10-3302-cv

United States Court of Appeals for the Second Circuit

STEPHANIE BIEDIGER, Individually and on behalf of all those similarly situated, KAYLA LAWLER, Individually and on behalf of all those similarly situated, ERIN OVERDEVEST, Individually and on behalf of all those similarly situated, KRISTEN CORINALDESI, Individually and on behalf of all those similarly situated, L.R., Individually and on behalf of all those similarly situated, ROBIN L. SPARKS, Individually, LOGAN RIKER, Individually and on behalf of all those similarly situated,

Plaintiffs-Appellees,

LESLEY RIKER, on behalf of her minor daughter,

Plaintiff,

vs.

QUINNIPIAC UNIVERSITY,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT (BRIDGEPORT)

AMICUS CURIAE BRIEF OF EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND, INC., IN SUPPORT OF DEFENDANT-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, Inc. ("Eagle Forum") makes the following disclosures: (1) No publicly held company owns 10% or more of Eagle Forum's stock, and (2) Eagle Forum does not have a parent company.

Dated: April 11, 2011

Respectfully submitted,

/s/ Lawrence J. Joseph

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

Amicus curiae Eagle Forum Education & Legal Defense Fund ("Eagle Forum"), a nonprofit Illinois corporation, seeks leave to file this *amicus* brief for the reasons set forth in the accompanying motion.[1] Founded in 1981, Eagle Forum has consistently defended federalism and supported autonomy in areas (like education) of predominantly local concern. Eagle Forum has a longstanding interest in applying Title IX consistent with its anti-discrimination intent, undistorted by unreasonable feminist demands to treat boys and girls identically or to satisfy unjustified sex-based quotas. Eagle Forum has advocated that boys' and girls' best interests are advanced by acknowledging their differences and having the flexibility to adopt educational programs that reflect their different interests. For these reasons, Eagle Forum has direct and vital interests in the issues before this Court.

STATEMENT OF THE CASE

This section outlines the relevant factual and legal background.

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[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 – made a monetary contribution to the preparation or submission of this brief.

Factual Background

The members of the Quinnipiac University women's volleyball team (collectively, "Plaintiffs") sue Quinnipiac University (the "University") to reverse the University's elimination of women's volleyball as an intercollegiate (*i.e.,* varsity) sport. At the same time, to comply with the so-called "Three-Part Test," the University also eliminated men's – but not women's – varsity track and elevated women's competitive cheerleading to varsity status.

Constitutional Background

Under Article III, appellate courts review jurisdictional issues *de novo, Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83, 94-95 (1998), and "presume that federal courts lack jurisdiction unless the contrary appears affirmatively from the record." *Renne v. Geary,* 501 U.S. 312, 316 (1991). 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 dismiss the action. *Id.*

The Fourteenth Amendment's Equal-Protection Clause prohibits states' "deny[ing] to any person within [their] jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV §1, cl. 4. The

Fourteenth Amendment covers only intentional discrimination, with no "disparate-impact" component. *Pers. Adm'r v. Feeney,* 442 U.S. 256, 272 (1979). The Fourteenth Amendment provides Congress the "power to enforce, by appropriate legislation, the provisions" of that Amendment. U.S. Const. amend. XIV, §5.

Statutory Background

Modeled on Title VI of the Civil Rights Act of 1964, Title IX prohibits sex-based discrimination in federally funded education. 20 U.S.C. §1681(a), prohibiting all gender-based "quotas," "ceilings," "even splits," "arbitrary ratios," and "specific percentage balances." *See* 117 CONG. REC. 30,409, 39,251, 39,259, 39,262 (1971); 118 CONG. REC. 5812-13 (1972). Like Title VI, Title IX prohibits only intentional discrimination (*i.e.,* action taken *because* of sex, not merely *in spite of* sex), *Alexander v. Sandoval,* 532 U.S. 275, 282-83 & n.2 (2001), and authorizes all funding agencies to issue regulations to effectuate Title IX's prohibition of intentional discrimination. 20 U.S.C. §1682. Congress enacted Title IX under only the Spending Clause, not under the Fourteenth Amendment. *Jackson v. Birmingham Bd. of Educ.,* 544 U.S. 167, 181 (2005).

In one key departure from Title VI, Congress included Title VII's restriction against preferential treatment based on imbalances with the population, 20 U.S.C. §1681(b), which is "designed to prevent ... undue 'Federal Government interference ... because of some Federal employee's ideas of ... balance.'" *United Steelworkers of Am. v. Weber,* 443 U.S. 193, 206-07 (1979). Although §901(b) allows agencies to consider "statistical evidence" in a specific "hearing or proceeding," 20 U.S.C. §1681(b), it "would be contrary to Congress' clearly expressed intent" to allow "quotas and preferential treatment [to] become the only cost-effective means of avoiding expensive litigation." *Watson v. Fort Worth Bank & Trust,* 487 U.S. 977, 992-93 (1988) (plurality); *Wards Cove Packing Co., Inc. v. Atonio,* 490 U.S. 642, 652-53 (1989). As the Supreme Court recently held, the authority to consider disparate-impact standards cannot and does not trump the statutory prohibition of intentional discrimination, which would create "a *de facto* quota system," contrary to the statutory prohibitions against both discrimination and balancing. *Ricci v. DeStefano,* 129 S.Ct. 2658, 2675 (2009) (citing *Watson,* 487 U.S. at 992, and 42 U.S.C. §2000e-2(j)).

In 1974, Senator Tower introduced an amendment to the

Education Amendments of 1974 to exempt revenue-producing intercollegiate athletics from Title IX and to require the Commissioner of Education to publish proposed Title IX regulations within 30 days. 120 CONG. REC. 15,322-23 (1974). Although he believed that Title IX did not apply to sports, his amendment clarified that – *if a court found Title IX to apply to sports* – it would exempt revenue-producing sports. *Id.* The requirement to publish proposed rules was "not intended to confer on [the Department of Health, Education and Welfare ("HEW")] any authority it does not already have under the act." *Id.*

The Tower Amendment passed the Senate, but was amended in conference (becoming the "Javits Amendment") to require HEW's Secretary (instead of the Commissioner of Education) to publish proposed regulations and to replace the revenue-sport exemption with a requirement to "include with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports." *Compare* H.R. 69, §536 (Tower Amendment), *reprinted in* 120 CONG. REG. 15,444, 15,477 (1974) *with* PUB. L. NO. 93-380, §844, 88 Stat. at 612. The committee otherwise left the Senate bill unchanged. S. CONF. REP. 93-1026, *reprinted in* 1974 U.S.C.C.A.N. 4206, 4271.

In splitting HEW into the Departments of Education ("DOE") and Health & Human Services ("HHS"), the Department of Education Organization Act, PUB. L. NO. 96-88, 93 Stat. 668 (1979) ("DEOA") transferred various "functions" from HEW and its officers to DOE and its officers. 20 U.S.C. §3441(a)-(b). DEOA reserved to HHS all HEW functions not transferred to DOE. 20 U.S.C. §3508(b).

Regulatory Background

In 1975, HEW issued regulations, which included the following relevant provisions with respect to assessing equal athletic opportunity:

> A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, *among other factors:*
>
> *(1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;*
>
> (2) The provision of equipment and supplies;
>
> (3) Scheduling of games and practice time;
>
> (4) Travel and per diem allowance;
>
> (5) Opportunity to receive coaching and academic tutoring;
>
> (6) Assignment and compensation of coaches and tutors;

> (7) Provision of locker rooms, practice and competitive facilities;
>
> (8) Provision of medical and training facilities and services;
>
> (9) Provision of housing and dining facilities and services;
>
> (10) Publicity.

45 C.F.R. §86.41(c) (emphasis added); 34 C.F.R. §106.41(c) (same). In 1979, HEW issued a "Policy Interpretation," which included an earlier version of the "Three-Part Test" at issue here for schools to (1) have "participation opportunities" substantially proportional to enrollment ratios, (2) show progress toward prong one, or (3) fully accommodate the underrepresented gender's interest. 44 Fed. Reg. 71,413, 71,418 (1979).

These regulatory equal-opportunity mandates plainly differ from statutory intentional-discrimination prohibition. *Horner v. Kentucky High Sch. Athletic Ass'n,* 206 F.3d 685, 694 (6th Cir. 2000) (distinguishing the regulations' equal-opportunity provisions from intentional discrimination). As relevant here, a school could decide to field only revenue-producing sports (*e.g.,* men's football and

basketball[2]) – which would not only disparately impact one sex over the other but also violate the regulation – without intentionally discriminating *because of sex*.

Consistent with Title IX's legislative history and its Title VI template, these Title IX regulations incorporate Title VI's procedural provisions. 45 C.F.R. §86.71 ("[t]he procedural provisions applicable to title VI of the Civil Rights Act of 1964 are hereby adopted and incorporated herein by reference"); 34 C.F.R. §106.71 (same).[3] "If there appears to be a failure or threatened failure to comply with this regulation, and if the noncompliance or threatened noncompliance cannot be corrected by informal means, compliance with this part may be effected by the suspension or termination of or refusal to grant or to continue Federal financial assistance or *by any other means authorized by law*." 45 C.F.R. §80.8(a) (emphasis added); 34 C.F.R. §100.8(a)

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[2] *Amicus* Eagle Forum recognizes that some, but not all, men's football and basketball teams lose money. That factual point is not the issue. Instead, the issue here hinges on the legal point that – for schools where men's football and basketball make money and no women's sports make money – strictly-business athletic departments could decide to field only men's teams, without discriminating *because of* sex.

[3] 118 CONG. REC. 5803 (1972) (Title IX has the same procedural protections afforded under Title VI) (Sen. Bayh); *id.* at 5808 ("These provisions parallel Title VI of the 1964 Civil Rights Act") (Sen. Bayh).

(same).

As relevant here, the regulations prohibit filing a regulation-based lawsuit – assuming *arguendo* that regulations-based lawsuits were "authorized by law" – until the agency determines that compliance cannot be achieved voluntarily and the funding recipient receives ten days' written notice of its noncompliance and the plan to effect compliance:

> *No action to effect compliance* by any other means authorized by law *shall be taken until* (1) the responsible Department official has determined that compliance cannot be secured by voluntary means, (2) the recipient or other person has been notified of its failure to comply and of the action to be taken to effect compliance, and (3) the expiration of at least 10 days from the mailing of such notice to the recipient or other person. During this period of at least 10 days additional efforts shall be made to persuade the recipient or other person to comply with the regulation and to take such corrective action as may be appropriate.

45 C.F.R. §80.8(d) (emphasis added); 34 C.F.R. §100.8(d) (same).

SUMMARY OF ARGUMENT

Neither the United States nor third-party beneficiaries can enforce Title IX's regulations without the regulatory conditions precedent (*e.g.,* attempts at voluntary compliance and notice of

violations and the means to achieve compliance), which undermines Plaintiffs' standing and ability to state a claim for relief (Sections I.B, III.B.2). Although Title IX regulations that exceed the scope of the statutory prohibition of intentional discrimination are not privately enforceable as a merits question (Section III.B.1), this Court also lacks jurisdiction to consider such claims because (1) Plaintiffs lack standing to enforce non-vested rights of the United States, and (2) Plaintiffs are not third-party beneficiaries of the regulations because the regulations do not directly benefit individuals (*i.e.,* schools can comply by elevating other women's teams, without aiding particular plaintiffs).

Agencies' Title IX regulations do not warrant deference because Congress did not delegate interpretive authority to any one agency (Section II). Prior Circuit precedent on deference was *dicta* because the parties there (like the parties here) did not dispute that DOE's regulations controlled.

On the statutory merits, federal courts and Congress must confine themselves to clear violations before encroaching in an area of traditional local concern, and statutory discrimination required proof of discriminatory intent, which Plaintiffs have not even attempted to show

(Section III.A.2). Although many extra-circuit decisions uphold the "Three-Part Test" at issue here, the Supreme Court abrogated those decisions by holding that Title IX's private right of action does not extend beyond statutory discrimination to violations of regulatory provisions that go beyond intentional discrimination under the statute (Sections III.A.1, III.B.1).

ARGUMENT

I. PLAINTIFFS LACK STANDING TO ENFORCE TITLE IX'S REGULATIONS

Under the plain terms of the regulations that Plaintiffs seek to enforce, "[n]o action to effect compliance by any … means authorized by law shall be taken" until certain regulatory preconditions have been met. Plaintiffs' failure to meet those regulatory preconditions denies them either constitutional standing or statutory standing. *See, e.g., Lerner v. Fleet Bank, N.A.,* 318 F.3d 113, 126 (2d Cir. 2003) (distinguishing constitutional, prudential, and statutory standing); *compare, e.g., Alliance for Environmental Renewal, Inc. v. Pyramid Crossgates Co.,* 436 F.3d 82, 86-87 (2d Cir. 2006) ("[i]n some cases, … statutory standing may be closely related to, if not inextricably entwined with, an issue on the merits") *with Loeffler v. Staten Island*

University Hosp., 582 F.3d 268, 280 (2d Cir. 2009) (statutory standing can be "coterminous" with Article III standing).[4] Either way, Plaintiffs cannot prevail.

A. Federal Agencies Lack Vested Rights to Enforce Regulations with Unmet Conditions Precedent

Courts analogize Spending-Clause programs to contracts struck between the government and recipients, with the public as third-party beneficiaries. *Barnes v. Gorman,* 536 U.S. 181, 186 (2002); *Indiana Protection & Advocacy Services v. Indiana Family & Social Services Admin.,* 603 F.3d 365, 386 (7th Cir. 2010); *Bossier Parish School Bd. v. Lemon,* 370 F.2d 847, 850 (5th Cir. 1967). To regulate recipients based on their accepting federal funds, Congress must express Spending-Clause conditions unambiguously. *Gorman,* 536 U.S. at 186. With the required notice, recipients face enforcement for violations of the *statute. Id.* at 187-89. As indicated in Section III.B.1, *infra,* no similar provision even authorizes private enforcement of the regulations:

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[4] Although the failure to satisfy regulatory conditions precedent negates both Plaintiffs' constitutional standing and their statutory standing, this Court may address statutory standing first. *Ortiz v. Fibreboard Corp.,* 527 U.S. 815, 830-31 (1999). Moreover, because this standing argument overlaps with the merits, Eagle Forum reprises this issue as a merits argument in Sections III.B.2, *infra.*

> The distinction between an intention to benefit a third party and an intention that the third party should have the right to enforce that intention is emphasized where the promisee is a governmental entity.

Astra USA, Inc. v. Santa Clara County, Cal., __ U.S. __, 2011 WL 1119021, 5 (2011) (*quoting* 9 J. Murray, Corbin on Contracts §45.6, p. 92 (rev. ed. 2007)). Federal agencies, of course, are bound by their own regulations, which prevent enforcement before the agencies determine that compliance cannot be secured voluntarily, notify recipients of planned actions, and provide ten days' notice. 45 C.F.R. §80.8(d); 34 C.F.R. §100.8(d). None of that happened here. Instead, Plaintiffs propose to "spawn a multitude of dispersed and uncoordinated lawsuits by [beneficiaries]," *Astra,* __ U.S. __, 2011 WL 1119021, at 5. The Schools never agreed to that, and federal law does not sanction it.

Assuming *arguendo* that the relevant Title IX regulations create enforceable individualized rights, *but see* Sections III.B.1, *infra,* Plaintiffs still cannot enforce the regulations without satisfying the regulatory conditions precedent. When a regulation under Spending-Clause legislation defines schools' obligations, the *entire* regulation constitutes schools' bargain that agencies (or third-party beneficiaries)

can enforce. *Global Crossing Telecomm., Inc. v. Metrophones Telecomm., Inc.,* 550 U.S. 45, 59 (2007); *FDA v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 133 (2000). Accepting the regulations as implementing the statute dooms Plaintiffs' regulation-based Title IX claims.

Under "traditional principles of contract interpretation," third-party beneficiaries like Plaintiffs cannot "cherry-pick" the specific regulatory provisions that they wish to enforce. *Clarett v. National Football League,* 369 F.3d 124, 135-36 (2d Cir. 2004) (in the labor-law context, allowing litigant "to cherry-pick the particular policies with which he took issue would run counter to the 'freedom of contract'"); *In re United Airlines, Inc.,* 368 F.3d 720, 725 (7th Cir. 2004) ("[d]ebtors in bankruptcy can't cherry-pick favorable features of a contract to be assumed"); *Thompson v. Goetzmann,* 337 F.3d 489, 501 (5th Cir. 2003) ("litigants cannot cherry-pick particular phrases out of statutory schemes simply to justify an exceptionally broad – and favorable – interpretation of a statute"). Thus, to accept the favorable regulatory terms, Plaintiffs must accept *all* regulatory terms, including the regulatory conditions precedent to regulatory enforcement.

Moreover, third-party beneficiaries "generally have no greater

rights in a contract than does the promise[e]," *United Steelworkers of Am. v. Rawson,* 495 U.S. 362, 375 (1990), because they "step into the shoes of the promisee." *Benson v. Brower's Moving & Storage, Inc.,* 907 F.2d 310, 313 (2d Cir. 1990); *accord BAII Banking Corp. v. UPG, Inc.,* 985 F.2d 685, 697 (2d Cir. 1993) ("third-party beneficiary … possessed no greater right to enforce a contract than the actual parties to the contract"); *Holbrook v. Pitt,* 643 F.2d 1261, 1273 n.24 (7th Cir. 1981) ("tenants, as third-party beneficiaries, are bound by the terms and conditions of the Contracts"); *Avatar Exploration, Inc. v. Chevron, U.S.A., Inc.,* 933 F.2d 314, 318 (5th Cir. 1991) ("[a]s third party beneficiaries, their rights under the contract could not exceed [the promisee's] rights"). Here, no federal agency could enforce its regulations in court without meeting the regulatory conditions precedent. *What agencies cannot do directly, Plaintiffs cannot do as third-party-beneficiaries.*

Under Title VII, such pre-litigation notice is a procedural prerequisite to filing suit. *Zipes v. Trans World Airlines, Inc.,* 455 U.S. 385, 398 (1982). Under environmental statutes' analogous notice requirements for citizen suits, the "purpose of notice to the alleged

violator is to give it an opportunity to bring itself into complete compliance … and thus ... render [private enforcement] unnecessary." *Friends of the Earth, Inc. v. Laidlaw Envtl. Serv. (TOC), Inc.,* 528 U.S. 167, 174-75 (2000) (interior quotations omitted). "Accordingly, … citizens lack statutory standing … to sue for violations that have ceased by the time the complaint is filed." *Id.* at 175; *see* Section III.B.2, *infra.* Regardless of "whether the notice provision is jurisdictional or procedural," Plaintiffs' regulatory claims are "barred" and "must be dismissed." *Hallstrom v. Tillamook County,* 493 U.S. 20, 32-33 (1989).

B. Plaintiffs Lack Standing to Enforce Non-Vested, Group-Based "Rights"

As explained in Section I.A *supra* and Section III.B.2 *infra,* lack of conditions precedent affects both standing under Rule 12(b)(1) and failure to state a claim under Rule 12(b)(6).[5] But even if lack of

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[5] *See, e.g., Shaw Constructors v. ICF Kaiser Engineers, Inc.,* 395 F.3d 533, 540 & n.15 (5th Cir. 2004); *Kane Enterprises v. MacGregor (USA) Inc.,* 322 F.3d 371, 375 (5th Cir. 2003). But even the federal common law includes a preference for state-law analysis when the federal government is not itself party to the dispute. *Miree v. DeKalb County,* 433 U.S. 25, 28 (1977) (federal courts look to state law for a third-party beneficiary's standing to enforce federal obligations); *U.S. v. Kimbell Foods, Inc.,* 440 U.S. 715, 728 (1979) ("when there is little need for a nationally uniform body of law, state law may be incorporated as the federal rule of decision").

conditions precedent implicated only Rule 12(b)(6) *for federal agencies,* it nonetheless implicates jurisdiction for third-party beneficiaries because third-party beneficiaries lack standing to enforce non-vested claims. *Connecticut State Medical Soc. v. Oxford Health Plans (CT), Inc.,* 272 Conn. 469, 476-78, 863 A.2d 645, 649-50 (Conn. 2005); *Holmes v. Connecticut Trust & Safe Deposit Co.,* 92 Conn. 507, 514, 103 Atl. 640 (Conn. 1918); *D'Addario v. D'Addario,* 26 Conn.App. 795, 799, 603 A.2d 1199, 1201 (Conn. App. 1992) (*citing Warner v. Bennett,* 31 Conn. 468, 475 (Conn. 1863)); *Multi Service Contractors, Inc. v. Town of Vernon,* 181 Conn. 445, 447, 435 A.2d 983 (Conn. 1980); *Palma v. Verex Assur., Inc.,* 79 F.3d 1453, 1458 (5th Cir. 1996); *Karo v. San Diego Symphony Orchestra Ass'n,* 762 F.2d 819, 822-24 (9th Cir. 1985); *cf. Peabody v. Weider Publications, Inc.,* 260 Fed.Appx. 380, 383 (2d Cir. 2008) ("[b]ecause the condition precedent never came to fruition, Peabody's rights under Section 2.6 never vested") (non-precedential summary order).[6] Without the conditions precedent to regulatory enforcement,

[6] Whatever federal agencies may say, schools plainly never signed up for private regulatory enforcement, especially without the regulatory conditions precedent. If the schools did not agree to such enforcement, then that enforcement is not part of the agreement: "a third party seeking to enforce a contract must allege and prove that the contracting

Plaintiffs lack a legally protected interest in regulatory enforcement and thus lack standing.

Similarly, in much the same way that the Supreme Court has held that group-based benefits do not provide privately enforceable rights, *Alexander v. Sandoval,* 532 U.S. 275, 285-90 (2001), Plaintiffs cannot even claim third-party beneficiary status to enforce the group-based regulations under Connecticut law, which requires a "*direct* obligation" to Plaintiffs. *Stowe,* 184 Conn. At 196, 441 A.2d 81 (emphasis added); *cf. Grigerik v. Sharpe,* 247 Conn. 293, 317-18, 721 A.2d 526 (Conn. 1998) ("the fact that a person is a foreseeable beneficiary of a contract is not sufficient for him to claim rights as a third party beneficiary"). DOE's ability to enforce its regulations without the same limitations demonstrates that Plaintiffs are not third-party beneficiaries of the regulations or funding agreements:

> First, the more indirect an injury is, the more difficult it becomes to determine the amount of [the] plaintiff's damages attributable to the wrongdoing as opposed to other, independent

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parties intended that the promisor should assume a direct obligation to the third party." *Stowe v. Smith,* 184 Conn. 194, 196, 441 A.2d 81 (Conn. 1981); *Gazo v. Stamford,* 255 Conn. 245, 261, 765 A.2d 505 (Conn. 2001).

> factors. Second, recognizing claims by the indirectly injured would require courts to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury from the ... acts, in order to avoid the risk of multiple recoveries. Third, *struggling with the first two problems is unnecessary where there are directly injured parties who can remedy the harm without these attendant problems.*

Ganim v. Smith & Wesson Corp., 258 Conn. 313, 353, 780 A.2d 98, 123 (Conn. 2001) (internal quotations omitted, emphasis added). Thus, for example, towns that participated in a quasi-public waste management corporation lacked standing to sue law firms that represented the corporation when the Connecticut Attorney General, as the corporation's authorized representative, could initiate suit. *Town of West Hartford v. Murtha Cullina, LLP,* 85 Conn.App. 15, 21-23, 857 A.2d 354, 358-59 (Conn. App. 2004). Here, the federal funding agencies bear the direct injury when schools violate the Three-Part Test, whereas individual students need not benefit when schools comply (*e.g.,* the University could elevate a women's sport over volleyball, denying Plaintiffs any benefit).

Of course, if they are neither third-party beneficiaries nor parties, Plaintiffs lack standing to enforce the provisions of the University's

federal funding agreements. *Madeira v. Affordable Housing Foundation, Inc.,* 469 F.3d 219, 252 (2d Cir. 2006); *Price v. Pierce,* 823 F.2d 1114, 1120 (7th Cir. 1987) (third-party beneficiary status goes to standing); *cf. Gart v. Cole,* 263 F.2d 244, 250-51 (2d Cir. 1959) (individual landowners and tenants lack standing to enforce sponsorship agreements under the Housing Act, which are designed to benefit the public at large).

To the extent other courts have assumed jurisdiction without addressing this issue, "drive-by jurisdictional rulings" that reach merits issues without considering a particular jurisdictional issue "have no precedential effect" on that jurisdictional issue. *Steel Co.,* 523 U.S. at 94-95; *Waters v. Churchill,* 511 U.S. 661, 678 (1994) ("cases [cited by Plaintiffs] cannot be read as foreclosing an argument that they never dealt with"). "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Cooper Industries, Inc. v. Aviall Services, Inc.,* 543 U.S. 157, 170 (2004) (interior quotations omitted). Courts that never *considered* a jurisdictional issue plainly never *decided* it.

In addition, the Title IX decisions that Plaintiffs would cite either pre-date or fail to address *Sandoval*. As such, they fail to distinguish between enforcing the regulations and enforcing the statute. Because those other courts never considered the additional impediments to enforcing Title IX's regulations, as distinct from enforcing the statute, this Court cannot rely on their holdings to enforce the regulations.

II. THIS COURT OWES NO DEFERENCE TO FEDERAL AGENCIES' INTERPRETATIONS IN THIS LITIGATION

With respect to deference to DOE's policies, this Court previously has stated that "[t]he degree of deference is particularly high in Title IX cases because Congress explicitly delegated to the agency the task of prescribing standards for athletic programs under Title IX," *McCormick v. School District of Mamaroneck,* 370 F.3d 275, 288 (2d Cir. 2004) (*citing Kelley v. Board of Trustees,* 35 F.3d 265 (7th Cir. 1994)), but in that case "[t]he parties agree[d] that we should defer to the Policy Interpretation." *Id.* at 290. Similarly here, the parties come to this Court with rival positions on what DOE's policies provide, each confident that deference is appropriate to *their* position on DOE's position. Under the circumstances – both here and in *McCormick* – the parties have not presented sufficient controversy for this Court to

decide the important question of whether DOE is entitled to deference.

In the balance of this Section, *amicus* Eagle Forum presents several reasons why this Court *does not* owe deference to the federal regulatory provisions cited by the parties. *Amicus* Eagle Forum respectfully submits that this Court should recognize that – as in *McCormick* – the parties present a case to be decided on DOE policies, without the need to decide whether DOE policies warrant any particular deference by other panels of this Court or by non-parties here or in *McCormick*.[7]

A. The Javits Amendment Did Not Delegate Any Relevant Authority

Because agencies axiomatically lack authority not expressly delegated to them, *Bowen v. Georgetown Univ. Hosp.,* 488 U.S. 204, 208 (1988), and judicial deference applies only to actions within agencies' delegations, *Chevron,* 467 U.S. at 865, the Javits Amendment cannot justify deference.

First, the Javits Amendment directed HEW's Secretary to issue

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[7] Of course, it does not matter what Congress and federal agencies believe about constitutional issues: the "power to interpret the Constitution … remains in the Judiciary." *City of Boerne v. Flores,* 521 U.S. 507, 524 (1997). Thus, federal interpretations cannot confer standing here.

proposed regulations, which command no deference. *Matter of Appletree Markets, Inc.,* 19 F.3d 969, 973 (5th Cir. 1994); *Public Citizen, Inc. v. Shalala,* 932 F.Supp. 13, 18 n.6 (D.D.C. 1996) (*citing Public Citizen Health Research Group v. Commissioner, F.D.A.,* 740 F.2d 21, 32-33 (D.C. Cir. 1984)); *Utah Wilderness Alliance v. Dabney,* 222 F.3d 819, 829 (10th Cir. 2000). By requiring only *proposed* regulations, the Amendment met the stated objective of "not … confer[ring] on HEW any authority it does not already have." 120 CONG. REC. 15,323 (Senate version); S. CONF. REP. 93-1026, *reprinted in* 1974 U.S.C.C.A.N. 4271 (adopting Senate language).

Second, assuming *arguendo* that it confers *any* authority, the Javits Amendment confers only the one-time authority to issue proposed regulations within 30 days of the Education Amendments of 1974's enactment. As such, courts would defer only to HEW's 1974 proposal, not to HEW's 1975 final rule, much less to any agency's subsequent actions, proposed or final. Unlike *Chevron*'s broad delegation, such temporary, special-circumstance delegations cannot elevate the delegate to the delegator's stature. *U.S. v. Eaton,* 169 U.S. 331, 343 (1898).

Third, assuming *arguendo* that the Javits Amendment conferred special Title IX authority, the Javits Amendment's exclusive focus on *intercollegiate* athletics would leave HEW without deference for the *interscholastic* athletics at issue in *McCormick*. Given the *Kelley* court's specific reliance on the Javits Amendment's authority over the *intercollegiate* athletics in that case, it necessarily follows that *Kelley* recognized that HEW had (and DOE has) no claim to authority with respect to *interscholastic* athletics. This congressional distinction – evident on the face of the Javits Amendment – coalesces with the long history of local control over education:

> Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result. This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority. This concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power.

Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers, 531 U.S. 159, 172-73 (2001) (citations omitted). Thus, if a

court wishes to take the Javits Amendment as delegating authority, it must recognize the limits of that authority to intercollegiate athletics (*i.e.,* no *interscholastic* athletics, no *non-athletic* issues at either the collegiate or scholastic level).

Finally, any conferred authority would not belong to DOE because DEOA left any Javits Amendment delegation with HHS. *See* Section II.C, *infra.* Because Congress cannot have intended to crown HHS as the Title IX czar, this Court should read the Javits Amendment consistent with its history and language as not conferring *any* authority.

B. Courts Owe No Deference to Federal Agencies' Interpretation under Statutes that Delegate Identical Authority to Multiple Agencies

Title IX delegates the same authority to multiple agencies. 20 U.S.C. §1682. Senator Bayh's failed 1971 amendment explicitly delegated rulemaking authority only to HEW. 117 CONG. REC. 30,399, 30,404 (1971); *accord id.* 30,407 (Sen. Bayh). Senator Bayh's 1972 amendment (which, with the House bill, became Title IX) delegates rulemaking authority to *all* federal agencies. 118 Cong. Reg. 5803 (1972). "Few principles of statutory construction are more compelling

than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS v. Cardoza-Fonseca,* 480 U.S. 421, 442-43 (1987) (citation omitted). Consequently, neither DOE nor DOE's predecessor (HEW) "owns" Title IX in any way that triggers *Chevron* deference.

Under the circumstances, either no deference or the lesser "*Skidmore*" deference applies. *Compare Chevron, U.S.A., Inc. v. N.R.D.C.,* 467 U.S. 837, 843-44 (1984) *with Skidmore v. Swift & Co.,* 323 U.S. 134, 140 (1944); *see Bragdon v. Abbott,* 524 U.S. 624, 642 (1998); *U.S. v. Mead Corp.,* 533 U.S. 218, 227-28 (2001); *Bowen v. Am. Hospital Ass'n,* 476 U.S. 610, 643 n.30 (1986) (plurality); *Wachtel v. O.T.S.,* 982 F.2d 581, 585 (D.C. Cir. 1993) (*Chevron* deference is "inappropriate" to affirmative-action statute administered by four agencies). Even if *Kelley* correctly deferred to HEW's intercollegiate-athletics provisions within the Javits-Amendment delegation, the Javits Amendment does not apply here.

C. DOE Lacks Unique Title IX Authority

In splitting HEW into DOE and HHS, Congress did not transfer

HEW's interpretive authority to DOE.[8] Nothing in DEOA §301 (or elsewhere) transfers Title IX rulemaking authority to DOE. DEOA §301(a)(1)'s laundry list of transferred offices does not include HEW's Secretary, and DEOA §301(a)(2)'s laundry list of transferred statutes does not include Title IX or the Javits Amendment. 20 U.S.C. §3441(a)(1)-(2). Because it applies only to "functions transferred by this section," DEOA §301(a)(3) cannot include rulemaking authority under Title IX or the Javits Amendment, which "this section" (§301) did not transfer. 20 U.S.C. §3441(a)(3). Further, HEW's *rulemaking* authority was administered by the *HEW Secretary,* and thus was not "being administered by the Office of Civil Rights" ("OCR"), as required by §301(a)(3). Like all agencies, DOE draws rulemaking authority from Title IX itself, 20 U.S.C. §1682, which authorizes *each* federal agency to

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[8] In a footnote, the Supreme Court stated that "HEW's functions under Title IX were transferred to [DOE]." *North Haven Bd. of Educ. v. Bell,* 456 U.S. 512, 517 n.4 (1982). The footnote explains why DOE defended that litigation on *certiorari,* but nothing substantive hinged on which agency defended there. Procedurally, *North Haven* parties challenging Title IX's application to employment received DOE funding, so they would have lacked standing against HHS. "[F]leeting footnotes" on which nothing turned are not precedents. *Arbaugh v. Y&H Corp.,* 546 U.S. 500, 512-13 & n.9 (2006) (disregarding remarks "*[e]n passant*" in "fleeting footnote[s]" when "our decision did not turn on that characterization, and the parties did not cross swords over it").

issue Title IX regulations.[9]

Under §902, DOE issued regulations upon its formation in 1980, 34 C.F.R. pt. 106, and HHS retains the original HEW regulations, 45 C.F.R. pt. 86. One of two situations applies: (1) as inheritor of all non-transferred HEW authority, HHS is the nation's Title IX czar, 20 U.S.C. §3508(b), or (2) consistent with their plain language and legislative histories, neither Title IX nor the Javits Amendment delegated special authority to HEW, HHS, or DOE.

D. Deference Cannot Overturn Plain Regulatory or Statutory Text

Courts owe no deference to regulatory interpretations inconsistent with the statute, *Chevron,* 467 U.S. at 842-43, which here prohibits only intentional discrimination. *See* Section III.A, *infra.* Under similar circumstances, the Supreme Court easily found that regulations did not expand Title VI's enforceable scope. *U.S. v. Fordice,* 505 U.S. 717, 732

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[9] Had DEOA transferred HEW's OCR to DOE, as the Senate Bill proposed, Doe could make the strained argument that §301(a)(3)'s "relates-to" clause includes any "function" related to any authority wielded by OCR. But the Senate receded to the House in conference, and the DEOA created a new OCR within DOE instead of transferring HEW's OCR. H.R. CONF REP. 96-459, 46-47, *reprinted in* 1979 U.S.C.C.A.N. 1612, 1626; 20 U.S.C. § 3413 (*creating* DOE's OCR). Thus, the strained argument is neither availing nor available.

n.7 (1992). Even if Title IX affords agencies deference, regulations beyond the statute deserve no deference in private-party litigation.

III. THE PLAINTIFFS CANNOT PREVAIL ON THE MERITS OF EITHER TITLE IX OR TITLE IX'S REGULATIONS

On the merits, Plaintiffs' challenge to the University's athletic offerings raises two distinct questions: (1) can Plaintiffs challenge volleyball's elimination under Title IX (*i.e.,* the intentional-discrimination statute), and (2) can Plaintiffs challenge volleyballs' elimination under Title IX's regulations or the "policy interpretation" as regulatory violations, even without intentional discrimination? Because Plaintiffs have not and cannot show discrimination *because of* sex, they cannot prevail under the statute. Although Plaintiffs perhaps may argue that the University waived the issue, Plaintiffs cannot state a claim for which relief can be granted under the regulations because they lack a cause of action to enforce the regulations.

A. Title IX Statutorily Prohibits Only Intentional Sex-Based Discrimination, which Plaintiffs Cannot Show

No one can dispute that §901(a) prohibits only intentional, sex-based discrimination. 20 U.S.C. §1681(a); *Jackson v. Birmingham Bd. of Educ.,* 544 U.S. at 173-74. It would be "absurd" to contend otherwise. *Sandoval,* 532 U.S. at 282 & n.2. Although Plaintiffs can cite a wealth

of extra-circuit decisions upholding the Three-Part Test, those decisions pre-date *Sandoval* – or failed to consider it – and enforce the regulations, not the statute.[10] In this Section, *amicus* Eagle Forum demonstrates that Plaintiffs have not demonstrated that the University *statutorily* violated Title IX. Without discrimination under the statute, Plaintiffs cannot claim *any* relief.

Pursuant to education's First-Amendment protections, *Grutter v. Bollinger,* 539 U.S. 306, 328-29 (2003), and its traditional regulation by states and localities, *Epperson v. Arkansas,* 393 U.S. 97, 104 (1968), courts require a clear violation before encroaching on schools' prerogatives. "[O]rdinary equal protection standards … require … show[ing] both that the [challenged action] had a discriminatory effect and that it was motivated by a discriminatory purpose." *Wayte v. U.S.,* 470 U.S. 598, 608 (1985). The required "discriminatory purpose" means "more than intent as volition or intent as aware of consequences. It implies that the decisionmaker ... selected or reaffirmed a course of action at least in part 'because of,' not merely 'in spite of' its *adverse*

[10] This Court owes no deference to agency interpretations (Section II, *supra*), and those agency interpretations are unenforceable without the regulatory conditions precedent (Section I.A, *supra*).

effects upon an identifiable group." *Feeney,* 442 U.S. at 279 (emphasis added); *Brown v. City of Oneonta, New York,* 221 F.3d 329, 338 (2d Cir. 2000) (intentional discrimination under Equal Protection Clause requires "discriminatory intent," not merely a "disparate impact"). Nothing in Title IX's history demonstrates an intent that the statute prohibit more than the intentional discrimination that Title VI prohibits with respect to race.

The decisions that Plaintiffs cite fall into two categories: (1) cases decided under the Three-Part Test that either pre-date Sandoval or fail to consider it; and (2) cases that involve discriminatory sex-based preferences that denied the plaintiff an otherwise-applicable entitlement (*e.g.,* denying admission to unique institutions, post-season competition, pensions or benefits, or opportunities for promotion). The Supreme Court has abrogated the first category of decisions, and the second category is inapposite to this litigation.

1. *Sandoval* Abrogates the "Three-Part Test" Precedents on which Plaintiffs Rely

As indicated in the Regulatory Background, *supra,* both the Title IX regulations and *a fortiori* the Three-Part Test are not intentional-discrimination standards. The former requires equal opportunity, even

if other controlling factors are not equal. For example, a hypothetical school that wanted to field only teams that supported themselves financially might field only men's football or basketball, without violating the regulations. The same applies to the Three-Part Test, which is tied more to equality of result than equality of opportunity, as the University's elimination of men's track – but not women's track – amply demonstrates. In summary, failing to meet the Three-Part Test does not constitute intentional discrimination under §901(a).

The bulk of the Three-Part Test decisions on which Plaintiffs rely pre-date *Sandoval* and therefore do not address the distinction between regulatory and statutory requirements and prohibitions. The few decisions that post-date *Sandoval* do not address it. In any event, the *Sandoval* principle (no private enforcement of regulations that exceed statutory prohibitions) dooms Plaintiffs' case.[11]

2. Eliminating the Volleyball Team Does Not Discriminatorily Deny Equal Treatment

Even assuming that they can show the necessary "adverse effect," Plaintiffs would also need to show that the schools acted *because of sex,*

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[11] If the regulations implemented – rather than expand upon – the statute, Plaintiffs' claims still are doomed because the regulations pose mandatory conditions precedent to suit. *See* Section III.B.2, *infra.*

not those *in spite of sex*. *Feeney,* 442 U.S. at 279. Here, without a corresponding *men's* volleyball team at the intercollegiate level, Plaintiffs lack any benchmark against which to show the denial of equal treatment in the statutory, intentional-discrimination sense.[12] Indeed, under the circumstances here, sex no longer necessarily factors into decisions about the conditions on the University's single-sex teams. Instead, the University appears to have acted to select the activity (competitive cheer) that was more popular with participants and spectators, at a lower cost per student, with a higher revenue-raising potential. Far from discrimination, that is simply common sense.

At bottom, Plaintiffs argue that schools nationwide must favor their definition of women's sports, supported in DOE's sub-regulatory pronouncements and backed by feminist interest groups. Although DOE and the feminist interest groups share obvious animosity to

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[12] *See, e.g., Feeney,* 442 U.S. at 274 (higher scrutiny covers "covert or overt" sex preferences); *Hogan,* 458 U.S. at 723 & n.8 (scrutiny applies to state actions that "discriminate" and "disadvantage" by sex); *Virginia,* 518 U.S at 531-34 (scrutiny applies to state action "denying rights or opportunities," "artificial[ly] constraint[ing] an individual's opportunity," or "creat[ing] or perpetuat[ing] the legal, social, and economic inferiority of women"); *cf. McCormick,* 370 F.3d at 302 n.25 (post-season competition afforded to boys but not girls).

cheerleading as a feminine stereotype, even *Virginia* recognizes that males and females are different. *U.S. v. Virginia,* 518 U.S. 515, 533 (1996). Indeed, "[s]ometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike." *Jenness v. Fortson,* 403 U.S. 431, 442 (1971); *Reed v. Reed,* 404 U.S. 71, 75 (1971) (Fourteenth Amendment allows "treat[ing] different classes of persons in different ways"). Calling something a stereotype does not change reality.

Fortunately, Title IX does not empower Plaintiffs to compel the nation's schools – and the communities that they serve – to conform to unisex stereotypes. Like it or not, women's cheerleading is more interesting to more participants and more spectators than women's volleyball (and quite a few other men's and women's sports). Equally important, cheerleading requires as much athleticism as other sports. All of these criteria are entirely permissible ones for schools to decide which teams to field.

B. Plaintiffs Cannot Enforce Title IX Regulations

Title IX's regulations (as distinct from Title IX) are unenforceable here for two reasons.

1. Regulations that Exceed the Statute Are Unenforceable

Under *Sandoval,* statutes like Title IX create an implied private right of action to enforce *statutory* bans of intentional discrimination, but do not create a private right of action to enforce *regulations* that address conduct that the statute does not prohibit. *Sandoval,* 532 U.S. at 288-89; *Gebser v. Lago Vista Independent School District,* 524 US 274, 292 (1998). Only regulations that define statutory discrimination are enforceable: "[l]anguage in a regulation may invoke a private right of action that Congress through statutory text created, but it may not create a right that Congress has not." *Sandoval,* 532 U.S. at 291. If the regulations prohibit more than statutory intentional discrimination, the regulations are unenforceable.

The regulations here are several steps removed from §901(a)'s rights-creating language that guided *Cannon:* (1) §902 does not itself contain any rights-creating language; (2) the regulations' statutory source (§902) applies to enforcing agencies, not to regulated recipients much less to beneficiaries like Plaintiffs; (3) the regulations confer group-wide benefits, not individual rights, so that the athletic department as a whole conforms to the regulations' equal-opportunity

regime (*i.e.,* the University could reach *overall* equality without benefiting women's volleyball; and (4) the regulations require more (equal opportunity[13]) than the statute prohibits (intentional discrimination). *Sandoval,* 532 U.S. at 288-89. Thus, the regulations are not enforceable beyond statutory discrimination.

2. Failure to Meet Regulatory Conditions Precedent Requires Dismissal

As indicated in Section I.A, *supra,* Title IX's regulations impose several conditions precedent on regulatory enforcement – *e.g.,* agencies' attempting voluntary resolution, ten days' written notice – that remain unmet here. Under federal common law, failure to meet conditions precedent can render third-party beneficiaries unable to state a claim for relief. Alternatively, Plaintiffs lack standing as third-party beneficiaries to the federal contracts because the regulations' enforceability has not vested. *See* Section I.B, *supra.* Either way, Plaintiffs cannot prevail on their Title IX regulatory claims. Assuming

[13] The Three-Part Test's overlay on the equal-opportunity regulations exceeds equal opportunity and becomes a disparate-impact standard (i.e., the Three-Part Test would find violations or permit otherwise-discriminatory treatment based only on numerical discrepancies between the athletic and student populations. Thus, the Three-Part Test falls even further outside the intentional-discrimination statute than the equal-opportunity regulations fall.

arguendo that this defect – namely, the lack of a vested, enforceable regulatory interest – is *not* jurisdictional, it nonetheless precludes Plaintiffs' stating a claim for regulatory relief.

CONCLUSION

This Court should reverse and remand with instructions to dismiss for lack of subject-matter jurisdiction.

Dated: April 11, 2011

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BRIEF FORM CERTIFICATE

Pursuant to Rule 32(a) of the FEDERAL RULES OF APPELLATE PROCEDURE, I certify that the foregoing *amicus curiae* brief is proportionately spaced, has a typeface of Century Schoolbook, 14 points, and contains 6,999 words, including footnotes, but excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

I have relied on Microsoft Word 2007's word calculation feature for the calculation.

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Pursuant to Circuit Rule 25(a)(6), I certify that I have scanned for viruses the PDF version of the foregoing *amicus curiae* brief that I submitted as an email attachment to civilcases@ca2.uscourts.gov and that no viruses were detected.

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