

No. 17-5171

In the U.S. Court of Appeals for the District of Columbia Circuit

ELECTRONIC PRIVACY INFORMATION CENTER,
Plaintiff-Appellant,

v.

PRESIDENTIAL ADVISORY COMMISSION ON ELECTION INTEGRITY,
ET AL.,
Defendants-Appellees.

APPEAL FROM U.S. DISTRICT COURT FOR THE DISTRICT OF
COLUMBIA, No. 1:17-cv-1320-CKK (HON. COLLEEN KOLLAR-KOTELLY)

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

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CORPORATE DISCLOSURE STATEMENT

Pursuant to FED. R. APP. P. 26.1 and Circuit Rules 26.1 and 27(a)(4), counsel for movant Eagle Forum Education & Legal Defense Fund (“EFELDF”) states that (a) EFELDF is a non-profit, tax-exempt corporation under §501(c)(3) of the Internal Revenue Code with no parent corporation; (b) no publicly traded entity – or any other entity – holds a ten-percent ownership interest in EFELDF; and (c) EFELDF is an education and legal defense fund that advocates for traditional American values and constitutional government, including – as relevant here for the elections on which the Nation has based its political community – governmental efforts both to reduce voter fraud and to maximize voter confidence in the electoral process.

Dated: September 21, 2017

Respectfully submitted,

/s/ Lawrence J. Joseph

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 27(a)(4), counsel for movant Eagle Forum Education & Legal Defense Fund (“EFELDF”) presents the following certificate as to parties, rulings, and related cases.

A. Parties and Amici

With the addition of EFELDF’s appearing as a movant (and potentially an *amicus*) in this appeal, the parties below and here are: (1) plaintiff-appellant Electronic Privacy Information Center (“EPIC”), and (2) defendants-appellees Presidential Advisory Commission on Election Integrity; Michael Pence, in his official capacity as Vice Chair of the Presidential Advisory Commission on Election Integrity; Kris Kobach, in his official capacity as Vice Chair of the Presidential Advisory Commission on Election Integrity; Charles C. Herndon, in his official capacity as Director of White House Information Technology; Executive Office of the President of the United States; Office of the Vice President of the United States; General Services Administration; U.S. Department of Defense; United States Digital Service; Executive Committee for Presidential Information Technology.

B. Rulings under Review

The ruling under review in this case is Judge Colleen Kollar-Kotelly’s July 24, 2017, Order and Memorandum Opinion denying EPIC’s Motion for a Temporary Restraining Order and Preliminary Injunction. *EPIC v. Presidential Advisory Comm’n on Election Integrity*, No. 1:17-1320-CKK (D.D.C. July 24, 2017).

C. Related Cases

Apart from the proceedings in the court below, this case has not previously been filed with this Court or any other court. Counsel is aware of the following cases qualifying as “related” under Circuit Rule 28(a)(1)(C): (1) *ACLU v. Trump*, No. 17-1351 (D.D.C. filed July 10, 2017); (2) *Lawyers’ Committee for Civil Rights Under Law v. Presidential Advisory Comm’n on Election Integrity*, No. 17-1354 (D.D.C. filed July 10, 2017), which is on appeal here as No. 17-5167 (D.C. Cir. filed July 21, 2017); and (3) *Common Cause v. Presidential Advisory Comm’n on Election Integrity*, No. 17-1398 (D.D.C. filed July 14, 2017). Although these cases all involve the formation and operation of the same advisory committee and related defendants, counsel does not understand these other cases to involve the same merits issues that EPIC raises under the E-Government Act of 2002.

Dated: September 21, 2017

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INTRODUCTION

Pursuant to FED. R. APP. PROC. 27 and 29(a) and Circuit Rules 27 and 29, the Eagle Forum Education & Legal Defense Fund (“EFELDF”) requests leave to file the accompanying *amicus curiae* brief in support of the defendants-appellees Presidential Advisory Commission on Election Integrity *et al.* (hereinafter, the “Commission”). By email before the Commission filed its brief, EFELDF sought the parties’ consent and, as a condition for consent, offered to file the EFELDF *amicus* brief earlier than Rule 29(a)(6) requires to accommodate a reply by plaintiff-appellant Electronic Privacy Information Center (“EPIC”). The Commission consented to the filing of the brief, but EPIC withheld its consent by email dated September 8, 2017, reasoning that “the issues raised on appeal will be adequately briefed by the parties involved in the case and that an *amicus curiae* brief in support of the appellees would not be ‘desirable’ or ‘relevant’ to the court’s consideration as required under FRAP 29(a).”

Of the approximately seventeen pages of argument in EFELDF’s brief, approximately three relate to preliminary-injunction factors that the Commission did not brief and approximately five relate to significant issues of Article III jurisdiction not covered by the Commission’s brief. The remaining nine pages cover EPIC’s chances of prevailing on the merits, but focus on many issues not covered in the Commission’s brief. Especially because this Court has the obligation to consider its

and the lower court's Article III jurisdiction, EFELDF respectively submits that the EFELDF brief will be directly useful to the Court's consideration of this matter.

I. INTEREST AND IDENTITY OF *AMICUS CURIAE*

EFELDF is a nonprofit corporation founded in 1981 and headquartered in Saint Louis, Missouri. For thirty-five years, EFELDF has consistently defended federalism and the separation of powers under our Constitution and supported efforts to ensure integrity and public confidence in the elections on which the Nation has based its political community. For example, EFELDF recently participated as *amicus curiae* in this Court's consideration of a preliminary injunction *League of Women Voters of the United States v. Newby*, No. 16-5196 (D.C. Cir. 2016), and has moved to intervene in the underlying district-court action for the limited purpose of unsealing the record there. *League of Women Voters of the United States v. Newby*, No. 1:16-cv-236-RJL (D.D.C. Mar. 16, 2017) (ECF #135). Similarly, EFELDF has consistently argued for judicial restraint under both Article III and separation-of-powers principles.

For all of the foregoing reasons, EFELDF has a direct and vital interest in the issues before this Court and respectfully requests leave to file its accompanying brief in support of the Commission.

II. AUTHORITY TO FILE EFELDF'S BRIEF

Motions under Rule 29(a)(3) 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(a)(3)(B). The Advisory Committee Note to the 1998 amendments to Rule 29 explains that "[t]he amended rule [*i.e.*, what is now Rule 29(a)(3)(B)] ... requires that the motion state the relevance of the matters asserted to the disposition of the case." The Advisory Committee Note then quotes Sup. Ct. R. 37.1 to emphasize the value of *amicus* briefs that bring a court's attention to relevant matter not raised by the parties:

An *amicus curiae* brief which brings relevant matter to the attention of the Court that has not already been brought to its attention by the parties is of considerable help to the Court.

Id. (quoting Sup. Ct. R. 37.1). "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."

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. EFELDF’S MOTION IS TIMELY

Although this matter is scheduled for expedited briefing, the briefing order did not set a time for filing *amicus* briefs. Accordingly, in the absence of filing deadlines in the briefing order, the timing in Rule 29(a)(6) applies per Circuit Rule 29(c). Because the Commission filed its brief on September 15, EFELDF’s brief is timely if EFELDF moves for leave to file on or before September 22, 2017. FED. R. APP. P. 29(a)(6).

IV. FILING EFELDF’S BRIEF WILL SERVE THE COURT’S RESOLUTION OF THE ISSUES RAISED

The primary rationale for *amicus* briefs is that the brief will aid the court in its consideration of the issues presented. Indeed, although EPIC withheld its consent before either the Commission’s or EFELDF’s briefs were written, the perceived lack of additional value in EFELDF’s brief was EPIC’s stated rationale for withholding consent. Movant EFELDF respectfully submits that its brief will aid the Court in the following ways:

- **Informational versus Procedural Standing.** The EFELDF brief highlights the disconnect between finding informational standing here and rejecting it in the procedural-standing case of *Florida Audubon Soc’y v. Bentsen*, 94 F.3d 658, 664-65 (D.C. Cir. 1996) (*en banc*), citing the similarities between the National Environmental Policy Act there and the E-Government Act here (*e.g.*, the requirement to conduct an impact assessment and to make the assessment publicly available).¹ See EFELDF Br. at 8-9. Although the Commission raises Article III issues, the Commission does not raise *this* Article III issue. Of course, where EFELDF agrees with the Commission’s Article III analysis, the brief simply says so and moves on. *Id.* at 8.
- **Diverted-Resources Standing under *Havens*.** Drawing on Judge Millett’s dissent in *People for the Ethical Treatment of Animals v. U.S. Dept. of Agriculture*, 797 F.3d 1087, 1100-01 (D.C. Cir. 2015) (“[t]he problem is not *Havens*[; the] problem is what our precedent has done with *Havens*”), the EFELDF brief explains in detail the deviation that this Court’s diverted-

¹ Significantly, the *Florida Audubon* plaintiffs also pressed information injury, 94 F.3d at 674 n.2 Rogers, J., dissenting); *Florida Audubon Soc’y v. Bentsen*, 25 ELR 21207, 21208 (D.C. Cir. 1995) (plaintiffs “further claimed that the Secretary’s failure to prepare an [environmental impact statement] deprived them of information they needed to protect the areas in question”) (panel decision), but they were held to lack Article III standing.

resources standing has taken from controlling authorities in *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372-73 (1982), and subsequent standing cases. EFELDF Br. at 9-12. As with informational standing, the Commission does not raise *this* Article III issue.

- **Preliminary Injunction Factors Two through Four.** The Commission did not brief the second, third, or fourth preliminary-injunction factors (*i.e.*, the need for irreparable harm, the balance of the equities, and the public interest) in any detail, so the EFELDF brief discusses this issues. *See* EFELDF Br. at 21-24. This discussion includes the context for the Commission’s formation (namely, the suspicion by many that elections can lack integrity in several respects), which is essential to the public interest, especially given EPIC’s weak showing on irreparable harm.
- **EPIC’s Unlikelihood of Prevailing on the Merits for Reasons Not Pressed by the Commission’s Brief.** Finally, although the Commission does brief EPIC’s unlikelihood of prevailing on the merits, the EFELDF brief addresses this issue, too. *See* EFELDF Br. at 12-21. As with standing, in the instances where EFELDF agrees with the Commission’s arguments, EFELDF simply says so and moves on. *See, e.g., id.* at 14. In addition, however, the EFELDF brief raises several merits issues that the Commission’s brief does not raise. *See id.* at 16 & n.7 (citing the *statutory* investigative power of entities held to

be agencies based on investigations, as distinct from the Commission which investigates using publicly available information); 20 n.8 (EPIC misstates the content of the document establishing the Director of White House Information Technology), 12-13 (Circuit precedent on not deeming advisory committees as “agencies”). Thus, even on the merits issues that the Commission briefs generally, the EFELDF brief will aid this Court’s consideration of the issues presented here.

As indicated above, approximately a third of EFELDF’s brief relates to issues of Article III jurisdiction that this Court has the obligation to consider, even *sua sponte* given that the Commission does not raise these issues. *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). Accordingly, the EFELDF *amicus* brief would aid the Court in deciding the case before it.

CONCLUSION

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

Dated: September 21, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of September, 2017, I electronically filed the foregoing motion for leave to file – in conjunction with the accompanying *amicus curiae* brief – with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit using the appellate CM/ECF system, causing the service on counsel for the parties to this action via electronic means.

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