meeting the test for permissive intervention. *See, e.g., Ionian Shipping Co. v. British Law Ins. Co.,* 426 F.2d 186, 191-92 (2d Cir. 1970) (denial of intervention as of right does not preordain denial of permissive intervention). Arizona meets this test.

First, Arizona's intervention is timely for permissive intervention for the reasons set out in Section I.B.1, *supra,* for intervention as of right. *See NAACP v. New York,* 413 U.S. 345, 365 (1973) (timeliness under Rule 24(a)-(b) coincide).

Second, Arizona obviously has claims against the Tucson Unified School District for implementing a racially conscious curriculum in violation of Arizona law, especially when that program is the result of a "friendly suit" that the district court had no Article III or prudential basis to allow to proceed with new curriculum-based claims. *See* Section I.A, *supra.* Under the circumstances, the legal and factual arguments that Arizona raises here and now are precisely the ones that it will need to raise against the District, and thus the plaintiffs and the district

court. For that reason, this Court should allow Arizona to intervene permissively, even if it denies intervention as of right.

II. CURRICULUM REMEDIES EXCEDES THE RELIEF ALLOWABLE IN SCHOOL DESEGREGATION CASES

Federal courts have not allowed curriculum-based remedies like the ones proposed here, *Keyes,* 521 F.2d at 482; *Yonkers,* 197 F.3d at 52, and for good reason. Desegregation cases are intended to integrate students into society (*i.e.,* "the environment in which they must ultimately function and compete"), so that they can "enter and be a part of that community." *Milliken v. Bradley,* 433 U.S. 267, 287 (1977). The race-conscious remedy here has two fundamental problems: it is neither necessary nor lawful.

First, the race-conscious remedy is unnecessary. The Equal Protection Clause does not require that government remedy the effects of *societal* discrimination: "'Findings of societal discrimination will not suffice,'" and instead "'must concern prior discrimination by the government unit involved.'" *Monterey Mechanical Co. v. Wilson,* 125 F.3d 702, 713 (9th Cir. 1997) (*quoting City of Richmond v. J.A. Croson Co.,* 488 U.S. 469, 485 (1989)). Accordingly, the desegregation remedies must relate to the nature and scope of the constitutional violation that triggered the suit in the first place. *Milliken,* 433 U.S. at 280. Here, that plainly is not the case, as evidenced by the stipulation dismissing the only curriculum-related allegation decades ago. *See* Arizona Br. at 26. While the class

plaintiffs – or rather the various interests seeking to bootstrap the new curriculum claim into this litigation – obviously have complaints about what they perceive as an oppressive U.S. culture, the school did not inflict those injuries. The plaintiffs' claims belong before the legislature, not a U.S. district court.

Second, the race-conscious remedy is counterproductive in that it would *re-segregate* the Tucson school system along racial lines. By contrast with that goal, a desegregation remedy must restore the victims of discrimination to the status that they would have enjoyed without the unlawful segregation. *Milliken,* 433 U.S. at 280. The curriculum remedy here does precisely the opposite.

CONCLUSION

This Court should reverse the denial of Arizona's intervention and remand with instructions for the district court to remove culturally relevant curricula for the two plaintiff groups from the Unitary Status Plan.

Dated: August 26, 2013

Respectfully submitted,

/s/ Lawrence J. Joseph

Lawrence J. Joseph, Cal. S.B. #154908
1250 Connecticut Ave. NW
Suite 200
Washington, DC 20036
Tel: 202-355-9452
Fax: 202-318-2254
Email: ljoseph@larryjoseph.com

Counsel for Amicus Curiae Eagle Forum Education & Legal Defense Fund

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, *amicus curiae* Eagle Forum Education & Legal Defense Fund states that it is unaware of any pending cases in this Court related to this one.

Dated: August 26, 2013

Respectfully submitted,

/s/ Lawrence J. Joseph

Lawrence J. Joseph, Cal. S.B. #154908
1250 Connecticut Ave, NW, Suite 200
Washington, DC 20036
Tel: 202-355-9452
Fax: 202-318-2254
Email: ljoseph@larryjoseph.com

Counsel for Amicus Curiae Eagle Forum Education & Legal Defense Fund

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the FEDERAL RULES OF APPELLATE PROCEDURE, and Circuit Rule 29-2(c)(2), I certify that the foregoing *amicus curiae* brief is proportionately spaced, has a typeface of Times New Roman, 14 points, and contains 3,111 words, including footnotes, but excluding this Brief Form Certificate, the Table of Citations, the Table of Contents, the Corporate Disclosure Statement, and the Certificate of Service. The foregoing brief was created in Microsoft Word 2010, and I have relied on that software's word-count feature to calculate the word count.

Dated: August 26, 2013

Respectfully submitted,

/s/ Lawrence J. Joseph

Lawrence J. Joseph, Cal. S.B. #154908
1250 Connecticut Ave, NW, Suite 200
Washington, DC 20036
Tel: 202-355-9452
Fax: 202-318-2254
Email: ljoseph@larryjoseph.com

Counsel for Amicus Curiae Eagle Forum Education & Legal Defense Fund

CERTIFICATE OF SERVICE

I hereby certify that, on August 26, 2013, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit – as an exhibit to the accompanying motion for leave to file – by using the Appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. I further certify that, on that date, the appellate CM/ECF system's service-list report showed that all participants in the case were registered for CM/ECF use.

/s/ Lawrence J. Joseph

Lawrence J. Joseph