No. 10-30378

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JANE DOE, as next friend to her minor daughters,
JOAN DOE and JILL DOE,
Plaintiff-Appellant,

vs.

VERMILION PARISH SCHOOL BOARD, RANDY SCHEXNAYDER, Superintendent, BILL SEARLE, District A, ANGELA FAULK, District B, DEXTER CALLAHAN, District C, RICKY LEBOUEF, District D, ANTHONY FONTANA, District E, CHARLES CAMPBELL, District F, CHRIS MAYARD, District G, RICKY BROUSSARD, District H, and DAVID DUPUIS, Principal, Rene A Rost Middle School,
Defendants-Appellees,

ON APPEAL FROM U.S. DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA, NO. 6:09-CV-01565, HON. RICHARD T HAIK, SR., U.S. DISTRICT JUDGE

BRIEF FOR *AMICUS CURIAE* EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF DEFENDANTS-APPELLEES

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 INTERESTED PERSONS

No. 10-30378, *Doe v. Vermilion Parish School Board at al.*

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.

Status	Name
Appellant	Jane Doe (as next friend to her minor daughters Jill Doe and Joan Doe)
Counsel for Appellant	Katharine M. Schwartzmann, Michael Potenza, Mark W. Friedman, Julie M. Calderon Rizzo, Megan K. Bannigan, Lenora Lapidus, Amy L. Katz
Appellees	Vermilion Parish School Board, Randy Schexnayder, Bill Searle, Angela Faulk, Dexter Callahan, Ricky Lebouef, Anthony Fontana, Charles Campbell, Chris Mayard, Ricky Broussard, David Dupuis
Counsel for Appellees	Calvin "Woody" Woodruff, Jr., Dawn L. Morris
Amicus Curiae	United States
Counsel for United States	Mark L. Gross, Thomas E. Chandler
Amici Curiae	Nat'l Women's Law Ctr., Am. Ass'n of Univ. Women, Anti-Defamation League, Asian Am. Justice Ctr., Asian Am. Legal Defense & Educ. Fund, Cal. Women's Law Ctr., Nancy Cantalupo, David S. Cohen, Conn. Women's Educ. & Legal Fund, Equal Rights Advocates, Feminist Majority Found., Gay, Lesbian & Straight Educ. Network, League of United Latin Am. Citizens, Legal Momentum, Legal Voice, Nancy Levit, Ann C. McGinley, Mexican Am. Legal Defense & Educ'l Fund,

Status	Name
	Nat'l Alliance for Partnerships in Equity, Nat'l Asian Pacific Am. Women's Forum, Nat'l Ass'n of Women Lawyers, Nat'l Ctr. for Lesbian Rights, Nat'l Council of Jewish Women, Nat'l Council of Negro Women, Inc., Nat'l Council of Women's Org., Nat'l Indian Educ. Ass'n, Nat'l Org. for Women Found., Nat'l Partnership for Women & Families, NCLR, People for the Am. Way Found., Pick Up the Pace, Sargent Shriver Nat'l Ctr. on Poverty Law, Sociologists for Women in Society, Southeast Asia Resource Action Ctr., Southwest Women's Law Ctr., Union for Reform Judaism, Washington Lawyers' Committee for Civil Rights & Urban Affairs, Wider Opportunities for Women, Women's Law Project (collectively, "NWLC")
Counsel for NWLC	Judson E. Lobdell, Angela E. Kleine
Amicus Curiae	Eagle Forum Education & Legal Defense Fund
Counsel for Eagle Forum	Lawrence J. Joseph

Dated: June 24, 2010

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

LEGISLATIVE HISTORY

RULES AND REGULATIONS

IDENTITY, INTEREST AND AUTHORITY TO FILE

Amicus curiae Eagle Forum Education & Legal Defense Fund ("Eagle Forum"), a nonprofit Illinois corporation, files this *amicus* brief with the consent of all parties. 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, without distortion from unreasonable feminist demands to always treat boys and girls identically or to satisfy unjustified gender-based quotas. Eagle Forum has advocated that boys' and girls' best interests are advanced by acknowledging their gender differences and having the flexibility to adopt educational programs that reflect their different interests. For these reasons, Eagle Forum has a direct and vital interest in the issues before this Court.

STATEMENT OF THE CASE

This section outlines the background relevant to this litigation.

Factual Background

Vermilion Parish School Board ("VPSB") receives – or recently received – federal funds from the federal Departments of Education ("ED"), Agriculture ("USDA"), and Health & Human Services ("HHS")

and the Federal Emergency Management Agency ("FEMA"). In 2009, a middle-school principal, David Dupuis, convinced VPSB to offer single-gender classes at his middle school to improve students' academic achievement and to decrease disciplinary events. Principal Dupuis based his presentation to the Board on his doctoral dissertation, which the district court found to include flawed data from Principal Dupuis' middle-school observations.

Initially, single-gender classes were mandatory, but VPSB created optional coeducational classes after plaintiff-appellant Doe threatened to sue on behalf of her daughters Joan and Jill. Doe complains that these coeducational classes are not comparable to the single-gender classes for a variety of reasons. VPSB taught the affected classes (math, science, language arts, social sciences, and reading) with the same teachers using the same state-mandated curricula and the same tests, schedules, resources, classrooms, and materials. Occasionally, VPSB offered different reading assignments and different quizzes and used different teaching styles and classroom layouts for boys and girls.

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 gender-based discrimination in federally funded education. 20 U.S.C. §1681(a). Like Title VI, Title IX prohibits only intentional

discrimination (*i.e.,* action taken *because* of gender, not merely *in spite of* gender), *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 the Equal Educational Opportunities Act ("EEOA") in the Education Amendments of 1974. PUB. L. NO. 93-380, §§201-259, 88 Stat. 484, 514-21 (1984). Although concerned primarily with racial desegregation decrees and busing, 118 CONG. REC. 8931 (1972), EEOA also addressed denying equal opportunity in "the *assignment* … of a student *to a school,* other than the one closest to his or her place of residence … if the *assignment* results in a greater degree of segregation of students on the basis of … sex … among the schools of [the district]." 20 U.S.C. §1703(c) (emphasis added). EEOA prohibits segregation by "race, color, or national origin *among or within* schools," 20 U.S.C. §1703(a) (emphasis added), but does not address gender segregation *within schools.*

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 ED and 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 ED and its officers. 20 U.S.C. §3441(a)-(b). DEOA reserved to HHS all HEW functions not transferred to ED. 20 U.S.C. §3508(b).

This Court has held that Congress adopted EEOA's race-discrimination provisions under the Fourteenth Amendment. *Castaneda v. Pickard,* 648 F.2d 989, 1001, 1008 n.9 (5th Cir. 1981). Congress enacted Title IX under only the Spending Clause. *Jackson v. Birmingham Bd. of Educ.,* 544 U.S. 167, 181 (2005).

Regulatory Background

FEMA, USDA, and HHS regulations provide that "recipient[s] shall not provide any course or otherwise carry out any of [their] education program or activity separately on the basis of sex, or require or refuse participation therein by any of its students on such basis." 44 C.F.R. §19.415; 7 C.F.R. §15a.34; 45 C.F.R. §86.31. ED's regulations allow single-gender classes under certain circumstances. 34 C.F.R. §106.34.

Consistent with Title IX's legislative history and its Title VI

template,[1] 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; 44 C.F.R. §19.605; 7 C.F.R. §15a.71. Among other things, those regulations prohibit filing a regulation-based lawsuit 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. 45 C.F.R. §80.8(d); 34 C.F.R. §100.8(d) (same); 45 C.F.R. §80.8(a); 34 C.F.R. §100.8(a).

SUMMARY OF ARGUMENT

Preliminary injunctions are extraordinary relief that courts – especially appellate courts – do not grant without the movants' meeting all criteria for relief (Section I). 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

[1] 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).

and notice), which undermines Doe's standing and her ability to state a claim for relief (Sections II.A, IV.A.1.a-IV.A.1.b). Similarly, EEOA does not even apply to single-gender classes within coeducational schools (Sections II.B, IV.B). Agencies' Title IX regulations do not warrant deference because Congress did not delegate interpretive authority to any one agency (Section III).

On the constitutional and statutory merits, federal courts and Congress must confine themselves to clear violations before encroaching in an area of traditional local concern (Section IV.A.1), and equal-protection violations that do not disadvantage legally protected interests require proof of discriminatory intent, which Doe has not even attempted (Section IV.A.2). In any event, Doe cannot establish that she will prevail over VPSB's single-gender classes under even heightened scrutiny (Sections IV.A.3-I.A.1.b). The rational-basis test applies to VPSB's decisions on pedagogical decisions within single-gender classes (Section I.A.1.c). Provided that they do not rise to the level of defeating single-gender classes' substantial equality, allegations of "stereotyping" cannot prevent VPSB's tailoring curricula, quizzes, teaching methods, or classroom layout to those classes (Section IV.A.4).

ARGUMENT

I. NO "EXTRAORDINARY CIRCUMSTANCES" WARRANT REVERSING THE DENIAL OF INTERIM RELIEF

Preliminary injunctions are extraordinary remedies that require: (1) substantial likelihood of prevailing on the merits; (2) substantial threat of irreparable injury without the injunction; (3) threatened injuries that outweigh the injunction's harm to non-moving parties; and (4) the injunction's being in the public interest. *Anderson v. Jackson,* 556 F. 3d 351, 355-56 (5th Cir. 2009). Courts review factual findings under the clearly-erroneous standard and legal findings *de novo*. *Id.* Reversing district courts' denial of preliminary injunctions requires "extraordinary circumstances." *Id.* Because Doe cannot prevail on the merits, she cannot justify the doubly extraordinary relief she seeks.

Doe argues that enjoining constitutional and civil-rights violations is in the public interest, Doe Br. at 58, which simply presumes her merits views. Because her only possible relief lies under Title IX's regulations, which are unenforceable here, Doe's public-interest showing is baseless. Moreover, her proposed remedy tramples the public interest in local administration of education, which necessarily outweighs Doe's lack of harm to legally protected interests. Finally, the

district court's effort to steer VPSB towards regulatory compliance in students' best interests satisfies the public-interest test.

II. DOE LACKS STANDING TO ENFORCE TITLE IX'S REGULATIONS AND EEOA

As VPSB explains, Doe's eldest daughter – Joan – graduated to a coeducational high school and lacks ongoing claims for injunctive relief at the middle school. As to Doe's younger daughter – Jill – there are two reasons, in addition to those presented by VPSB, why she lacks standing to enforce the Title IX regulations and EEOA.

Eagle Forum's standing arguments go to either prudential standing and jurisdiction or statutory standing and failure to state a claim. *See, e.g., Blanchard 1986, Ltd. v. Park Plantation, LLC,* 553 F.3d 405, 409 (5th Cir. 2008) (distinguishing statutory and constitutional standing); *James v. City of Dallas, Tex.,* 254 F.3d 551, 562 (5th Cir. 2001). VPSB is free to raise these issues as this litigation proceeds. *Kinney v. Weaver,* 367 F.3d 337, 355 n.21 (5th Cir. 2004). Because these issues either go to jurisdiction (which this Court must address) or to Doe's ability to state a claim (which Doe needs to prevail), these issues

are relevant at this stage, whether jurisdictional or not.[2]

A. Title IX's Regulations Require Pre-Enforcement Attempt at Voluntary Resolution and Written Notice

Doe admits that the "real difference" underlying her complaint derives from the differences between the coeducational and single-gender classes. Doe Br. at 55. Because Title IX's regulations provide the only basis for Doe to expect coeducational classes, she necessarily relies on Title IX's regulations, as distinct from Title IX. But neither federal agencies nor third-party beneficiaries like Jill can enforce the regulations until all conditions precedent are met.

Amicus United States argues that "to the extent the single-sex classroom plan violates ED's Title IX regulations, it necessarily violates Title IX." US Br. at 12 n.2. Because ED's regulations require coeducational alternatives not required by the constitutional and statutory prohibitions of intentional discrimination, the United States is simply wrong about this. *See* Sections IV.A, IV.A.2, *infra.*

---

[2] Because standing overlaps with the merits, Eagle Forum reprises these as merits arguments in Sections IV.A.1.b (Title IX regulations), IV.B (EEOA), *infra.*

1. 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); *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. 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.

Assuming *arguendo* that the relevant Title IX regulations create enforceable individualized rights, *but see* Sections IV.A.1.a, *infra,* Doe still cannot enforce the regulations without the 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 Doe's regulation-based Title IX claims.

Under "traditional principles of contract interpretation," third-party beneficiaries like Jill cannot "cherry-pick" the specific regulatory provisions that they wish to enforce. *Ingalls Shipbuilding v. Fed'l Ins. Co.,* 410 F.3d 214, 223 (5th Cir. 2005); *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"). 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); *Avatar Exploration, Inc. v. Chevron, U.S.A., Inc.,* 933 F.2d 314, 318 (5th Cir. 1991) (under Louisiana law, "[a]s third party beneficiaries, their rights under the contract could not exceed [the promisee's] rights"). Here, no federal agency can enforce its regulations in court without meeting the regulatory prerequisites. *What agencies cannot do directly, Jill cannot do as third-party-beneficiary.*

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 IV.A.1.b, *infra.* Regardless of "whether the notice provision is jurisdictional or procedural," Doe's regulatory claims are "barred" and "must be dismissed." *Hallstrom v. Tillamook County,* 493 U.S. 20, 32-33 (1989).

2. Third-Party Beneficiaries Lack Standing to Enforce Non-Vested Rights

As explained in Section II.A.1 *supra* and Section IV.A.1.b *infra,* lack of conditions precedent affects both standing under Rule 12(b)(1) and failure to state a claim under Rule 12(b)(6). But even if lack of 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. *Conoco, Inc. v. Republic Ins. Co.,* 819 F.2d 120, 123-24 (5th Cir. 1987); *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). Without the conditions precedent to regulatory enforcement, Doe lacks a legally protected interest in regulatory enforcement and thus lacks standing.

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 Doe] 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* these jurisdictional issues plainly never *decided* them.

In addition, the Title IX decisions that Doe 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.

B. EEOA Allows Single-Gender Classes *within Coeducational Schools*

Regarding gender segregation, EEOA prohibits only school-based assignments. 20 U.S.C. §1703(c). Whatever rights EEOA may create with regard to gender are inapposite to both *voluntary* single-gender schools and *assigned single-gender classes* within coeducational schools. With no legally protected EEOA interest implicated by single-gender classes in coeducational schools, EEOA provides no standing to sue VPSB.

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

Typically, when federal statutes delegate rulemaking authority to an agency, courts defer to the agency unless its regulation conflicts with Congressional intent or impermissibly interprets an ambiguous statute. *BCCA Appeal Group v. EPA,* 355 F.3d 817, 824-25 (5th Cir. 2003). For

several reasons here, however, this Court does not owe deference to the various federal regulations that Doe and her *amici* cite.

A. Courts Owe No Deference to Federal Agencies' Constitutional Interpretations

Significantly, it does not matter what Congress and federal agencies believe about the Fourteenth Amendment: the "power to interpret the Constitution … remains in the Judiciary." *City of Boerne v. Flores,* 521 U.S. 507, 524 (1997). Even statutes that allow or acquiesce to gender-based actions cannot make those actions constitutional:

> The fact that [§901(a)(5)] applies to [the school] provides the State no solace: "[A] statute apparently governing a dispute cannot be applied by judges, consistently with their obligations under the Supremacy Clause, when such an application … would conflict with the Constitution.

Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 731-33 (1982). On constitutional issues, only prior holdings of this Court or the Supreme Court bind the panel here.

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

As demonstrated by the divergent agency regulations cited here,

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 ED nor ED'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). Indeed, the very fact that the agencies' regulations differ demonstrates why this Court cannot defer to *any* agency's regulations. ED allows single-gender classes; FEMA purportedly prohibits them. ED funds all public schools; FEMA funds only some. Congress cannot have intended to permit single-gender classes nationwide, except in areas unfortunate enough to need FEMA funding to rebuild hurricane-wracked schools.

C. The Javits Amendment Delegated No 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 directs HEW's Secretary to issue *proposed* regulations, which commands 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 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 *interscholastic* athletics. Similarly, any conferred authority would not apply to either collegiate or scholastic areas *other than athletics,* such as

the single-gender classes here. Finally, any conferred authority would not belong to ED because DEOA left any Javits Amendment delegation with HHS. *See* Section III.D, *infra.* Because Congress cannot have intended to erect these intercollegiate-interscholastic or athletics-academic dichotomies or to crown HHS as the Title IX czar, courts must read the Javits Amendment consistent with its history and language as not conferring any authority.

D. ED Lacks Unique Title IX Authority

In splitting HEW into ED and HHS, Congress did not transfer HEW's interpretive authority to ED.[3] Nothing in DEOA §301 (or elsewhere) transfers Title IX rulemaking authority to ED. DEOA §301(a)(1)'s laundry list of transferred offices does not include HEW's

[3] In a footnote, the Supreme Court stated that "HEW's functions under Title IX were transferred to [ED]." *North Haven Bd. of Educ. v. Bell,* 456 U.S. 512, 517 n.4 (1982). The footnote explains why ED 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 ED 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").

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, ED draws rulemaking authority from Title IX itself, 20 U.S.C. §1682, which authorizes *each* federal agency to issue Title IX regulations.[4]

Under §902, ED 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-

[4] Had DEOA transferred HEW's OCR to ED, 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 ED 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* ED's OCR). Thus, the strained argument is neither availing nor available.

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 ED.

E. 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 IV.A.2, *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 n.7 (1992). Even if Title IX affords agencies deference, regulations beyond the statute deserve no deference.

IV. THE FOURTEENTH AMENDMENT, TITLE IX, AND EEOA AUTHORIZE SINGLE-GENDER CLASSES

Neither the Fourteenth Amendment nor Title IX prohibits single-gender classes. EEOA addresses only single-gender schools. Accordingly, Doe cannot succeed on the merits.

A. The Constitution Does Not Prohibit Single-Gender Classes with Different Curricula

The parties divide sharply on discriminatory intent's role in equal-

protection violations for gender-based segregation. *Compare* VPSB Br. at 19-25 *with* Doe Br. at 43-46. Analogizing to racial-segregation and unequal-opportunity gender-discrimination cases, Doe argues that classification itself is discriminatory, and VPSB argues that Doe must prove discriminatory intent to establish an equal-protection violation here. *Id.* Because race is inapposite and opportunity is substantially equal, VPSB is correct.

But even if Doe correctly argues that she need not show intent to invalidate gender segregation, Doe still cannot show a likelihood of success against VPSB's single-gender classes. Nothing requires government to treat males and females identically, and minor differences here do not approach the "substantial *inequality*" that violates equal-protection principles. Finally, the less-demanding rational-basis test applies to pedagogical decisions *within single-gender classes.*

1. Federal Oversight of Education – a Traditionally Local Concern – Is Limited without Clear Fourteenth-Amendment Violations

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 constitutional violation before encroaching on schools' prerogatives: "equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." *Sonnier v. Quarterman,* 476 F.3d 349, 368 (5th Cir. 2007) (*citing FCC v. Beach Communications, Inc.,* 508 U.S. 307 (1993)).[5] As explained *infra,* there is no constitutional (or statutory) violation here, much less one clear enough to trench VPSB's authority with a preliminary injunction.

2. Gender Discrimination Requires either Intent or Disadvantageous Gender Preferences

"[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); *Baranowski v. Hart,* 486 F.3d 112, 123 (5th Cir. 2007);

---

[5] For statutory violations, the same constraints apply to overreaching by federal agencies and statutes. *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers,* 531 U.S. 159, 174 (2001); *N.L.R.B. v. Catholic Bishop of Chicago,* 440 U.S. 490, 499-500 (1979); *Bowen,* 476 U.S. at 643-44 ("Congress therefore 'will not be deemed to have significantly changed the federal-state balance" – *or to have authorized its delegates to do so* – 'unless otherwise the purpose of the Act would be defeated') (citations omitted, emphasis added); *Raygor v. Regents of Univ. of Minnesota,* 534 U.S. 533, 543-44 (2002).

Beltran v. City of El Paso, 367 F.3d 299, 304 (5th Cir. 2004). Although Doe would have this Court ignore intent, all of the cases that she and her *amici* cite involve discriminatory gender-based preferences that denied the plaintiff an otherwise-applicable entitlement (*e.g.,* denying admission to unique institutions, pensions or benefits, or opportunities for promotion). None of those cases involve separating boys and girls and providing comparable treatment.[6] 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* effects upon an identifiable group." *Feeney,* 442 U.S. at 279 (emphasis added). For "cases of [that] genre," heightened review "address[es] specifically and only an … opportunity recognized … as 'unique.'" *Virginia,* 518 U.S. 515, 534-35 & n.7 (1996). In contrast,

---

[6] *See, e.g., Feeney,* 442 U.S. at 274 (higher scrutiny covers "covert or overt" gender preferences); *Hogan,* 458 U.S. at 723 & n.8 (scrutiny applies to state actions that "discriminate" and "disadvantage" by gender); *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").

VPSB has acted evenhandedly here. This Circuit requires that VPSB "promulgated [gender segregation] for educational purposes only," not for "discriminatory purposes." *U.S. v. State of Ga.,* 466 F.2d 197, 200 (5th Cir. 1972). No-one contends otherwise here.

State of Georgia concerned gender segregation for racially motivated purposes, long after the Supreme Court rejected separate but equal as inherently unequal for racial discrimination. *Id.* The separate-but-equal racial regime created schools that were decidedly unequal in fact, and (even if equal in fact) created a racial "feeling of inferiority" that would violate Equal Protection even with equal facilities. *Brown v. Board of Education,* 347 U.S. 483, 494 (1954). Unlike racial segregation, gender segregation neither stigmatizes students factually nor triggers strict scrutiny legally. Accordingly, "substantial equality" satisfies gender-based Equal Protection. *Virginia,* 518 U.S. at 554 (*citing Sweatt v. Painter,* 339 U.S. 629, 633 (1950)). With substantial equality of gender-segregated classes, heightened scrutiny does not apply.[7]

---

[7] The absence of discriminatory intent has nothing to do with VPSB's assertion of a benign motive, US Br. at 29-30, and everything to do with the elements of an equal-protection violation when opportunity is substantially equal. United States' citation to *Croson* (*id.* at 25) is

(Footnote cont'd on next page)

To prevail, Doe must prove discriminatory purpose, which her opening brief fails to do. By failing to brief the issue, she waives it. *U.S. v. Stalnaker,* 571 F.3d 428, 439-40 (5th Cir. 2009). Without discrimination, Doe cannot claim *any* relief.

3. Single-Gender Classes Satisfy Heightened Scrutiny for Gender-Based Treatment

In *U.S. v. Virginia,* the Supreme Court announced heightened scrutiny for unique post-secondary educational opportunities. *U.S. v. Virginia,* 518 U.S. at 533. At the outset, that regime is entirely inapposite to local elementary and secondary schools that offer substantially equal single-gender programs: heightened scrutiny should not apply to this local public school issue. In cases where this heightened scrutiny applies, defendants will prevail if their gender-based classifications achieve "important governmental objectives," and the classifications "substantially relate" to achieving those objectives. *Id.* Even under this standard, Doe cannot establish her likelihood of prevailing on the merits.

(Footnote cont'd from previous page.)

expressly limited to "[c]lassifications based on race, *City of Richmond v. J.A. Croson Co.,* 488 U.S. 469, 493-94 (1989), and thus inapposite here.

a. Improving Education is an Important Governmental Objective

As VPSB established, the goal of its single-gender classes are clearly important government objectives: improving academic achievement and decreasing disciplinary referrals. VPSB Br. at 30-31. These are legitimate goals for public schools. Time that teachers spend on discipline is time when they are not teaching. Unlike racial segregation, gender segregation is a means to good ends, and it stigmatizes no-one.

b. Single-Gender Classes Substantially Relate to Improved Academics and Discipline

Doe argues that VPSB relied only on the flawed Dupuis data, which cannot satisfy either the second *Virginia* prong or ED's Title IX regulations. *See* Doe Br. at 42; US Br. at 13; NWLC Br. at 22. For three reasons, however, whatever flaws lie in those data do not render VPSB unable to show that single-gender classes substantially relate to academic success and improved discipline: (1) the record does not include all the research and authorities cited in Principal Dupuis' dissertation, (2) this Court cannot assemble and evaluate those materials, and (3) this Court has no record information on what additional materials contributed to VPSB's decision to continue single-

gender classes in 2010-11. Without these materials, this Court can only guess whether Doe will prevail.

Significantly, Doe bears the responsibility for the state of record. If she believed that discovery was complete and all the evidence was before the district court, Doe had every opportunity to move for summary judgment or to ask the district court to consolidate the merits with preliminary relief. FED. R. CIV. P. 56(a), 65(a)(2). Either action would have put VPSB on notice and provided the opportunity to bring forward all relevant evidence. FED. R. CIV. P. 56(f); *Western Water Management, Inc. v. Brown,* 40 F.3d 105, 109 & n.5 (5th Cir. 1994). Instead, Doe chose an interlocutory over completing the record.

Doe misrepresents the district court's holding with respect to the basis for VPSB's single-gender classes. According to the district court, "There is no question that the data contained in Principal Dupuis' dissertation (which was the basis for the program) was extremely flawed." Under the nearest-antecedent rule and common sense, the basis for VPSB's program was the dissertation, not merely the flawed data. *Washington Market Co. v. District of Columbia,* 172 U.S. 361, 368 (1899). Even if Principal Dupuis' data from his middle-school

experiment were flawed, Doe cannot establish a likelihood of success *for 2009-10* without addressing the Dupuis dissertation's other references.

As ED acknowledged in 2006, there is "a debate among educators on the effectiveness of single-gender education." 71 Fed. Reg. 62,530, 62,532 (2006). This Court is not in the position to prejudge that debate.[8] In any event, as VPSB argues, this litigation now concerns 2010-11, not 2009-10, and the record does not include whatever data or research VPSB relied upon *to continue* its single-gender classes for the upcoming year. The most that Doe can achieve on this record is a remand for further hearings with respect to VPSB's decision for 2010-11.

c. Pedagogic Decisions in Single-Gender Classes Trigger the Rational-Basis Test

Doe's entire case lies on the flawed premise that Jill has a right to coeducational classes, and that premise is especially flawed with respect to marginally different teaching styles and reading materials in the single-gender classes. Here, "it is important to distinguish between

[8] For its part, NWLC puts forward selective and potentially irrelevant extra-record evidence (NWLC Br. at 13-20) without complying with appellate or evidentiary rules. FED. R. APP. P. 10(e)(2); FED. R. EVID. 201(d).

what the Constitution permits and what it requires," *Gannett Co., Inc. v. DePasquale,* 443 U.S. 368, 385 (1979), and to focus on the level of scrutiny that applies to actions taken within single-gender classes.

Even assuming that she could show the necessary "adverse effect," she would also need to show that VPSB acted *because of gender,* not those *in spite of gender*. *Feeney,* 442 U.S. at 279. Once VPSB permissibly segregates its classes by gender, however, gender no longer factors into decisions about curricula and teaching styles. Instead, teachers decide what works best for that class, which happens to consist entirely of one gender. The rational-basis test applies to those decisions:

> It is well settled that where a statutory classification does not itself impinge on a right or liberty protected by the Constitution, the validity of classification must be sustained unless "the classification rests on grounds wholly irrelevant to the achievement of [any legitimate governmental] objective."

Harris v. McRae, 448 U.S. 297, 322 (1980) (rational-basis test applies to abortion-funding restrictions notwithstanding the exclusive effect on women). Unless and until VPSB's boys' and girls' single-gender classes become *substantially* unequal, individual teachers can defend pedagogical decisions based on the fit of the method or curriculum to

the class. Unlike elite institutions like the Virginia Military Institute that provide unique and selective opportunities, *Virginia,* 518 U.S. at 550, public elementary and secondary schools certainly can teach in a non-discriminatory manner that takes into consideration the way that their students are.

4. Equal Protection Does Not Prohibit Differential Treatment of Groups that Fundamentally Differ

Doe and her *amici* protest most stridently the differential teaching methods and curricula that they attribute to stereotypes. Doe Br. at 41-42; NWLC Br. at 23-24. But there is nothing unconstitutional about having boys read Stephen Crane and girls read Edith Wharton. Even *Virginia* recognizes that males and females are different. *Virginia,* 518 U.S. at 533. Calling something a stereotype does not change reality.

If a selected reading meets the relevant pedagogical criteria, the Fourteenth Amendment does not prohibit a teacher's selecting that reading: "Sometimes 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"). Equal Protection does not empower Doe to compel

VPSB and Jill's schoolmates to conform to unisex stereotypes.

Increasing students' interest in assignments to increase their participation and educational benefits easily meets the two *Virginia* criteria of heightened scrutiny – which should not even apply here – and *a fortiorari* meets the rational-basis test. Thus, whatever level of scrutiny applies, Doe cannot prevail on her claim that single-gender classes constitute impermissible stereotyping.

B. Title IX Does Not Prohibit Single-Gender Classes with Different Curricula

Doe's ability to challenge VPSB's single-gender classes raises two questions: (1) can she challenge them under the regulations, and (2) can she challenge them under the statute? The regulations are unenforceable here, and the statute does not prohibit VPSB's single-gender classes.

1. Title IX's Regulations Are Unenforceable Here

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

a. 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.[9] *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 regulated recipients much less beneficiaries like Jill; and (3) the regulations confer group-wide benefits, not individual rights, including a requirement for coeducational classes. *Sandoval,* 532 U.S. at 288-89. Thus, the

---

[9] Doe incorrectly suggests that *Bossier Parish* enforced regulations. Doe Br. at 36. Because that decision concerned intentional discrimination, it enforced §601, not §602's regulations. *Bossier Parish,* 370 F.2d at 850-51.

regulations are not enforceable beyond statutory discrimination.

b. Failure to Meet Regulatory Conditions Precedent Requires Dismissal

As indicated in Section II.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. For stipulations *pour autrui* (*i.e.,* third-party beneficiary contracts), Louisiana law suggest that failure to meet these conditions precedent renders Doe unable to state a claim for relief. *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). Alternatively, Jill lacks standing as a third-party beneficiary to the federal funding contracts because the regulations' enforceability has not vested. *See* Section II.A, *supra.* Although this defect negates both Doe's constitutional standing and her statutory standing, this Court may address statutory standing first. *Ortiz v. Fibreboard Corp.,* 527 U.S. 815, 830-31 (1999). Either way, Doe cannot prevail on her Title IX regulatory claims.

2. Title IX Statutorily Prohibits Only Intentional Discrimination under Fourteenth Amendment

Shorn of her regulatory claims, Doe can argue only her statutory

claims under Title IX. No-one can dispute that §901(a) prohibits only intentional, gender-based discrimination. *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. Because this Court owes no deference to competing agency interpretations (Section III, *supra*) and those agency interpretations are unenforceable without the regulatory conditions precedent (Section II.A, *supra*), the substantive Title IX question collapses to the constitutional question discussed in Section IV.A, *supra.*

As outlined in Section IV.A, *supra,* for intentional-discrimination violations of the Fourteenth Amendment, VPSB has not violated Title IX. *Cf. Saucedo-Falls v. Kunkle,* 299 Fed.Appx. 315, 323 (5th Cir. 2008) (unnecessary to evaluate Title VII and Fourteenth Amendment separately because they provide identical protection from stereotype-based disparate treatment) (non-precedential); *Davis v. Monroe County Board of Education,* 526 U.S. 629, 640 (1999) (relying on Title VII to interpret Title IX). Doe misplaces her analogy to Title VI's strict-scrutiny standards because both statutes adopt the constitutional standard, but constitutional scrutiny differs for race and gender. *See*

Section IV.A.2, *supra*. Otherwise, Title IX's most famous (or infamous) impact – gender-segregated athletics – would violate Title IX.[10] Doe cannot state a claim under Title IX.

B. EEOA Allows Single-Gender Classes within Schools

EEOA does not even address single-gender classes within coeducational schools. Section II.B, *supra;* 20 U.S.C. §1703(c); *U.S. v. Hinds County Sch. Bd.,* 560 F.2d 619, 624 (5th Cir. 1977). Because EEOA does not apply, Doe cannot prevail under EEOA.

CONCLUSION

This Court should affirm the district court.

[10] Doe cites a Michigan district-court decision, Doe Br. at 39-40, which is inapposite because that circuit applied strict scrutiny to gender discrimination. *Conlin v. Blanchard,* 890 F.2d 811, 816 (6th Cir. 1989).

Dated: June 24, 2010

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 SERVICE

I hereby certify that on the 24th day of June, 2010, I electronically filed the foregoing document with the Clerk of the Court for the U.S. Court of Appeals for the Fifth Circuit via the appellate CM/ECF system and served electronically on the counsel listed below:

For Plaintiff-Appellant:
Katharine M. Schwartzmann
American Civil Liberties Union Foundation of Louisiana
P.O. Box 56157
New Orleans, LA 70156

Lenora M. Lapidus
Amy Lynn Katz
Women's Rights Project
ACLU Foundation
125 Broad Street, 18th Floor
New York, New York 10004

Mark W. Friedman
Debevoise & Plimpton LLP
919 Third Avenue
New York, New York 10022

For Defendants-Appellees:
Calvin "Woody" Woodruff, Jr.
P.O. Box 520
Abbeville, LA 70511-0520

For Defendants-Appellees:
Dawn L. Morris
Law Office of Dawn L. Morris
1106 Coolidge Blvd. Suite A
Lafayette, LA 70503

For Amici Nat'l Women's Law Ctr. et al.:
Judson E. Lobdell
Angela E. Kleine
Morrison & Foerster LLP
425 Market Street
San Francisco, CA 94105-2482

For Amicus United States:
Thomas E. Chandler
Mark L. Gross
Department of Justice
Civil Rights Division
Appellate Section - RFK 3718
Ben Franklin Station
P.O. Box 14403
Washington, DC 20044-4403

/s/ Lawrence J. Joseph
Lawrence J. Joseph

CERTIFICATE REGARDING
PRIVACY REDACTIONS AND VIRUS SCANNING

No. 10-30378, *Doe v. Vermilion Parish School Board et al.*

I certify (1) that all required privacy redactions have been made in this brief, in compliance with 5th Cir. Rule 25.2.13; (2) that the electronic submission is an exact copy of the paper document, in compliance with 5th Cir. R. 25.2.1; and (3) that the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

Dated: June 24, 2010

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

No. 10-30378, *Doe v. Vermilion Parish School Board et al.*

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because:

This brief contains 6,963 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii) and Circuit Rule 32.2.

2. This 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:

This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in Century Schoolbook 14-point font.

Dated: June 24, 2010

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