No. 10-35551

United States Court of Appeals for the Ninth Circuit

MONICA EMELDI,
Plaintiff-Appellant,

v.

UNIVERSITY OF OREGON,
Defendant-Appellee.

ON APPEAL FROM U.S. DISTRICT COURT FOR THE DISTRICT OF OREGON, CIVIL ACTION NO. 6:08-CV-06346-HO, HON. MICHAEL R. HOGAN

AMICUS CURIAE BRIEF OF EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND IN SUPPORT OF APPELLEE'S PETITION FOR RECONSIDERATION AND REHEARING *EN BANC*

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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 makes the following disclosures:

1) For non-governmental corporate parties please list all parent corporations: None.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock: None.

Dated: April 30, 2012

Respectfully submitted,

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IDENTITY, INTEREST AND AUTHORITY TO FILE

Amicus curiae Eagle Forum Education & Legal Defense Fund ("Eagle Forum"), a nonprofit Illinois corporation, submits this *amicus* brief with the accompanying motion for leave to file.[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, without intruding any further into schools' educational missions. For these reasons, Eagle Forum has a direct and vital interest in the issues before this Court.

STATEMENT OF THE CASE

In this action, former doctoral candidate Monica Emeldi sues the University of Oregon ("Oregon") for retaliation under Title IX on the theory that her second dissertation advisor, Dr. Rob Horner, resigned from that role and fifteen of his peers refused Emeldi's requests to take over that role, citing their schedules or their lack of qualifications in her

[1] By analogy to FED. R. APP. P. 29(c)(5), the undersigned counsel certifies that: counsel for *amicus* authored this brief in whole; no counsel for a party authored this brief in any respect; and no person or entity – other than *amicus*, its members, and its counsel – contributed monetarily to this brief's preparation or submission.

area of research. That said, Emeldi did not reach out to at least two Department members (including her initial advisor, who had returned from the sabbatical that caused her to seek out Dr. Horner in the first place) who were both qualified and available. Backed by corroborating emails, Dr. Horner claims that he resigned because Emeldi refused his efforts to get her to focus her work. Contemporaneously, Emeldi wrote a memorandum recommending various changes to make Oregon's College of Education more accessible to female graduate students and also met with Dr. Marian Friestad, an administrator and faculty member, to discuss her views and her relationship with Dr. Horner. According to Dr. Friestad, however, Emeldi never alleged discrimination, and Dr. Friestad's subsequent discussion with Dr. Horner discussed only Emeldi's dissertation, not an allegation of discrimination.

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.*

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). Like Title VI, 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). Similarly, like Title VI and the Equal Protection Clause, 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.

In *Jackson,* the Supreme Court recently found that Title IX includes a cause of action for retaliation for championing the Title IX rights of others. *Jackson,* 544 U.S. at 178. Specifically, relying on *Sullivan v. Little Hunting Park, Inc.,* 396 U.S. 229 (1969), the Court held that 42 U.S.C. §1982 provides a white lessor "his *own* private cause

of action under §1982 if he could show that he was 'punished for trying to vindicate the rights of minorities.'" 544 U.S. at 176 n.1 (emphasis in original).

Regulatory Background

In 1975, the Department of Health, Education & Welfare ("HEW") issued regulations under Title IX. In several respects, the regulations exceed Title IX's intentional-discrimination scope. *See, e.g.,* 45 C.F.R. §§86.3(c), .4(a), .36(c); 34 C.F.R. §§106.3(c), .4(a), .36(c). 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).[2] Two aspects of these incorporated Title VI regulations are relevant here.

First, the regulations prohibit retaliation not only "for the purpose of interfering with any right or privilege secured by [20 U.S.C.

[2] 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).

§1681(a)[3]]" but also "because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this part." 45 C.F.R. §80.7(e); 34 C.F.R. §100.7(e).

Second, the Title VI regulations also address the procedure associated with regulatory claims. "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) (same).

Significantly, the 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:

> *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

[3] With regard to Title IX, the reference to Title VI's "section 601" refers to Title IX's analogous "section 901(a)." 20 U.S.C. §1681(a).

> 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

Emeldi claims retaliation under Title IX, but – as Oregon points out – she does not claim to have engaged in statutorily protected activity. Pet. at 13. To the extent that she bases her claims on the Title IX *regulations,* as distinct from the *statute,* Emeldi failed to satisfy the conditions precedent to enforcing the regulations, assuming *arguendo* that the regulations are privately enforceable at all. *Amicus* Eagle Forum therefore treats statutory and regulatory claims separately.

With respect to statute-based retaliation (Section I), Emeldi faces two insurmountable problems. First, as Oregon argues, Emeldi does not genuinely allege that Oregon discriminated against her because of her sex. Pet. at 13. Second, the panel majority mistakenly allowed Emeldi to stand on her circumstantial, *prima facie* case that Dr. Horner knew

about her alleged advocacy on behalf of women to meet her burden to defeat summary judgment that Oregon's rationale was pretextual or dishonest (Section I.B). For its part, *Jackson* is not to the contrary, as that case involved surviving a motion to dismiss, not surviving a motion for summary judgment (Section I.A).

With respect to regulation-based retaliation, neither the United States nor third-party beneficiaries like Emeldi can enforce Title IX's regulations without the regulatory conditions precedent (*e.g.,* attempts at voluntary compliance and notice), which undermines Emeldi's standing and ability to state a claim for relief (Sections II.A-II.C). Although Title IX regulations that exceed the scope of the statutory prohibition of intentional discrimination are not privately enforceable as a merits question (Section II.C), this Court also lacks jurisdiction to consider such claims because Title IX plaintiffs lack standing to enforce non-vested rights of the United States (Sections II.A-II.B).

ARGUMENT

I. FOR STATUTORILY BASED TITLE IX RETALIATION, EMELDI FAILED TO DEFEND AGAINST OREGON'S SUMMARY JUDGMENT MOTION

The parties appear to have accepted Title VII's burden-shifting analysis as appropriate to resolve retaliation under Title IX, as this

Court has done in prior decisions. *Cf. Davis v. Monroe County Board of Education,* 526 U.S. 629, 640 (1999) (relying on Title VII to interpret Title IX). Under this framework, however, Emeldi's claims must fail because she has neither produced direct evidence of intentional discrimination nor rebutted Oregon's proffered non-discriminatory justifications for its actions.

A. *Jackson* Provides Little Help at Summary Judgment Because *Jackson* Merely Survived a Motion to Dismiss

The result here differs from the result in *Jackson* because of the different procedural posture of this appeal. Allegations and inferences may be enough to survive a motion to dismiss, but they are not enough to survive a motion for summary judgment. Thus, in *Jackson,* the courts *assumed* that the Board retaliated against Jackson for complaining about Title IX violations. *Jackson,* 544 U.S. at 171-72. "Retaliation for Jackson's advocacy of the rights of the girls' basketball team in this case is 'discrimination' 'on the basis of sex,' just as retaliation for advocacy on behalf of a black lessee in *Sullivan* was discrimination on the basis of race." *Id.* at 176–177. Under *Sandoval,* 532 U.S. at 281, 288-89, however, schools do not violate Title IX by violating regulatory provisions that exceed the scope of Title IX's statutory prohibition, and

those regulations do not confer privately enforceable rights.

Indeed, under the supervening decision in *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 562-63 (2007), the *Jackson* plaintiff potentially could not survive a motion to dismiss today, in light of the conclusory nature of his complaint and the need to plead that the school acted because of sex. Before *Twombly,* plaintiffs could survive motions to dismiss unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957). In any event, Coach Jackson's surviving a motion to dismiss cannot help Emeldi avoid summary judgment.

B. The *Prima Facie* Case for Discrimination Is Generally Insufficient to Rebut a Nondiscriminatory Rationale

Under the Title VII framework, plaintiffs alleging disparate treatment such as retaliation must establish a *prima facie* case of discrimination by offering evidence that "give[s] rise to an inference of unlawful discrimination." *Tex. Dep't of Cmty. Affairs v. Burdine,* 450 U.S. 248, 253 (1981). Plaintiffs may do so either via the four-part test laid out in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802 (1973), or by providing direct evidence suggesting that the employment decision

was based on an impermissible criterion. *E.E.O.C. v. Boeing Co.,* 577 F.3d 1044, 1049 (9th Cir. 2009). Making the *prima facie* case shifts "[t]he burden of production, but not persuasion, … to the employer to articulate some legitimate, nondiscriminatory reason for the challenged action." *Id.* (interior quotations omitted). If the employer meets that burden, "the plaintiff must then show that the articulated reason is pretextual 'either directly by persuading the [fact-finder] that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence.'" *Id.* (*quoting Burdine,* 450 U.S. at 256). Plaintiffs' burden under this third step depends on the evidence that they provided.

When a discrimination plaintiff has provided direct evidence, this Court "require[s] very little evidence to survive summary judgment." *Lam v. Univ. of Hawaii,* 40 F.3d 1551, 1564 (9th Cir. 1994) (*citing Sischo-Nownejad v. Merced Cmty. Coll. Dist.,* 934 F.2d 1104, 1111 (9th Cir.1991)). By contrast, "when the plaintiff relies on circumstantial evidence, that evidence must be specific and substantial to defeat the employer's motion for summary judgment." *Boeing Co.,* 577 F.3d at 1049 (*citing Coghlan v. Am. Seafoods Co. LLC,* 413 F.3d 1090, 1095 (9th

Cir. 2005)). Further, the plaintiff's evidence must be "sufficient to permit a reasonable trier of fact to *find by a preponderance of the evidence* that [the] decision ... was motivated" by impermissible criteria such as sex or race. *FDIC v. Henderson,* 940 F.2d 465, 473 (9th Cir. 1991) (emphasis added). Thus, "the opposing party must produce *specific* facts showing that there remains a genuine factual issue for trial and evidence significantly probative as to any [material] fact claimed to be disputed." *Miller v. Fairchild Industries, Inc.*, 797 F.2d 727, 731 (9th Cir. 1986) (interior quotations omitted, emphasis in original). Here, Emeldi's entire retaliation case rests on an inference – disputed by Oregon and wholly unsubstantiated by Emeldi – that Dr. Horner even knew about Emeldi's "complaints of gender discrimination" to Dr. Friestad.[4]

Even assuming *arguendo* that that inference makes out Emeldi's *prima facie* case, it cannot rebut Oregon's non-discriminatory rationale for its actions:

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[4] Direct evidence, "if believed, proves the fact [of discriminatory animus] without inference or presumption." *Coghlan,* 413 F.3d at 1095, whereas circumstantial evidence requires an inference. Here, the majority inferred that Dr. Friestad debriefed Dr. Horner about Emeldi's alleged complaints. Slip Op. at 3277.

> when evidence to refute the defendant's legitimate explanation is totally lacking, summary judgment is appropriate even though plaintiff may have established a minimal *prima facie* case based on a *McDonnell Douglas* type presumption.

Wallis v. J.R. Simplot Co., 26 F.3d 885, 890-91 (9th Cir. 1994); *Chuang v. Univ. of Cal. Davis, Bd. of Trs.,* 225 F.3d 1115, 1127 (9th Cir. 2000) (plaintiff must show "that a discriminatory reason more likely motivated the employer," or "that the employer's proffered explanation is 'unworthy of credence' because it is internally inconsistent or otherwise not believable"). The majority acknowledges that Oregon has the stronger case – given its corroborating email evidence and Emeldi's inconsistencies – but gives Emeldi the benefit of the doubt on what Emeldi *might* explain later. Slip Op. 3280 & n.8. The entire point of summary judgment is to require the non-moving party to present their evidence *now,* not later. Because she failed to mount sufficient evidence on an issue on which she bore the burdens of production and proof, it is simply too late.

II. EMELDI LACKS STANDING TO ENFORCE THE RETALIATION REGULATIONS

Under the plain terms of the regulations, "[n]o action to effect compliance by any … means authorized by law shall be taken" until

certain regulatory preconditions have been met. Emeldi's failure to meet those regulatory preconditions denies her either prudential standing or statutory standing to the extent that she alleges retaliation for her advocacy for regulatory issues that do not rise to the level of statutory discrimination: to "invoke[e] federal jurisdiction, [plaintiffs] must establish the irreducible constitutional minimum of standing in addition to meeting the statutory standing requirements." *Mendoza v. Zirkle Fruit Co.,* 301 F.3d 1163, 1172 (9th Cir. 2002); *Salmon Spawning & Recovery Alliance v. Gutierrez,* 545 F.3d 1220, 1225 (9th Cir. 2008) (lack of statutory standing goes to failure to state claim).[5] Whether the failure to meet the conditions precedent to regulatory enforcement goes to Article III standing or failure to state a claim, Emeldi cannot enforce the regulations in this litigation.

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). To regulate

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[5] Courts may address statutory standing before constitutional standing. *Ortiz v. Fibreboard Corp.,* 527 U.S. 815, 830-31 (1999).

recipients based on their accepting federal funds, however, Congress must express Spending-Clause conditions unambiguously. *Gorman,* 536 U.S. at 186. Indeed, "[t]he legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of th[at] 'contract.'" *Pennhurst State School & Hospital v. Halderman,* 451 U.S. 1, 17 (1981). The Supreme Court recently clarified that this contract-law analogy is not an open-ended invitation to interpret Spending-Clause agreements *broadly,* but rather – consistent with the clear-notice rule – applies "only as a potential *limitation* on liability." *Sossamon v. Texas,* 131 S.Ct. 1651, 1661 (2011) (emphasis added).

With the required notice, recipients face enforcement for violations of the *statute. Gorman,* 536 U.S. at 187-89. As indicated in Section II.C, *infra,* no similar provision even authorizes private enforcement of the regulations, a distinction "that … is emphasized where the promisee is a governmental entity." *Astra USA, Inc. v. Santa Clara County, Cal.,* 131 S.Ct. 1342, 1348 (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, and recipient schools never agreed to enforcing the regulations separate from the statute.

Assuming *arguendo* that the relevant Title IX regulations create enforceable individualized rights, a plaintiff still cannot enforce the regulations without satisfying the regulatory conditions precedent. When a regulation under Spending-Clause legislation defines the University's obligations, the *entire* regulation constitutes the University's bargain that third-party beneficiaries would enforce. *Global Crossing Telecomm., Inc. v. Metrophones Telecomm., Inc.,* 550 U.S. 45, 59 (2007) ("Congress that intends the statute to be enforced through a private cause of action intends the authoritative interpretation of the statute to be so enforced as well"). This Court must "interpret the statute [and its implementing regulation] as a symmetrical and coherent regulatory scheme and fit, if possible, all parts into [a] harmonious whole." *FDA v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 133 (2000) (interior citations omitted). Accepting

the regulations as implementing the statute would doom any regulation-based Title IX claims.

Under "traditional principles of contract interpretation," third-party beneficiaries such as Emeldi cannot cherry-pick the specific regulatory provisions that they wish to enforce because they "generally have no greater rights in a contract than does the promise[e]." *United Steelworkers of America v. Rawson,* 495 U.S. 362, 375 (1990) (citations omitted); *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"). Here, no federal agency can enforce its regulations in court without meeting the regulatory prerequisites. *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 the 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 II.C, *infra.* Regardless of "whether the notice provision is jurisdictional or procedural," Emeldi's regulatory claims are "barred" and "must be dismissed." *Hallstrom v. Tillamook County,* 493 U.S. 20, 32-33 (1989).

B. Emeldi Lacks Standing to Enforce Non-Vested Regulatory "Rights"

As explained in Section II.A *supra* and Section II.C *infra,* the failure to meet a condition 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 who lack standing to enforce non-vested claims, *Karo v. San Diego Symphony Orchestra Ass'n,* 762 F.2d 819, 822 (9th Cir. 1985) ("he must be seeking to enforce a right that is personal to him and vested in him at the time of the suit"), without which "[h]e does not have standing to sue as a third party beneficiary because he had no

vested rights." *Karo,* at 824. Similarly, Oregon law ties the vesting of third-party beneficiaries' rights to any conditions precedent in the underlying contract: "rights only vest when [the plaintiff] has satisfied all conditions precedent." *State ex rel. Roberts v. Public Finance Co.,* 294 Or. 713, 718, 662 P.2d 330, 333 (1983) (interior quotations omitted); *Gender Machine Works, Inc. v. Eidal Intern. Sales Corp., Inc.,* 145 Or.App. 198, 210, 929 P.2d 1033, 1040 (Or. App. 1996) (third-party beneficiaries' rights subject to same defenses as promisor could assert).[6]

Without the conditions precedent to regulatory enforcement, Emeldi lacks a legally protected interest in regulatory enforcement and thus lacks standing. *Karo,* 762 F.2d at 822-24. Whatever federal agencies may say, schools plainly never signed up for private regulatory enforcement, especially without the regulatory conditions precedent. If

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[6] Although "[f]ederal law typically controls when the Federal Government is a party to a suit involving its rights or obligations under a contract," *Boyle v. United Tech. Corp.,* 487 U.S. 500, 519 (1988), a uniform federal rule of decision is not required in *private enforcement* of a federal contract or program if the claim "will have *no direct effect upon the United States or its Treasury*." *Boyle,* 487 U.S. at 520 (*quoting Miree v. DeKalb County,* 433 U.S. 25, 29 (1977)) (emphasis in *Boyle*). For example, under *Miree,* 433 U.S. at 28, federal courts can look to state law for third-party beneficiaries' standing to enforce obligations under federal contracts.

the schools did not agree to such enforcement, then that enforcement is not part of the agreement.

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 Emeldi] 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.

C. Emeldi Cannot Litigate Regulatory Violations that Are Not Statutory Violations

No one can credibly dispute that Title IX statutorily prohibits only intentional, sex-based discrimination. *Jackson,* 544 U.S. at 173-74. It would be "absurd" to contend otherwise. *Sandoval,* 532 U.S. at 282 & n.2. By introducing the distinction between regulatory and statutory

violations, *Sandoval* undermined numerous prior decisions that did not consider that distinction. *Jackson,* 544 U.S. at 178 ("plaintiffs may not assert claims under Title IX for conduct not prohibited by that statute"). The question is whether Emeldi can litigate retaliation claims that are regulatory, but not statutory.

Jackson involved an appellate decision affirming dismissal for failure to state a claim, on the theory that *Sandoval* precluded the coach there from asserting a Title IX *regulatory* claim for retaliation. The Supreme Court rejected the regulations as the basis for its finding a Title IX cause of action for third-party retaliation (*e.g.,* retaliation against a coach for championing the rights of athletes):

> We do not rely on regulations extending Title IX's protection beyond its statutory limits; indeed, we do not rely on the Department of Education's regulation at all, because the statute itself contains the necessary prohibition.

Jackson, 544 U.S. at 178. Instead, the Court "interpret[ed] Title IX's text to clearly prohibit retaliation for complaints about sex discrimination." *Id.* Obviously, a statute that does not itself prohibit non-statutory regulatory violations does not render such violations as prohibited *statutory* "sex discrimination."

Unlike the statute – which prohibits intentional retaliation for advocating against intentional sex discrimination – the regulations prohibit not only that but also "interfering with any right or privilege secured by … [the regulations], or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under [the regulations]." 45 C.F.R. §80.7(e); 34 C.F.R. §100.7(e). Thus, someone retaliated against for Title IX regulatory issues is not without any remedy, but the remedy lies in the Title IX regulatory process.[7]

As indicated in Sections II.A-II.B, *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. *See, e.g., Shaw Constructors v. ICF Kaiser Engineers, Inc.,* 395 F.3d 533, 540 & n.15 (5th Cir. 2004). Alternatively, Emeldi lacks standing as a third-party beneficiary to the federal

[7] By contrast, Title VII's express statutory retaliation remedy, 42 U.S.C. §2000e-3(a), includes participation in regulatory proceedings. *See also CBOCS West, Inc. v. Humphries,* 553 U.S. 442, 456 (2008).

contracts because the regulations' enforceability has not vested. *See* Section II.A, *supra*. Either way, Emeldi cannot prevail on any Title IX regulatory claims. Assuming *arguendo* that this defect – the lack of a vested, enforceable regulatory interest – is *not* jurisdictional, it nonetheless precludes stating a claim for regulatory relief.

CONCLUSION

The petition for reconsideration and rehearing *en banc* should be granted.

Dated: April 30, 2012

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the FEDERAL RULES OF APPELLATE PROCEDURE, and Circuit Rule 29-2(c)(2), I certify that the foregoing *amicus curiae* brief is proportionately spaced, has a typeface of Century Schoolbook, 14 points, and contains 4,195 words, including footnotes, but excluding this Brief Form Certificate, the Table of Citations, the Table of Contents, the Corporate Disclosure Statement, and the Certificate of Service. The foregoing brief was created in Microsoft Word 2010, and I have relied on that software's word-count feature to calculate the word count.

Dated: April 30, 2012

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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of April, 2012, I electronically filed the foregoing *amicus curiae* brief with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit – as an exhibit to the accompanying motion for leave to file – by using the appellate CM/ECF system. I further certify that, on that date, the appellate CM/ECF system's service-list report showed that none of the participants in the case were unregistered for CM/ECF use.

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