10-3298

United States Court of Appeals for the Eighth Circuit

PLANNED PARENTHOOD OF THE HEARTLAND, *ET AL.*,
Plaintiffs-Appellees,

v.

DAVE HEINEMAN, GOVERNOR OF NEBRASKA, IN HIS OFFICIAL CAPACITY, *ET AL.*,
Defendants-Appellees,

v.

EAGLE FORUM EDUCATION AND LEGAL DEFENSE FUND, *ET AL.*,
Movants,

NEBRASKANS UNITED FOR LIFE, DOING BUSINESS AS NULIFE PREGNANCY RESOURCE CENTER,
Movant-Appellant.

ON APPEAL FROM U.S. DISTRICT COURT FOR THE DISTRICT OF NEBRASKA, LINCOLN DIVISION, CIVIL NO. 4:10-03122, HON. LAURIE CAMP SMITH

BRIEF FOR *AMICUS CURIAE* EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF APPELLANT'S PETITION FOR REHEARING *EN BANC* 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* 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: January 12, 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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES AND REGULATIONS

IDENTITY, INTEREST AND AUTHORITY TO FILE

Amicus curiae Eagle Forum Education & Legal Defense Fund ("Eagle Forum"), a nonprofit Illinois corporation, seeks the Court's leave to file this brief for the reasons set forth in the accompanying motion.[1] Founded in 1981, Eagle Forum has consistently defended federalism and supported states' autonomy from the federal government in areas – like public health – that are of traditionally local concern. 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 direct and vital interests in the issues before this Court.

INTRODUCTION

After affirming the district court's denial of intervention as untimely, the panel held that this Court therefore lacked jurisdiction to review the district court's subject-matter jurisdiction in the underlying

---

[1] The undersigned counsel represented both the *amicus* and the appellant in the district court and, as appellant's trial counsel, filed the notice of appeal to this Court. By analogy to FED. R. APP. P. 29(c)(5), the undersigned counsel certifies that, except as provided in the prior sentence: the undersigned counsel for the *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.

litigation. Far from lacking jurisdiction to reach that threshold jurisdictional question, this Court has *the obligation* to reach it. The *en banc* Court must correct the panel's failure – contrary to decisions of other federal circuits and the Supreme Court – to meet its obligation.

Although the questions that the appellant (hereinafter, "NuLife") presents to the *en banc* Court are jurisdictional, some background on the underlying litigation helps to frame those questions. The plaintiffs-appellees (collectively hereinafter, "Planned Parenthood") challenge Nebraska's Women's Health Protection Act (hereinafter, "LB594"). That law creates a private state-law cause of action for victims of abortion performed without informed consent and provides mechanisms to protect abortion providers who provide informed consent. Because state courts – not the Nebraska executive-branch state defendants here – will implement LB594, it is unclear how these defendants can redress Planned Parenthood's alleged injuries.

Specifically, although LB594 §11(3) immunizes against criminal action, disciplinary action, or revocation of a license pursuant to the Uniform Credentialing Act based on failure to meet LB594's informed-consent criteria, Planned Parenthood claims to fear imminent

enforcement *against its facilities* via "disciplinary action against a license issued under the Health Care Facility Licensure Act," for "'[c]ommitting or permit[ing], aiding, or abetting the commission of any unlawful act'" by facilities' immunized staff. NuLife Add. 18a (*quoting* NEB. REV. STAT. §71-448). This hypothetical, non-imminent and, indeed, improbable state enforcement – which has an entirely adequate post-enforcement remedy – served as the district court's jurisdictional hook to enjoin LB594, notwithstanding that the district court could have enjoyed only LB594's enforcement against facilities via §71-448.

I. APPELLATE COURTS HAVE THE OBLIGATION TO ASSESS NOT ONLY THEIR JURISDICTION BUT ALSO THE JURISDICTION OF THE LOWER COURTS

In its opening brief, NuLife argued that this Court had the obligation to consider the district court's jurisdiction for the underlying litigation, even if this Court affirmed the denial of intervention. NuLife Br. at 24-27. NuLife then devoted a third of its brief to demonstrating that Planned Parenthood failed to establish jurisdiction for its action. *Id.* at 27-45. Because Planned Parenthood made the strategic decision to ignore elements of that jurisdictional challenge, Planned Parenthood Br. at 49-51, NuLife cited that silence as a fatal waiver on issues on

which Planned Parenthood bore the burden of proof. NuLife Reply Br. at 13-14 (standing), 16-17 (ripeness); *see also* FED. R. APP. P. 29(a)(9)(A), (b) (appellants *and appellees* must argue their "contentions and the reasons for them, with citations to the authorities and parts of the record on which [they] rel[y]"). Because "[e]ven appellees waive arguments by failing to brief them," *U.S. v. Ford,* 184 F.3d 566, 578 n.3 (6th Cir. 1999), this Court should remand with an order to dismiss.[2]

Although NuLife's motion to intervene was concededly timely for purposes of FED. R. APP. P. 4, *see* Planned Parenthood Br. at 8 (NuLife filed on "the last day to file a notice of appeal"); *accord* Slip Op. at 3 (NuLife filed "on the last day to file a notice of appeal"), the panel affirmed the district court's holding that NuLife's motion to intervene was untimely *for purposes of FED. R. CIV. P. 24.* Slip Op. at 5. In a

---

[2] Even if this Court *en banc* were to accept Planned Parenthood's argument that the wholly unsubstantiated threat of the Nebraska defendants' enforcing LB564 *against a facility* provides standing, the Court nonetheless would have the obligation to trim the injunction to that case or controversy by enjoining such enforcement (which is the only relief that these state defendants can provide) and nothing else. *Lewis v. Casey,* 518 U.S. 343, 358 n.6 (1996) ("standing is not dispensed in gross"); *Summers v. Earth Island Institute,* 129 S.Ct. 1142, 1151 (2009) (plaintiffs must establish standing for all merits relief).

footnote to its decision, the panel then cited *Bauer v. Transitional Sch. Dist. of City of St. Louis,* 255 F.3d 478 (8th Cir. 2001) – for the first time in this litigation – to suggest that the Court could "not reach the underlying federal subject matter jurisdiction questions" "[b]ecause we conclude that we lack appellate jurisdiction." Slip Op. at 5 n.3 (*quoting Bauer,* 255 F.3d at 480). The panel misapplied *Bauer* to this case.

In *Bauer,* this Court dismissed an appeal of a district court's order to remand to state court a case that the defendant previously had removed from state court to the federal court. Although the removal dispute involved the district court's subject-matter jurisdiction, the issue in this Court involved *appellate* subject-matter jurisdiction:

> All federal courts, other than the Supreme Court, derive their jurisdiction wholly from the exercise of the authority to 'ordain and establish' inferior courts, conferred on Congress by Article III, § 1 of the Constitution. Removal jurisdiction is therefore completely statutory, and we cannot construe jurisdictional statutes any broader than their language will bear. … By statutory mandate, "[a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise." 28 U.S.C. § 1447(d).

Bauer, 255 F.3d at 480 (citations omitted). As *Bauer* explained, this Court was without jurisdiction over that appeal because Congress, by

statute, had denied jurisdiction over removal-related appeals of the type contemplated by the appellant there. *Id.* at 480-81. As explained *infra,* by contrast, NuLife argues that this Court's obligations *under Article III* require appellate courts to assess a lower court's jurisdiction in any case properly before the appellate court.

One difference, then, between *Bauer* and this case is that the former involves statutory jurisdiction, while the latter involves constitutional jurisdiction: "whether or not there is jurisdiction in the appellate court to review the District Court's order turns not on the subject matter of Congress' jurisdictional grant to the district courts, but on traditional principles of justiciability." *Church of Scientology of California v. U.S.,* 506 U.S. 9, 15 (1992). The other difference is that the entire appeal in *Bauer* was not properly before this Court, whereas the appeal here is properly before this Court. Obviously, when an appellate court lacks jurisdiction over an entire appeal, it must dismiss without reviewing the underlying litigation. *Browder v. Director, Dep't of Corr.,* 434 U.S. 257, 264 (1978) (noting that the timely filing of an appeal is "mandatory and jurisdictional"); *U.S. E.P.A. v. City of Green Forest,* 921 F.2d 1394, 1401 (8th Cir. 1990). But no one could seriously contend that

this Court lacks jurisdiction over NuLife's appeal (*e.g.*, the Court could grant NuLife intervention and even stay the district court's judgment pending appeal, etc.). *Bauer* is entirely irrelevant to this appeal.

Federal appellate courts have an obligation to consider not only their own jurisdiction but also the lower courts' jurisdiction. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95 (1998). Thus, the Second Circuit has relied on *Steel Company* to reach a decision squarely at odds with the panel's decision here. *Am. Lung Ass'n v. Reilly,* 962 F.2d 258, 262-63 (2d Cir. 1992). In *Reilly,* the Second Circuit reviewed the lower court's subject-matter jurisdiction, after affirming the denial of intervention. *Reilly,* 962 F.2d at 262-63. Indeed, the Third Circuit went so far as to remand the defendants' partial appeal with an order to dismiss not only the appealed portion of the case, but also the plaintiff's judgment on counts that the defendants *did not even appeal,* because the district court lacked jurisdiction. *Lyon v. Whisman,* 45 F.3d 758, 758-59 & n.1 (3d Cir. 1995). These authoritative decisions weigh strongly against the panel's relying on the clearly inapposite *Bauer* decision to avoid the underlying jurisdictional issue presented here.

Unlike the statutory jurisdictional issues in *Bauer,* the Article III

issue here "assumes 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). In addition to its obligation to police the lower courts' assertions of jurisdiction that they lack, this Court has the obligation to exercise the jurisdiction that it has. As Chief Justice Marshall famously put it, "[w]e have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." *Cohens v. Virginia,* 19 U.S. (6 Wheat.) 264, 404 (1821); *Barzilay v. Barzilay,* 536 F.3d 844, 849-50 (8th Cir. 2008). Thus, federal courts have a "virtually unflagging obligation ... to exercise the jurisdiction given them." *Colorado River Water Conserv. Dist. v. U.S.,* 424 U.S. 800, 817 (1976); *Royal Indem. Co. v. Apex Oil Co.,* 511 F.3d 788, 792-93 (8th Cir. 2008). No principle of law or equity authorizes this Court's avoiding the threshold jurisdictional issues presented here.

Two unmistakable results flow from the foregoing authorities. First, this Court has the obligation to exercise the jurisdiction that NuLife's timely appeal has presented to this Court. Second, that appellate jurisdiction extends not only to the specific issues presented

on appeal of the district court's order denying intervention but also to the district court's jurisdiction over the underlying litigation. Accordingly, this Court *en banc* should reverse the panel's contrary holding and assess whether Planned Parenthood has standing and a ripe claim for all of the relief that the district court's judgment awards.

II. NOTWITHSTANDING UNTIMELINESS WITH RESPECT TO INTERVENTION *ON THE MERITS,* THIS COURT SHOULD ALLOW POST-JUDGMENT INTERVENTION TO CHALLENGE JURISDICTION WHENEVER A TIMELY NOTICE OF APPEAL IS FILED

Amicus Eagle Forum respectfully submits that this Court should adopt a bright-line rule within this Circuit that intervening to challenge a district court's jurisdiction is always timely when – as here – the movant seeks to intervene within the time allowed for filing a notice of appeal and files a timely notice of appeal. Given that appellate courts have the obligation to consider the lower courts' jurisdiction, even if the appellate court denies intervention, *see* Section I, *supra,* the proposed bright-line rule already applies *in appellate courts* as a practical matter, even without a bright-line rule. The value of the proposed rule is to guide *the district courts* in this Circuit.

Before addressing why post-judgment intervention to challenge

jurisdiction is always timely if the movant files a timely notice of appeal, *amicus* Eagle Forum first explains the value of this Court's adopting a bright-line rule. In the proceeding below, the district court did not consider the jurisdictional issues that NuLife raised, choosing to rule on the timeliness of NuLife's motion to intervene and NuLife's standing. To the contrary, however, given the Nebraska defendants' capitulation and the district court's obligation to assess its jurisdiction, the district court should have accepted NuLife's "concrete adverseness … [that] sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr,* 369 U.S. 186, 204 (1962). Otherwise, courts risk entering judgments that lack a "true challenge" in the absence of intervention. *Horne v. Flores,* 129 S.Ct. 2579, 2596 (2009).

Had the district court weighed and ruled on NuLife's jurisdictional arguments, this Court would have the benefit of a decision on appeal. Indeed, while the non-prevailing party potentially would have appealed, the district court's jurisdictional analysis at least potentially could have resolved this litigation without the need for an appeal. Given that this Court must consider the jurisdictional issues in any event, *see* Section I,

supra, a bright-line rule would serve judicial economy by having district courts resolve these important issues before they reach this Court.

In addition to its utility, Eagle Forum's proposed bright-line rule also would reflect applicable law. As a threshold matter, Rule 24 plainly permits post-judgment intervention filed within the time for noticing an appeal. *United Airlines, Inc. v. McDonald,* 432 U.S. 385, 394 (1977). As the panel indicated, Circuit precedent provides "[t]he *general rule* … that motions for intervention made after entry of final judgment will be granted only upon a strong showing of entitlement and of justification for failure to request intervention sooner." Slip Op. at 4 (*quoting U.S. v. Associated Milk Producers, Inc.,* 534 F.2d 113, 116 (8th Cir. 1976)) (emphasis added). To the extent that it set an inflexible rule for post-judgment intervention, however, *Associated Milk Producers* would be inconsistent with *Nat'l Ass'n for Advancement of Colored People v. New York,* 413 U.S. 345, 365-66 (1973) ("*NAACP*"), which held that courts evaluate timeliness under a totality-of-the-circumstances test in which "the point to which the suit has progressed is one factor" "not solely dispositive." *Id.* Significantly, neither *Associated Milk Producers* nor *NAACP* involved jurisdictional challenges to the underlying litigation.

An unappealed judgment that lacks subject-matter jurisdiction easily qualifies as an exceptional circumstance that warrants post-judgment intervention on the jurisdictional issue. *Acree v. Republic of Iraq,* 370 F.3d 41, 50-51 (D.C. Cir. 2004), *cert. denied*, 544 U.S. 1010 (2005), *abrogated on other grnds.*, *Republic of Iraq v. Beaty,* 129 S.Ct. 2183, 2195 (2009). *Steel Company* should answer the concerns of any judge of this Court who questions the need to allow post-judgment intervention to challenge jurisdiction: "For a court to pronounce upon the meaning or the constitutionality of a state or 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. This Court simply cannot assume prejudice from vacating an *ultra vires* judgment.[3]

For all of the foregoing reasons, this Court should adopt a bright-line rule that a jurisdictional challenge brought in a motion to intervene

---

[3] Even if a typical litigant or district court would have legitimate concerns about arguments arriving post-judgment, that would not be relevant here. As Planned Parenthood complained below, NuLife's post-judgment arguments reprised the arguments that NuLife made in opposing the preliminary injunction before the entry of judgment, which reprised the arguments that Eagle Forum *et al.* made in an *amicus* brief that the district court declined to file before the entry of the preliminary injunction. Under the circumstances, no one can complain of prejudice.

is timely if the movant timely files a notice of appeal.[4] As a practical matter, this Court has the obligation to review these jurisdictional challenges on appeal in any event, but a bright-line rule would direct district courts on how to handle these issues below.

III. THIS CASE PRESENTS ISSUES OF EXCEPTIONAL IMPORTANCE TO RECOGNIZING STATES' LATITUDE TO ENSURE INFORMED CONSENT AND TO PROTECT WOMEN CONSIDERING ABORTIONS

NuLife's petition for rehearing *en banc* focuses on jurisdictional questions. While it recognizes the wisdom of NuLife's approach, Eagle Forum respectfully submits that this litigation presents two issues of exceptional public importance – one substantive and one procedural – to the balancing of the roles of state legislatures and federal courts in defining and protecting women's rights under *Roe v. Wade*, 410 U.S. 113 (1974), and its progeny. For both issues, the narrow questions presented to the *en banc* Court may make these issues irrelevant to *how* the *en banc* Court decides the questions presented. But *amicus* Eagle Forum

---

[4] As this Circuit and others have recognized, notices of appeal are timely filed if a movant for intervention – after moving to intervene – files a protective notice of appeal within FED. R. APP. P. 4's jurisdictional timelines. *Mausolf v. Babbitt,* 125 F.3d 661, 666 (8th Cir. 1997); *Purcell v. BankAtlantic Fin. Corp.,* 85 F.3d 1508, 1151 n.3 (11th Cir. 1996).

respectfully submits that both issues are relevant to *whether* the *en banc* Court should answer the questions presented to it.

First, *Roe* concerned states' ability to *prohibit* 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. Under *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833 (1992), federal courts must balance state regulation of abortions against the *Roe-Casey* right to abortions. 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." *Casey,* 505 U.S. at 878. Further, "[t]he 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." *Id.* At least when a willing intervener appears to defend state law, the defendants' quick capitulation in a case in which they have tangential involvement *at best*

does not provide the delicate balancing that *Casey* requires.

Second, the process below fits a troubling pattern in challenges to state abortion laws, with Planned Parenthood's waiting until just before LB594 took effect to race to court for interim relief. The timing left the Nebraska defendants half of the time that Local Rule 7.0.1(b)(1)(B) provides for an opposition. As a result, the state could not develop evidence to counter Planned Parenthood's evidence, and the district court capriciously denied leave to file the *amicus* brief and evidence that Eagle Forum marshaled on short notice. After losing on a preliminary injunction under hurried conditions, the defendants – who have very little, *if anything,* at stake – simply capitulated. In sum, the district court has issued an obviously overbroad permanent injunction against a duly enacted law of the State of Nebraska on a paltry and biased record at the preliminary-injunction stage – which would not even control on the merits, *Univ. of Texas v. Camenisch,* 451 U.S. 390, 395 (1981) – with only trivial, disinterested opposition. Surely a federal court needs more to displace a sovereign state.

CONCLUSION

This Court should rehear the jurisdictional issues *en banc.*

Dated: January 12, 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 COMPLIANCE

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 Century Schoolbook 14-point font.

Dated: January 12, 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