

No. 13-35401

In the United States Court of Appeals for the Ninth Circuit

JENNIE LINN MCCORMACK,
Plaintiff/Appellee,

and

RICHARD HEARN, M.D., ON HIS OWN BEHALF AND ON BEHALF OF HIS PATIENTS,
Plaintiff-Intervener/Appellee,

v.

STEPHEN F. HERZOG, BANNOCK COUNTY PROSECUTING ATTORNEY,
Defendant/Appellant,

ON APPEAL FROM U.S. DISTRICT COURT FOR THE
DISTRICT OF IDAHO, CIVIL ACTION NO. 4:11-CV-0433,
HON. B. LYNN WINMILL

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

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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 23, 2013

Respectfully submitted,

/s/ Lawrence J. Joseph

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INTRODUCTION

Pursuant to FED. R. APP. PROC. 27 and 29(a) and Ninth Cir. R. 29-3, the Eagle Forum Education & Legal Defense Fund (“Eagle Forum”) respectfully seeks this Court’s leave to file the accompanying *amicus curiae* brief. The defendant-appellant (hereinafter “Idaho”) consented to the filing of this *amicus* brief, but the plaintiff-appellee Jennie Linn McCormack and her counsel – plaintiff-intervener-appellee Richard Hearn, M.D. – indicated their likely opposition to the filing of the Eagle Forum brief.¹

I. INTEREST AND IDENTITY OF *AMICUS CURIAE*

Eagle Forum is a nonprofit corporation founded in 1981 and headquartered in Saint Louis, Missouri. Eagle Forum has consistently defended federalism and supported states’ autonomy from federal intrusion in areas – like public health – that are of traditionally local concern. Similarly, Eagle Forum has also long argued for judicial restraint under both Article III and separation-of-powers principles. In addition, Eagle Forum has a longstanding interest in protecting unborn life and in adherence to the Constitution as written. Any reported decision here could therefore profoundly affect not only the foregoing interests in federalism and judicial restraint but also substantive issues related to abortion. Because Eagle

¹ Specifically, Dr. Hearn’s email states “[a]t this time it is my belief that we will oppose any motion filed by the Eagle Forum in this appeal.”

Forum has active chapters in most of the states within this Circuit, the decision here likely will affect Eagle Forum members.

More than half of Eagle Forum's brief relates to Article III jurisdiction that parties can raise at any time and that courts have an obligation to consider, even *sua sponte*. For that reason alone, Eagle Forum respectfully submits that the Eagle Forum brief will be directly useful to the Court's consideration of this matter.

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 Idaho.

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 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.

Advisory Committee Note to the 1998 amendments to Rule 29 (*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.” *Id.*

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 IN THIS APPEAL

As indicated above, more than half of Eagle Forum’s brief relates to issues of Article III jurisdiction, which this Court has the obligation to consider, even for the first time on appeal. *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990). Indeed, “if the record discloses that the lower court was without jurisdiction [an appellate] court will notice the defect” and “the only function

remaining to the court is that of announcing the fact and dismissing the cause.” *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94 (1998) (interior quotations omitted).

On the merits, the Eagle Forum brief addresses an important issue under the Supreme Court’s decision in *Planned Parenthood of Southeastern Penn. v. Casey*, 505 U.S. 833, 876 (1992), with respect to state regulations of abortion that protect the health of the pregnant woman seeking an abortion, as opposed to seeking to protect the fetus. *Cf. Roe v. Wade*, 410 U.S. 113 (1974). Even with respect to merits arguments raised by *amici*, 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); *see also id.* at 2521 (Thomas, J., dissenting).

With that background, the following sections outline several jurisdictional and merits areas in which the Eagle Forum brief will aid the Court.

A. Dr. Hearn Lacks Standing to Press His Claims

The Eagle Forum brief raises four important issues with respect to Article III and prudential standing:

- Dr. Hearn is not only Ms. McCormack’s counsel but also a plaintiff-intervener seeking to protect both his own rights (as a non-practicing but licensed physician) to prescribe abortifacient drugs and his prospective patients’ rights to those drugs. The district court’s opinion lifted a statement from the plaintiffs’ statement of facts to suggest that Dr. Hearn’s “desire[] to prescribe FDA approved medications to women in Bannock County” was undisputed, but the plaintiffs’ statement mis-cited the pleadings to tie that allegation to a portion of Dr. Hearn’s complaint in intervention that Idaho admitted, whereas the correct cite was a portion of the complaint in intervention that Idaho did not admit. *See* Eagle Forum Br. at 8-11. The upshot of this discrepancy is that a key issue in Dr. Hearn’s standing is based solely on an allegation, which can suffice for surviving a motion to dismiss at the pleading stage, but not for establishing standing on the merits at the summary-judgment phase. *Id.* at 10-11.
- The district court misconstrues language from *Flast v. Cohen* to suggest that standing is based on the individual before the court, not on the issues that he seeks to litigate. *See McCormack v. Hiedeman*, 900 F.Supp.2d 1128, 1140 (D. Idaho 2013) (*quoting Flast v. Cohen*, 392 U.S. 83, 99 (1968)). This misconstrues the *issues* (*i.e.*, legal arguments) that one raises in support of a *claim* (*i.e.*, an effort to invalidate a particular enactment), which does not

generalize to one's having standing to support *multiple claims* (e.g., Hearn's opposition to multiple sections of the Idaho Code). As the Supreme Court colorfully put it, "standing is not dispensed in gross," and plaintiffs must have independent standing for each form of relief that they seek. *See Eagle Forum Br.* at 11 (*quoting Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996)).

- The Eagle Forum brief further argues that Dr. Hearn's desire to prescribe abortifacient drugs is insufficiently concrete – at least for a non-practicing physician – to qualify as sufficiently imminent for the standing inquiry: "Such 'some day' intentions – without any description of concrete plans, or indeed even any specification of *when* the some day will be – do not support a finding of the 'actual or imminent' injury that our cases require." *See Eagle Forum Br.* at 12-13 (*quoting Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992)).
- The Eagle Forum brief demonstrates that Dr. Hearn does not meet the three-part test for third-party standing, namely that the plaintiff have its own constitutional standing and a "close" relationship with the absent third parties and that a sufficient "hindrance" keeps the absent third parties from protecting their own interests. *See Eagle Forum Br.* at 13-15 (*citing Kowalski v. Tesmer*, 543 U.S. 125, 128-30 (2004)). The Eagle Forum brief also cites *Kowalski* for the proposition that the types of hypothetical future

relationships that Dr. Hearn – a *non-practicing* physician – presses do not meet the test for third-party standing. *See id.* at 14 (*citing Kowalski*, 543 U.S. at 131).

B. The Casey Undue-Burden Test Does Not Apply to State Abortion Measures That Protect the Woman Seeking an Abortion Unless Those Measures Fail a Threshold Inquiry Into Their Necessity

The Eagle Forum brief focuses the Court on language in *Casey* that applies the *Casey* undue-burden analysis to statutes designed to protect the pregnant woman (as opposed to the fetus) only when those statutes are *unnecessary*:

As with any medical procedure, the State may enact regulations to further the health or safety of a woman seeking an abortion. *Unnecessary 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.*

See Eagle Forum Br. at 2 (*quoting Casey*, 505 U.S. at 878 (citations omitted, emphasis added)). Significantly, the Eagle Forum brief also cites post-*Roe* and post-*Casey* Supreme Court decisions recognizing that states can require that physicians perform abortion-related services. *See id.* (*citing Connecticut v. Menillo*, 423 U.S. 9, 10-11 (1975) and *Mazurek v. Armstrong*, 520 U.S. 968, 971 (1997)). Here, the plaintiffs are seeking the right to follow “off-label” uses (*i.e.*, uses not federally approved) that correlate with higher risks of injury and death for second-trimester abortions, outside of medical supervision. As *Menillo* recognized contemporaneously with *Roe*, states may require that “abortion [be] performed by

medically competent personnel under conditions insuring maximum safety for the woman.” Id. (quoting Menillo, 423 U.S. at 10-11). That is precisely what Idaho has required here, with respect to its laws regulating abortion providers.

With respect to restrictions on abortion providers, Eagle Forum argues that such restrictions are plainly “necessary,” which renders the undue-burden analysis inapposite. Particularly because the federal government lacks a general police power to protect health and has not acted on these off-label uses under its commerce-power for drug-safety laws, Eagle Forum respectfully submits that these state laws are the only protection from an otherwise-unregulated industry, which should give courts pause to second-guess states in an area of traditional state concern (public health) and medical uncertainty.

CONCLUSION

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

Dated: August 23, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 23, 2013 I electronically transmitted the foregoing document and the accompanying *amicus* brief and disclosure statement to the Clerk for filing and transmittal of a Notice of Electronic Filing to the participants in this appeal, all of whom are registered CM/ECF users, and I understand that service will be accomplished by the appellate CM/ECF system.

Dated: August 23, 2013

Respectfully submitted,

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