No. 12-30456

United States Court of Appeals for the Fifth Circuit

K.P., M.D.; D.B., M.D.; and HOPE MEDICAL GROUP FOR WOMEN,
Plaintiffs-Appellees,

v.

LORRAINE LEBLANC, in her official capacity as Executive Director of the Louisiana Patient's Compensation Fund Oversight Board; CLARK COSSE, in his official capacities as a Member of the Louisiana Patient's Compensation Fund Oversight Board; MELANIE FIRMAN, in her official capacities as a Member of the Louisiana Patient's Compensation Fund Oversight Board; VINCENT CULOTTA, in his official capacities as a Member of the Louisiana Patient's Compensation Fund Oversight Board; WILLIAM SCHUMACHER, in his official capacities as a Member of the Louisiana Patient's Compensation Fund Oversight Board; JOSEPH DONCHESS, in his official capacities as a Member of the Louisiana Patient's Compensation Fund Oversight Board; DIONNE VIATOR, in her official capacities as a Member of the Louisiana Patient's Compensation Fund Oversight Board; DANIEL LENNIE, in his official capacities as a Member of the Louisiana Patient's Compensation Fund Oversight Board; and MANUEL DEPASCUAL, in his official capacities as a Member of the Louisiana Patient's Compensation Fund Oversight Board,
Defendants-Appellants.

ON APPEAL FROM U.S. DISTRICT COURT
FOR THE MIDDLE DISTRICT OF LOUISIANA,
CIVIL NO. 07-879, HON. HELEN G. BERRIGAN

CORRECTED *AMICUS CURIAE* BRIEF OF EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF APPELLANTS IN SUPPORT OF REVERSAL

Lawrence J. Joseph, D.C. Bar #464777
1250 Connecticut Ave, NW, Suite 200
Washington, DC 20036
Tel: 202-669-5135
Fax: 202-318-2254
Email: ljoseph@larryjoseph.com

Counsel for Amicus Curiae

CERTIFICATE OF INTERESTED PERSONS

The case number is No. 12-30456. The case is styled as *K. P. v. LeBlanc.* The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These presentations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Hope Medical Group for Women (June Medical Services, L.L.C.)
Appellee

K.P., M.D.
Appellee

D.B., M.D.
Appellee

Lorraine LeBlanc, in her official capacity as Executive Director of the Louisiana Patient's Compensation Fund Oversight Board
Appellant

Clark Cosse, in his official capacity as a member of the Louisiana Patient's Compensation Fund Oversight Board
Appellant

Melanie Firman, in her official capacity as a member of the Louisiana Patient's Compensation Fund Oversight Board
Appellant

Vincent Culotta, in his official capacity as a member of the Louisiana Patient's Compensation Fund Oversight Board
Appellant

William Schumacher, in his official capacity as a member of the Louisiana Patient's Compensation Fund Oversight Board
Appellant

Joseph Donchess, in his official capacity as a member of the Louisiana Patient's Compensation Fund Oversight Board
Appellant

Dionne Viator, in her official capacity as a member of the Louisiana Patient's Compensation Fund Oversight Board
Appellant

Daniel Lennie, in his official capacity as a member of the Louisiana Patient's Compensation Fund Oversight Board
Appellant

Manuel DePascual, in his official capacity as a member of the Louisiana Patient's Compensation Fund Oversight Board
Appellant

William St. John LaCorte
Other Interested Party (current Patient's Compensation Fund Oversight Board Member)

Kent Guidry
Other Interested Party (current Patient's Compensation Fund Oversight Board Member)

Katharine C. Rathbun
Other Interested Party (current Patient's Compensation Fund Oversight Board Member)

James E. Hritz
Other Interested Party (current Patient's Compensation Fund Oversight Board Member)

Brittany Prudhome
Other Interested Party (medical malpractice claimant against appellees in separate action)

State of Louisiana
Amicus Curiae

Attorney General for the State of Louisiana, James D. "Buddy" Caldwell
Amicus Curiae

Eagle Forum Education & Legal Defense Fund
Amicus Curiae

William E. Rittenberg and Rittenberg, Samuel and Phillips, L.L.C.
Counsel for Appellees

Stephanie Toti, Bonnie Scott Jones, Michelle Movahed, Rebecca Hart, and the Center for Reproductive Rights
Counsel for Appellees

Carlton Jones, III, Ryan R. Brown, and Roedel, Parsons, Koch, Blache, Balhoff & McCollister
Counsel for Appellants

Sandra M. Williams, Kevin P. Landreneau, and Seale & Ross
Counsel for Other Interested Party Brittany Prudhome

James D. "Buddy" Caldwell, Attorney General for the State of Louisiana, and Angelique D. Freel, Assistant Attorney General, State of Louisiana
Counsel for Amici Curiae State of Louisiana and Its Attorney General

Lawrence J. Joseph
Counsel for Amicus Curiae Eagle Forum Education & Legal Defense Fund

Dated: August 8, 2012

Respectfully submitted,

/s/ Lawrence J. Joseph

Lawrence J. Joseph, D.C. Bar #464777
1250 Connecticut Ave, NW, Suite 200
Washington, DC 20036
Tel: 202-669-5135
Fax: 202-318-2254
Email: ljoseph@larryjoseph.com

Counsel for Amicus Curiae Eagle Forum Education & Legal Defense Fund

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IDENTITY, INTEREST AND AUTHORITY TO FILE

Amicus curiae Eagle Forum Education & Legal Defense Fund ("Eagle Forum") files this *amicus* brief with the consent of all the parties.[1] Since 1981, Eagle Forum has consistently defended federalism and supported States' autonomy from the federal government in areas – like public health – that are traditionally state concerns. In addition, Eagle Forum has a longstanding interest in protecting unborn life and in adherence to the Constitution as written. For these reasons, Eagle Forum has a direct and vital interest in the issues before this Court.

STATEMENT OF THE CASE

An abortion provider, Hope Medical Group for Women, and two of its physicians (collectively, "HMG") sued the members of the Louisiana Patient's Compensation Fund Oversight Board (the "Board") and the Board's Executive Director (collectively, with the Board's members, "Louisiana") for declaratory and injunctive relief against the operation of LA. R.S. §9:2800.12 ("Act 825"). The district court granted HMG's summary judgment motion, and Louisiana appealed.

Under Louisiana's Medical Malpractice Act, LA. R.S. §§40:1299.41-.49 ("Med-Mal Act"), the Board administers the Patient's Compensation Fund, which consists of private funds – collected from medical providers who voluntarily enroll

[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.

in the program – from which to pay medical-malpractice claimants. LA. R.S. §40:1299.44(A)(1). Enrolling in the program entitles medical providers to limited liability for medical malpractice, with the Patient's Compensation Fund's paying settlements or damage awards over $100,000 up to a $500,000 statutory cap, plus interest and future medical costs. LA. R.S. §40:1299.43. Medical providers who do not participate in the program do not benefit from the Med-Mal Act's limitations on liability. Before a medical-malpractice claimant may sue a qualified medical provider in state court, the claim must be submitted to a medical review panel. LA. R.S. §§40:1299.47(A)(1)(a), 40:1299.47(B)(1)(a)(i). Once the Board convenes a medical review panel, the Board lacks control over the panel. The medical review panel's report is submitted in evidence in the medical-malpractice claim.

Act 825 removes abortion-based injuries from the Med-Mal Act, LA. R.S. §9:2800.12(C)(2), and provides a cause of action in the Med-Mal Act's place, LA. R.S. §9:2800.12(A), based on and limited by informed consent:

> The signing of a consent form by the mother prior to the abortion does not negate this cause of action, but rather reduces the recovery of damages to the extent that the content of the consent form informed the mother of the risk of the type of injuries or loss for which she is seeking to recover.

LA. R.S. §9:2800.12(C)(1). In essence, physicians who perform abortions can protect themselves from liability by providing warnings of the risks that the physicians consider material. But such physicians cannot protect themselves with

blanket consent forms that fail to advise the patient of the relevant risks.

As identified by numerous peer-reviewed medical journals, abortion correlates with many risks that warrant disclosure to patients who are considering an abortion:

- Abortion correlates with a sixfold (600 percent) increased risk of suicide compared with birth and a threefold (300 percent) increased risk over the general population. M. Gissler *et al., Pregnancy-Associated Deaths in Finland 1987-1994 – Definition Problems and Benefits of Record Linkage*, 76 ACTA OBSTETRICA & GYNECOLOGICA SCANDINAVICA 651-57 (1997); D. Reardon *et al., Deaths Associated with Pregnancy Outcome: A Record Linkage Study of Low Income Women*, 95:8 SO. MED. J. 834-41 (2002).
- Women who undergo elective abortions have a higher incidence of mood and anxiety disorders than either the general population or women who deliver children. David M. Fergusson *et al., Abortion and mental health disorders: evidence from a 30-year longitudinal study*, 193 BRIT. J. PSYCHIATRY 444-51 (2008); D. Reardon *et al., Record Linkage Study*, 95:8 SO. MED. J. at 834-41.
- Women who undergo elective abortions have higher incidence of substance abuse than either the general population or women who deliver children. Priscilla K. Coleman *et al., Induced abortion and anxiety, mood, and*

substance abuse disorders: Isolating the effects of abortion in the national comorbidity survey, 43 J. PSYCHIATRIC RES. 770-76 (2009).

- Prior abortions correlate with increased risk of premature births in later pregnancies, including a significantly elevated risk (64 percent) of "very preterm" births prior to 32 weeks gestation. Jay D. Iams *et al., Primary, secondary, and tertiary interventions to reduce the morbidity and mortality of preterm birth*, 371 THE LANCET 164-75 (Jan. 2008); Hanes M. Swingle *et al., Abortion and the Risk of Subsequent Preterm Birth: A Systematic Review with Meta-analyses*, 54 J. REPRODUCTIVE MED. 95-108 (2009); Institute of Medicine, *Preterm Birth: Causes, Consequences, and Prevention*, 519 (National Academy of Science Press, July 2006) (listing abortion as an immutable risk factor for preterm birth).[2]
- Induced abortions correlate with significantly increased breast-cancer risk. Kim E. Innes, Tim E. Byers, *First Pregnancy Characteristics & Subsequent Breast Cancer Risk Among Young Women*, 112 INT. J. CANCER 306-11 (2004); Janet R. Daling *et al., Risk of Breast Cancer Among Young Women: Relationship to Induced Abortion*, 86 J. NAT'L CANCER INST. 1584 (1994).

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[2] Among very preterm newborns, cerebral palsy risk increases fifty-five fold (5500 percent) versus full-term newborns. E. Himpens *et al., Prevalence, type, and distribution and severity of cerebral palsy in relation to gestational age: a meta-analytic review*, 50 DEVELOPMENTAL MED. CHILD NEUROLOGY 334-40 (2008).

Importantly, the physiology of why abortion increases the risk of breast cancer is well-understood, but nonetheless minimized or suppressed, apparently for political reasons. *See* Angela Lanfranchi, M.D., *The Federal Government and Academic Texts as Barriers to Informed Consent*, 13:1 J. AM. PHYSICIANS & SURGEONS 12, 13-15 (Spring 2008).

- Induced abortions correlate with a sevenfold (700 percent) increase in the risk of placenta previa, J. M. Barrett *et al., Induced abortion: a risk factor for placenta previa*, 141(7) AM. J. OBSTET. GYNECOL. 769-72 (1981), the leading cause of uterine bleeding in the third trimester and medically indicated preterm birth. Women who have placenta previa face markedly higher risks of preterm birth, low birth weight, and perinatal death in subsequent pregnancies, as well as increased risk of hemorrhaging (of which placenta previa is a major cause). John M. Thorp *et al., Long-Term Physical and Psychological Health Consequences of Induced Abortion: Review of the Evidence*, 58 OB GYN SURVEY 67-79 (2002).

While some abortion providers and many of their academic supporters dispute the causation underlying the foregoing correlations, no one seriously disputes that abortion providers generally avoid disclosing these ongoing scientific debates to their patients and prospective patients.

Amicus Eagle Forum respectfully submits that Act 825 constitutes an

important improvement to this area of medicine, where the providers have actively denied that any harms flow from abortion, which they regard as an important civil-rights issue. Unfortunately for their patients, the abortion industry's civil-rights advocacy can leave their patients without full information. For example, in unrelated litigation in which Eagle Forum recently filed *amicus* briefs, other abortion providers challenged as compelled speech the required disclosure of risks identified in peer-reviewed medical literature. In the absence of definitive proof in these medical debates, the question is whether *the patient* is entitled to learn of the ***potential*** risks.

Here, by contrast with disclosure-based statutes in other States, Louisiana has not ***compelled*** abortion providers to disclose ***anything.*** Louisiana has merely prevented abortion providers from hiding behind blanket waivers. If these abortion providers or their insurers want limited liability, the abortion providers can disclose any risks that they consider sufficiently material and thus beneficial in limiting the abortion providers' liability. Patients likely deserve more, but they certainly deserve ***no less.***

As countless pro-choice physicians can attest, there is nothing ***legitimate*** about being "pro-choice" that precludes being "pro-information":

> [I]t will surely be agreed that open discussion of risks is vital and must include the people – in this case the women – concerned. I believe that if you take a view (as I do), which is often called "pro-choice," you need at the

> same time to have a view which might be called "pro-information" without excessive paternalistic censorship (or interpretation) of the data.

Stuart Donnan, M.D., Editor in Chief, *Abortion, Breast Cancer, and Impact Factors – in this Number and the Last,* 50 J. EPIDEMIOLOGY & COMMUNITY HEALTH 605 (1996). True choice presupposes the information needed to make the choice. HMG's legal challenge is pro-abortion and pro-profit, but not pro-choice.

STATEMENT OF FACTS

The facts underlying this specific case bear out the general wisdom of Act 825. Brittany Prudhome, a former HMG patient, has sued HMG in state court for alleged injuries – a uterine tear and an incomplete abortion – she allegedly received during an abortion performed by HMG in 2006. *Prudhome v. June Medical Services, L.L.C., et al.,* No. 513,752 (1st Judicial Dist. Ct., Parish of Caddo, La.) (*"Prudhome"*). Ms. Prudhome signed an informed consent form prior to the abortion.

> Legal as well as illegal induced abortions may result in perforation of the uterus, with infection (*vide supra*), hemorrhage, and shock. A missed or incomplete abortion, whether natural or induced, may be the cause of persistent bleeding and infection.

Jane M. Orient, M.D., *Sapira's Art and Science of Bedside Diagnosis*, at 490 (Lippincott, Williams & Wilkins, 3rd ed. 2005). In 2007, Ms. Prudhome filed a medical review panel request. Initially, the Board declined to convene a medical review panel, based on Act 825, but the Board convened a panel after HMG filed

this action. In doing so, the Board completed all actions arguably owed to HMG and Ms. Prudhome at this point.

STANDARD OF REVIEW

This Court reviews summary judgments *de novo. Trinity Universal Ins. Co. v. Emp'rs. Mut. Cas. Co.,* 592 F.3d 687, 690 (5th Cir. 2010). Similarly, this Court reviews issues of jurisdiction *de novo, SmallBizPros, Inc. v. MacDonald,* 618 F.3d 458, 461 (5th Cir.2010), and has the obligation to consider them *sua sponte,* even if the parties do not raise them. *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 95 (1998).

This litigation came to this Court previously, *K.P. v. LeBlanc,* 627 F.3d 115 (5th Cir. 2010), and many of the issues in that appeal are also relevant here. Ordinarily, under the "law of the case" doctrine, "an issue of fact or law decided on appeal may not be reexamined either by the district court on remand or by the appellate court on subsequent appeal." *U.S. v. Lee,* 358 F.3d 315, 320 (5th Cir. 2004) (internal quotations and citation omitted). That said, the "doctrine is a matter of judicial discretion rather than judicial power when a court is reviewing its own prior decision," *Perillo v. Johnson,* 205 F.3d 775, 780-81 (5th Cir. 2000), and has important exceptions, including "an intervening change of law by a controlling authority," *Pondexter v. Quarterman,* 537 F.3d 511, 523 (5th Cir. 2008) (interior quotations omitted), and a "lesser standard of review" in the prior appeal such that

"the factual issues differ." *Royal Ins. Co. of Am. v. Quinn-L Capital Corp.*, 3 F.3d 877, 881 (5th Cir. 1993); *Society of Roman Catholic Church of Diocese of Lafayette, Inc. v. Interstate Fire & Casualty Co.*, 126 F.3d 727, 735 (5th Cir. 1997); *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889 (1990) (distinguishing between standards of review for motions to dismiss and motions for summary judgment); 18B CHARLES ALAN WRIGHT, ARTHUR R. MILLER, *ET AL.*, FED'L PRAC. & PROC. Juris. §4478.5 (2d ed.) ("[r]econsideration of a fact issue may be appropriate … if there is new evidence, or if a change of procedural posture changes the nature of the issue").

SUMMARY OF ARGUMENT

On the merits, HMG's three theories of Act 825's unconstitutionality all hinge on its view that Act 825 imposes a strict-liability regime, which it plainly does not (Section I.A). In any event, for HMG to have standing to challenge the strict-liability regime it fears, HMG would need to face enforcement – or the reasonable expectation of enforcement – under that strict-liability regime, but HMG faces no such threat under *Prudhome* or from any other source (Section II.A). With respect to vagueness, Act 825 both is not the type of criminal or quasi-criminal statute that triggers the void-for-vagueness doctrine and is not vague (Section I.C). The Supreme Court has expressly allowed States to adopt informed-consent laws, and Act 825 imposes no burdens on women seeking abortions

(Section I.D). Act 825 satisfies equal protection not only because Act 825's informed consent provisions easily meet the constitutional criteria but also because the district court erred in attempting to disqualify Louisiana's motives when, to the contrary, the rational-basis test requires only that Louisiana ***may*** have had a ***plausible*** rationale and HMG bears (and did not meet) the burden of disproving every basis on which Louisiana ***may possibly*** have acted (Section I.E).

In any event, the district court lacked Article III jurisdiction over HMG's claims because the Board has now done all that it can do with respect to HMG's ripe claims, which leave the Board without power to redress whatever ripe injuries HMG suffers in state court in *Prudhome* (Section II.A). On the other hand, HMG's claims with respect to payment from the Patient's Compensation Fund are not ripe (Section II.B), and HMG's efforts to compel the Board to convene a medical review panel have now been mooted by the Board's convening the panel and the release of the panel report (Section II.C). Similarly, unlike the situation that obtained on the prior appeal with respect to Louisiana's motion to dismiss, HMG no longer can cite an ongoing violation of federal law by the Board defendants; thus, Louisiana's immunity requires dismissal of this action (Section III.B).

ARGUMENT

I. ACT 825 COMPLIES WITH THE CONSTITUTION

The district court found that Act 825 was void for vagueness, imposed an

undue burden on rights under *Planned Parenthood of Southeastern Penn. v. Casey*, 505 U.S. 833, 876 (1992), and violated the Equal Protection Clause. Slip Op. at 6-13. The district court's finding that Act 825 imposes strict liability underpins each of these three findings of unconstitutionality. *Amicus* Eagle Forum first refutes the central premise of strict liability then demonstrates that Act 825 is fully constitutional, with none of the district court's three bases for finding it unconstitutional below having merit.

A. The Prior Appeals Did Not Resolve Any Merits Issues

At several points, the district court relies on the vacated panel decision in *Okpalobi v. Foster,* 190 F.3d 337, 341 (5th Cir. 1999), *vacated for lack of jurisdiction,* 244 F.3d 405 (5th Cir. 2001) (*en banc*). That vacated panel decision does not constitute even the law of the *Okpalobi* case, much less precedent here: "For a court to pronounce upon the meaning or the constitutionality of … federal law when it has no jurisdiction to do so is, by very definition, for a court to act *ultra vires.*" *Steel Co.,* 523 U.S. at 101-02. A "lack of subject matter jurisdiction goes to the very power of a court to hear a controversy; ... [the] earlier case can be accorded no weight either as precedent or as law of the case." *U.S. v. Troup,* 821 F.2d 194, 197 (3d Cir. 1987) (*quoting Ala. Hosp. Ass'n v. U.S.*, 228 Ct.Cl. 176, 656 F.2d 606 (1981)) (alterations in original); *Orff v. U.S.*, 358 F.3d 1137, 1149-50 (9th Cir. 2004) (same). While district judges certainly may agree with the reasoning

expressed in *dicta* or in decisions vacated as lacking jurisdiction, that reasoning has no claim as precedent that binds a panel – or even a district court – of this Circuit.

The district court also moored its strict-liability theory in a selectively edited quotation from the prior panel decision: "Section 9:2800.12 ... provides that no standard of care will apply to damages resulting from abortions." Slip Op. at 8 (*quoting K.P.*, 627 F.3d at 121) (district court's alterations). The district court's reliance on this snippet fails for two reasons.

First, the prior panel clearly spoke in terms of merely ***possible*** outcomes (*i.e.*, what "***might*** make the report irrelevant" and what "***could*** be"). *K.P.*, 627 F.3d at 121 (emphasis added). As such, the district court's selective editing is suspect.

Second, and more important, this Court's analysis at that stage was a motion to dismiss under Rule 12(b)(1), which assumes the plaintiff's merits views to evaluate whether jurisdiction exists: "The Supreme Court has made clear that when considering whether a plaintiff has Article III standing, a federal court must assume *arguendo* the merits of his or her legal claim." *Cole v. General Motors Corp.*, 484 F.3d 717, 723 (5th Cir. 2007) (*quoting Parker v. District of Columbia*, 478 F.3d 370, 377 (D.C. Cir. 2007). Similarly, the sovereign-immunity analysis does not screen the plaintiff's merits views to determine whether the allegation of an ongoing violation of federal law *indeed is* a violation of federal law. *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 636-37 (2002) ("inquiry into

whether suit lies under *Ex parte Young* does not include [merits] analysis"). That is how a ***threshold*** jurisdictional analysis works, and it certainly cannot prove what it assumed *arguendo.*

Except for claims "wholly insubstantial or frivolous," a federal court has subject matter jurisdiction when "the right of the [plaintiff] to recover under [the] complaint will be sustained if the ... laws of the United States are given one construction and will be defeated if they are given another." *Wheeldin v. Wheeler*, 373 U.S. 647, 649 (1963) (*quoting Bell v. Hood*, 327 U.S. 678, 685 (1946)). In finding jurisdiction for HMG's case to proceed, all that the Fifth Circuit necessarily ***held*** about the merits of HMG's claims is that those claims ***were***[3] not so "wholly insubstantial or frivolous" as to deny HMG a federal forum to be heard.

B. Act 825 Does Not – But Lawfully Could – Impose Strict Liability

Having established that nothing ***from the prior litigation*** binds this Court to HMG's notion that Act 825 imposes strict liability, *amicus* Eagle Forum now turns to the underlying merits question of whether Act 825 imposes strict liability. At the outset, *amicus* defers to Louisiana's counsel on the need to read Act 825 *in pari*

[3] As explained in Sections II and III, what was true in 2010 at the pleading stage is not necessarily true now on the merits, both because of changed events and because of the different standard of review on the pleadings versus the merits.

materia with Louisiana tort law. Louisiana Opening Br. at 28-30.[4] That analysis indicates that Act 825 imposes a negligence-based standard of care.

Instead, *amicus* Eagle Forum will focus on ***federal*** law, under which HMG must rely on a "credible threat" of enforcement against the plaintiff to bring a pre-enforcement challenge. *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979). Here, the *Prudhome* litigation that HMG actually faces is a negligence action, which cannot provide a credible threat of imposing strict liability. For that reason, *amicus* Eagle Forum respectfully submits that HMG's fear of exposure to strict-liability enforcement is too speculative – or, alternatively, insufficiently "actual or imminent" – to satisfy Article III.

Finally, of HMG's and the district court's three arguments, only the undue-burden argument under *Casey* even potentially relates to the scope of liability. *See* Sections I.C (void-for-vagueness doctrine applicable only to criminal and quasi-criminal penalties), I.E (equal-protection analysis under rational-basis test does not hinge on type of civil liability), *infra*. With respect to the undue-burden analysis under *Casey*, HMG lacks standing to litigate the abortion-related rights of prospective patients from whom HMG seeks to withhold information on informed

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[4] Although "[t]he informed consent doctrine has become firmly entrenched in American tort law," *Cruzan by Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 269 (1990), Louisiana follows a civil-law tradition that may differ in some respects from the common-law tradition prevailing on other jurisdictions, and *amicus* Eagle Forum respectfully defers to Louisiana's counsel on these issues.

consent. *See* Section II.A, *infra.* Thus, even if Act 825 ***did*** impose strict liability, that would not affect the outcome here.

C. Act 825 Is Not Void for Vagueness

HMG's argument that Act 825 is "void for vagueness" is baseless. First, the Act does not impose any criminal or "quasi-criminal" penalties, and thus the "void-for-vagueness" analysis is inapplicable. Second, HMG does not have sufficiently actual or imminent exposure to strict-liability enforcement: Ms. Prudhome has brought a standard negligence action, which provides the only Article III controversy. Third, the Act is not, in fact, vague.

In rejecting similar arguments in another abortion case, the U.S. Supreme Court reiterated that the "void for vagueness" argument applies only to criminal or quasi-criminal penalties:

> As generally stated, the void-for-vagueness doctrine requires that a ***penal*** statute define the ***criminal offense*** with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."

Gonzales v. Carhart, 550 U.S. 124, 148-49 (2007) (interior quotations omitted, emphasis added). There are no criminal or quasi-criminal penalties imposed by Act 825. Accordingly, the void-for-vagueness argument has no applicability whatsoever to Act 825.

Even if the Act were somehow deemed to impose quasi-criminal penalties,

HMG's argument would still fail. HMG attempts to create a vagueness issue in inventing the specter of strict liability that no one on the other side has suggested. The U.S. Supreme Court has expressly rejected that litigate-by-hypothetical approach, and sharply criticized the Eleventh Circuit for allowing it:

> [The Eleventh Circuit's] basic mistake lies in the belief that the mere fact that close cases can be envisioned renders a statute vague. ***That is not so.*** Close cases can be imagined under virtually any statute.

U.S. v. Williams, 553 U.S. 285, 305-06 (2008) (emphasis added). For its part, this Circuit's *Bell* decision enjoined on vagueness grounds licensing provisions where operating outside a license constituted a misdemeanor and violations were punishable by quasi-criminal civil fines. *Women's Medical Center of Northwest Houston v. Bell,* 248 F.3d 411, 422 (5th Cir. 2001). No such issue is presented here. *See* LA. R.S. §9:2800.12.[5] In addition, *Bell* reiterated that:

> [S]peculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a statute when it is surely valid in the vast majority of its intended applications.

Id. at 422 n.36 (interior quotations omitted).

Where it applies, the void-for-vagueness doctrine poses a two-part test: (1) whether the law gives people of ordinary intelligence a reasonable opportunity

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[5] Punitive damages can be quasi-criminal, but compensatory damages are not. *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001).

to know what is prohibited,[6] and (2) whether the law provides sufficient standards for those applying the law to avoid arbitrary and discriminatory applications. *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972); *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983); *Bell*, 248 F.3d at 422. A "lack of precision, alone, does not violate due process," however, when "the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." *U.S. v. Freeman*, 808 F.2d 1290, 1292 (8th Cir. 1987). At some level, the question reduces to whether "men of reasonable intelligence, guided by common understanding and practices, would believe that [their] conduct is permissible." *Id.* Under the circumstances here, any reasonable physician or medical professional should know exactly what Act 825 requires.

In summary, Act 825 clarifies informed consent and codifies civil remedies for failing to provide it. The Act is not void for vagueness.

D. Act 825 Does Not Impose an Undue Burden under *Casey*

Roe v. Wade, 410 U.S. 113 (1974), concerned States' ability to ***prohibit***

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[6] Where a statute "involves conduct of a select group of persons having specialized knowledge, and the challenged phraseology is indigenous to the idiom of that class, the [vagueness] standard is lowered and a court may uphold a statute which 'uses words or phrases having a technical or other special meaning, well enough known to enable those within its reach to correctly apply them.'" *Precious Metals Assocs., Inc. v. Commodity Futures Trading Commission*, 620 F.2d 900, 907 (1st Cir. 1980) (*quoting Connally v. General Constr. Co.*, 269 U.S. 385, 391, 46 S. Ct. 126 (1926)). Here, Act 825 concerns reasonable physicians and medical professionals, measured against what a reasonable patient would want to know.

abortions in the interest of the ***infant.*** By contrast, this litigation concerns the States' ability to ***regulate*** abortions in the interest of ***pregnant women*** who contemplate abortions. Federal courts called upon to balance State regulation of abortions against the *Roe-Casey* right to abortions must do so under the framework provided in *Casey:*

(1) Given "the State's profound interest in potential life," "the State may take measures to ensure that the woman's choice is informed … as long as their purpose is to persuade the woman to choose childbirth over abortion" and they are "not … an undue burden on the right."

(2) "The State 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."

Casey, 505 U.S. at 878. Act 825 easily meets these criteria.

When regulating abortion to protect pregnant women, only "unnecessary" regulation triggers undue-burden analysis. *Casey,* 505 U.S. at 878. Even if HMG could provide studies countering abortion's numerous potential physical and psychological effects, this would remain an area of medical uncertainty. As such, HMG cannot overcome "[legislatures'] wide discretion to pass legislation in areas where there is medical … uncertainty," where "medical uncertainty … provides a

sufficient basis to conclude in [a] facial attack that the Act ***does not*** impose an undue burden." *Gonzales v. Carhart*, 550 U.S. 124, 164 (2007) (emphasis added). Significantly, the Constitution does "not give abortion doctors unfettered choice in the course of their medical practice, nor should it elevate their status above other physicians in the medical community." *Gonzales*, 550 U.S. at 163. As *Casey* recognized, States have an interest in ensuring that abortion patients receive the information necessary to make their decisions.

Although *Casey* rejects limiting due-process rights incorporated by the Fourteenth Amendment to "only those practices … protected against government interference … when the Fourteenth Amendment was ratified," *Casey*, 505 U.S. at 847, this case requires reflecting on what the States ratified in the Fourteenth Amendment. If *Roe-Casey* abortion rights had come instead via federal legislation, the resulting preemption would be subject to a presumption against preemption for fields – such as medical practice, public health, and informed consent – traditionally occupied by the States. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). When this "presumption against preemption" applies, courts do not assume preemption "unless that was the ***clear and manifest purpose*** of Congress." *Id.* (emphasis added). Moreover, even preemptive laws are subject to the presumption against preemption to determine the ***scope*** of their preemption. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). "When the text of an express

pre-emption clause is susceptible of more than one plausible reading, courts ordinarily accept the reading that disfavors pre-emption." *Altria Group, Inc. v. Good*, 555 U.S. 70, 77 (2008) (interior quotations omitted). While preemption analysis does not apply *per se*, analogy to that analysis provides a far better reading – more in line with what the States ratified – that would allow any permissible reading to survive facial attack.

E. Act 825 Does Not Violate the Equal Protection Clause

The district court rejected Louisiana's proffered informed-consent rationale as "not credible," which the district court found to leave the State with "no proffered goal" and an "inference" of "animosity toward the class of persons affected." Slip Op. at 11-12 (interior quotations and citations omitted). This analysis wildly misses the law on equal protection.

First, given "the State's profound interest in potential life," *Casey*, 505 U.S. at 878, it is simply wrong to equate elective abortion – which artificially and unnecessarily terminates life – with other forms of medical practice. In any event, the States also have a permissible interest in ensuring informed consent of the women who seek abortions, *id.*, and neither those women nor *a fortiori* abortion providers like HMG are a protected class entitled to elevated scrutiny under the Equal Protection Clause. *Harris v. McRae*, 448 U.S. 297, 322 (1980) (restrictions on abortion funding are not discrimination because of sex); *Bray v. Alexandria*

Women's Health Clinic, 506 U.S. 263, 271 (1993). As such, as even the district court appears to recognize, the rational-basis test applies.

To prevail, a rational-basis plaintiff must "negative every conceivable basis which might support [the challenged statute]," including those bases on which the State plausibly ***may have*** acted. *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973) (internal quotations omitted); *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 462-63 (1988) ("the Equal Protection Clause is offended only if the statute's classification rests on grounds wholly irrelevant to the achievement of the State's objective") (interior quotations omitted). It is enough, for example, that a State ***may have*** considered informed consent to have benefits for either the women patients themselves or the fetuses' potential life:

> The Equal Protection Clause is satisfied so long as there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based ***rationally may have been considered to be true by the governmental decisionmaker,*** and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.

Nordlinger v. Hahn, 505 U.S. 1, 11-12 (1992) (citations omitted, emphasis added). Neither HMG nor the district court ***negatives*** the bases on which Louisiana acted and the other ***plausible*** bases on which it ***may*** have acted.

Significantly, "a legislative choice" like Act 825 "is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or

empirical data." *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993); *Heller v. Doe*, 509 U.S. 312, 320 (1993) (same). HMG could not prevail by marshaling "impressive supporting evidence … [on] the probable consequences of the [statute]" vis-à-vis the legislative purpose but must instead negate "the ***theoretical*** connection" between the two. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 463-64 (1981) (emphasis in original). *Amicus* Eagle Forum respectfully submits that HMG not only did not even attempt to achieve that level of proof but also could never do so. Act 825 empowers patients either to receive relevant information or to bring an after-the-fact cause of action if an abortion provider withholds information, and it empowers abortion providers either to obtain before-the-fact informed consent and a limitation on liability or to avoid disclosure and truly informed consent while risking heightened liability.

II. FEDERAL COURTS LACK ARTICLE III JURISDICTION OVER AT LEAST SOME OF HMG'S CLAIMS

Article III limits federal courts' jurisdiction to cases and controversies, U.S. CONST. art III, §2, which presents "the threshold question in every federal case, determining the power of the court to entertain the suit." *Warth v. Seldin*, 422 U.S. 490, 499 (1975). The partially overlapping limits of standing, ripeness, and mootness all derive from Article III's limitations. *Allen v. Wright*, 468 U.S. 737, 750 (1984). These limitations "assume[] particular importance in ensuring that the Federal Judiciary respects the proper – and properly limited – role of the courts in a

democratic society." *DaimlerChrysler Corp. v. Cuno,* 547 U.S. 332, 341 (2006) (citations and internal quotations omitted).

Under Article III, appellate courts "presume that federal courts lack jurisdiction unless the contrary appears affirmatively from the record," *Renne v. Geary,* 501 U.S. 312, 316 (1991), and the party invoking federal jurisdiction bears the burden of proof on each step of the jurisdictional analysis.[7] *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561 (1992). Parties cannot grant jurisdiction by consent or waiver, *FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215, 231 (1990), "[a]nd 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.*, 523 U.S. at 94 (interior quotations omitted).

A. HMG Lacks Standing to Bring Its Claims

With respect to HMG's potential liability in *Prudhome,* the Board defendants are without power to affect the outcome of that suit and thus without power to redress HMG's actual or imminent injuries. *Okpalobi v. Foster,* 244 F.3d

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[7] In ruling on Rule 12(b)(1) motions, courts take the plaintiff's factual allegations as true and also "presume[] that general allegations embrace those specific facts that are necessary to support the claim." *Lujan v. Nat'l Wildlife Fed'n,* 497 U.S. 871, 889 (1990). By contrast, plaintiffs must establish standing ***on the merits*** to support injunctive relief on the merits. *Summers v. Earth Island Institute,* 129 S.Ct. 1142, 1151 (2009).

405, 426 (5th Cir. 2001) (*en banc*); *cf. Bennett v. Spear*, 520 U.S. 154, 169 (1997) (redressability fails if independent non-parties cause harm). Moreover, HMG claims injury from exposure to a strict-liability Act 825 that only HMG argues to exist, which is not sufficiently actual or imminent for Article III. Without any credible threat of future strict-liability enforcement, HMG lacks standing to challenge that purely speculative enforcement exposure. *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979). Further, because "standing is not dispensed in gross," *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996), plaintiffs must establish standing for all of the relief that they request. Standing to challenge a limited aspect of a law does not necessarily provide standing to challenge all applications and potential future applications of that law.

HMG also seeks to assert abortion rights under *Roe v. Wade*, 410 U.S. 113 (1974), and its progeny, but those rights belong to the women patients that Act 825 protects, not to abortion providers.[8] Generally, for a plaintiff to assert the rights of absent third parties, *jus tertii* (third-party) standing requires 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

[8] While courts have sometimes allowed physicians to assert abortion rights, those cases involve instances where the challenged abortion restrictions imposed criminal penalties on the abortion providers, thereby putting the providers in the same shoes as the patients. Act 825 does not similarly penalize abortion providers.

protecting their own interests. *Kowalski v. Tesmer,* 543 U.S. 125, 128-30 (2004) (*citing Powers v. Ohio,* 499 U.S. 400, 411 (1991)). Here, all plaintiffs lack standing, so HMG fails the first prong of the *Powers* test. Moreover, abortion providers do not have a close relationship with their patients, who have only sporadic occasions to seek abortions. Finally, the Supreme Court foreclosed basing third-party standing on the "***hypothetical*** … relationship posited here." *Tesmer,* 543 U.S. at 131 (emphasis in original). Under the circumstances, because it lacks standing and a close relationship with its future patients, HMG cannot assert women's rights under *Roe* and its progeny. *Tesmer,* 543 U.S. at 128-31. Even if HMG had constitutional standing, withholding information from abortion patients would fall well outside the zone of interests protected by the underlying rights. *Sabine River Authority v. U.S. Dep't of Interior,* 951 F.2d 669, 676 (5th Cir. 1992).

The fact that this Court found standing on the pleadings' "general allegations" and the additional facts implicitly "embrace[d]" by those pleadings, *Nat'l Wildlife Fed'n,* 497 U.S. at 889, says absolutely nothing about HMG's having proved the elements of its standing on the merits. *Summers,* 129 S.Ct. at 1151. For all these reasons, HMG lacks standing ***now,*** notwithstanding its earlier success in this Court on that issue, under a more lenient standard.

B. HMG's Claims Against the Board Are Not Ripe

It is altogether unclear whether HMG will face damages or a settlement in

excess of Act 825's $100,000 limit. As such, this Court has no basis under Article III on which to judge the future impact of Act 825 on HMG. *See* Louisiana Br. at 16-21. Accordingly, this Court should dismiss the HMG claims related to potential future liability.

C. HMG's Claims Against the Board Are Moot

Whatever controversy existed between the Board and HMG while the Board withheld a medical review panel has been mooted by the Board's convening that panel and the panel's preparing its report. *See* Louisiana Br. at 13-16. Accordingly, this Court should dismiss the HMG claims related to past failure to convene a medical review panel. While this Court previously held that voluntary cessation did not moot the case then before the Court, *K.P.*, 627 at 121, that holding in that procedural context has no bearing on the current procedural context, after the Board fully met any currently ripe alleged obligations to HMG.

III. LOUISIANA IS IMMUNE FROM SUIT BECAUSE HMG CANNOT CITE AN *ONGOING* VIOLATION OF FEDERAL LAW BY *THESE* OFFICER DEFENDANTS

The district court considered itself bound by the prior Fifth Circuit panel's determination that Louisiana's sovereign immunity posed no barrier to this litigation's proceeding beyond the motion-to-dismiss threshold. Slip Op. at 3-5. Because the *Ex parte Young* officer-suit exception to sovereign immunity requires an ***ongoing*** violation of federal law, however, the Board's convening the

previously withheld medical review panel changes the analysis by removing the then-ongoing alleged violation of federal law as a basis on which HMG could assert federal-court jurisdiction over Louisiana.

Under the Eleventh Amendment, "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. *Ex parte Young* provides a limited exception that applies only to ***ongoing*** *violations* of federal law. Thus, for example, the exception was unavailable in *Green v. Mansour,* 474 U.S. 64, 66-67 (1985), where, after "Respondent … brought state policy into compliance," and the plaintiffs sought "a declaratory judgment that state officials violated federal law in the past when there is no ongoing violation of federal law." *Id.,* With no ongoing violation, the federal courts lose their hold over sovereign States. Further, the rationale for the *Ex parte Young* exception to sovereign immunity "is wholly absent … when a plaintiff alleges that a state official has violated ***state*** law." *Pennhurst State School & Hospital v. Halderman,* 465 U.S. 89, 106 (1984) (emphasis in original). "On the contrary, it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law." *Id.*

A. The Prior Appeal Did Not Resolve the Eleventh-Amendment Issues Presented by this Appeal

Even if it brings a ***constitutionally*** ripe claim for injunctive relief, HMG no longer brings a claim that is sufficiently imminent to ignore Louisiana's sovereign immunity from suit in federal court. *Amicus* Eagle Forum has no significant quarrel today with the decision of this Court in the prior appeal, while it remained possible that the Board would terminate or squelch the medical review panel. *K.P.*, 627 F.3d at 121. In the current procedural posture, however, without that alleged violation at the pleading stage, there is no place for this Court "to determine the constitutionality of state laws in hypothetical situations where it is not even clear the State itself would consider its law applicable." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 381-83 (1992). Significantly, the *Morales* restrictions based on immunity apply even "assuming [that a plaintiff's challenge] would meet Article III case-or-controversy requirements." *Morales*, 504 U.S. at 382. While this Court's prior holding based on immunity was a rifle shot aimed at the withheld medical review panel, the district court's new summary judgment is the very "blunderbuss" that *Morales* prohibits.

B. HMG Cannot Cite an Ongoing Violation of Federal Law

Louisiana has convened a medical review panel under its Med-Mal Act, which is all that HMG is now entitled to under its federal-law theories about Act 825's invalidity. Future payments by the Board and future findings by non-party

Louisiana courts are simply not before this Court at this time. As such, the Eleventh Amendment prohibits this Court's exercising jurisdiction over the sovereign State of Louisiana "to determine the constitutionality of state laws in hypothetical situations." *Morales*, 504 U.S. at 382-83. The only ***potential*** violation of federal law ever present in this litigation – the Board's failure to convene a medical review panel – has been cured, and there is no reason to suspect that the Board will fail to convene future panels and thus no basis for continued federal jurisdiction over Louisiana. *Mansour*, 474 U.S. at 66-67. Finally, to the extent that HMG asserts its rights under the Med-Mal Act, as opposed to its rights under federal law, HMG cannot sue in federal court. *Pennhurst*, 465 U.S. at 106. In sum, HMG has no present basis on which to keep Louisiana in federal court.

CONCLUSION

For the foregoing reasons and those argued by Louisiana, this Court should reverse and remand with an order to dismiss this action for failure to state a claim.

Dated: August 8, 2012

Respectfully submitted,

/s/ Lawrence J. Joseph

Lawrence J. Joseph
1250 Connecticut Ave. NW, Suite 200
Washington, DC 20036
Tel: 202-669-5135
Fax: 202-318-2254
Email: ljoseph@larryjoseph.com

Counsel for Amicus Curiae Eagle Forum Education & Legal Defense Fund

CERTIFICATE OF COMPLIANCE

No. 12-30456, *K. P. v. LeBlanc.*

1. The foregoing brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because the brief contains 6,848 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii) and Circuit Rule 32.2.

2. The foregoing brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14-point font.

Dated: August 8, 2012

Respectfully submitted,

/s/ Lawrence J. Joseph

Lawrence J. Joseph, D.C. Bar #464777
1250 Connecticut Ave, NW, Suite 200
Washington, DC 20036
Tel: 202-669-5135
Fax: 202-318-2254
Email: ljoseph@larryjoseph.com

Counsel for Amicus Curiae Eagle Forum Education & Legal Defense Fund

CERTIFICATE OF SERVICE

No. 12-30456, *K. P. v. LeBlanc.*

I hereby certify that, on August 8, 2012, I electronically filed the foregoing corrected brief – together with the accompanying motion for leave to file a corrected brief – with the Clerk of the Court for the U.S. Court of Appeals for the Fifth Circuit 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. In addition, I served one paper copy on the following counsel via U.S. Mail, postage prepaid:

Stephanie Toti
Center for Reproductive Rights
120 Wall Street, 14th Floor
New York, NY 10005
(917) 637-3684
stoti@reprorights.org

William E. Rittenberg
Rittenberg, Samuel & Phillips, LLC
715 Girod Street
New Orleans, LA 70130
(504) 524-5555
rittenberg@rittenbergsamuel.com

Carlton Jones, III
Roedel, Parsons *et al.*
8440 Jefferson Highway, Suite 301
Baton Rouge, LA 70809-7679
(225) 929-7033
cjones@roedelparsons.com

I further certify that, on that date, the appellate CM/ECF system's service-list report showed that none of the case participants were unregistered for CM/ECF.

/s/ Lawrence J. Joseph

Lawrence J. Joseph

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I hereby certify that: (1) required privacy redactions have been made; (2) the electronic submission of this document is an exact copy of the corresponding paper document; and (3) the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

Dated: August 8, 2012

Respectfully submitted,

/s/ Lawrence J. Joseph

Lawrence J. Joseph, D.C. Bar #464777
1250 Connecticut Ave, NW, Suite 200
Washington, DC 20036
Tel: 202-669-5135
Fax: 202-318-2254
Email: ljoseph@larryjoseph.com

Counsel for Amicus Curiae Eagle Forum Education & Legal Defense Fund