No. 12-871

In the Supreme Court of the United States

UNIVERSITY OF OREGON,

Petitioner,

v.

MONICA EMELDI,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND, INC., IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

The Ninth Circuit in this case applied the *McDonnell Douglas Corp. v. Green* burden-shifting framework, despite the fact that the defendant articulated a legitimate, nondiscriminatory reason for the challenged action. The D.C. Circuit has held that *McDonnell Douglas* is inapplicable in such situations. But the Ninth Circuit, along with the Fifth, Tenth, and most other circuits, disagrees. The questions presented are:

1. Whether resort to the *McDonnell Douglas Corp. v. Green* framework is warranted when the defendant has articulated a legitimate, nondiscriminatory reason for the challenged action.
2. Whether the Ninth Circuit misapplied this Court's settled precedent governing retaliation claims when it concluded that the plaintiff's speculation about the reason for her academic difficulties constituted sufficient proof of retaliation to defeat summary judgment.

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INTEREST OF *AMICUS CURIAE*

Amicus curiae Eagle Forum Education & Legal Defense Fund ("Eagle Forum"),[1] a nonprofit Illinois corporation founded in 1981, has consistently defended federalism and supported local autonomy in areas (like education) of predominantly local concern. In addition, 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

[1] *Amicus* files this brief with consent by all parties, with 10 days' prior written notice; *amicus* has lodged the parties' written consent with the Clerk. Pursuant to Rule 37.6, counsel for *amicus* authored this brief in whole, no party's counsel authored this brief in whole or in part, and no person or entity – other than *amicus* and its counsel – contributed monetarily to preparing or submitting the brief.

these reasons, Eagle Forum has a direct and vital interest in the issues before this Court.

STATEMENT OF THE CASE

Amicus Eagle Forum adopts the facts as stated by the University. *See* Pet. at 5-10. In summary, former doctoral candidate Monica Emeldi sues the University of Oregon (the "University") for sex discrimination under Title IX on the theory that her second dissertation advisor, Dr. Rob Horner, retaliatorily resigned from that role and convinced fifteen of his peers to refuse Emeldi's requests to take her on, thereby constructively discharging her from the University's graduate program. According to the University's evidence, however, those fifteen other faculty members either lacked the time to help Emeldi or were unqualified to work in her field. Moreover, 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.

At the same time, Emeldi wrote a memorandum recommending various changes to make the University's graduate program more accessible to female students and also met with Dr. Marian Friestad, an administrator and faculty member, to discuss her views and her relationship with Dr. Horner. Two items requested by Emeldi's memorandum were that the University hire qualified women into the tenured faculty to provide

"empowered female role models successfully working within an academic context" and that the University "model a balance of gender appointments that reflect the proportion of student gender population ratios." According to Dr. Friestad, Emeldi never alleged discrimination against Dr. Horner, and thus Dr. Friestad's follow-up discussion with Dr. Horner discussed only Emeldi's dissertation, not any allegations of discrimination.

The Ninth Circuit reversed the trial court's entry of summary judgment for the University, relying on the same *prima facie* case with which Emeldi stated her claim to defeat summary judgment.

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

As its text and legislative history make clear, *compare* 20 U.S.C. §1681(a) *with* 42 U.S.C. §2000d; 117 Cong. Rec. 30,404 (1971) (Sen. Bayh), Title IX is modeled on Title VI of the Civil Rights Act of 1964. As with 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). 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). Title VI's legislative history makes clear that these statutes merely restate constitutional standards and establish a process to implement those standards to ensure that the Federal Government did not support discrimination with federal funding: "there is a constitutional restriction against discrimination in the use of Federal funds; and Title VI simply spells out the procedure to be used in enforcing that restriction." 110 Cong. Rec. 13,333 (1964) (Sen. Ribicoff).[2] Congress adopted these general funding laws in order to avoid debating divisive issues – such as segregated facilities that received federal funds – annually in each appropriations bill.

In *Jackson,* this Court found Title IX to include a cause of action for retaliation for championing the Title IX rights of others. *Jackson,* 544 U.S. at 178. *Jackson* relied on *Sullivan v. Little Hunting Park,*

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[2] *See also* 110 Cong. Rec. 5254 ("[t]he existing law of the land is stated in section 601") (Sen. Humphrey); 110 Cong. Rec. 5255 ("[n]o new rights are granted here nor are any taken away") (Sen. Humphrey); 110 Cong. Rec. 6553 ("[the bill] provides that race shall not be a basis for making decisions") (Sen. Humphrey); 110 Cong. Rec. 7064 (confirms question that Title VI is already the law) (Sen. Pastore); 110 Cong. Rec. 13,442 ("Section 601 is a policy statement on constitutional law") (Sen. Humphrey). Senator Humphrey was a floor manager for the Civil Rights Act of 1964, Senator Pastore was a floor manager for Title VI, and Senator Ribicoff participated with the bipartisan leadership on Title VI.

Inc., 396 U.S. 229 (1969), in which this Court held that a white lessor had "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).

The Ninth Circuit applied the burden-shifting analysis that this Court developed to resolve claims of discrimination under Title VII of the Civil Rights Act of 1964, which the University has accepted *arguendo* as appropriate for retaliation claims under Title IX. *See* Pet. at 13 & n.3; *cf. Davis v. Monroe County Board of Education,* 526 U.S. 629, 640 (1999) (relying on Title VII to interpret Title IX). Under this analysis, plaintiffs alleging disparate treatment such as retaliation may 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), if they cannot provide direct evidence that the defendant discriminated based on impermissible criteria. *Cf. Wayte v. U.S.,* 470 U.S. 598, 608 (1985).

Making the *prima facie* case under the four-part test laid out in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802 (1973), shifts the burden of production – not persuasion – to the defendant, but it "can involve no credibility assessment." *Reeves v. Sanderson Plumbing Prod., Inc.,* 530 U.S. 133, 142-43 (2000) (interior quotations omitted). Where (as here), the defendant meets that "burden by offering admissible evidence sufficient for the trier of fact to conclude that petitioner was fired because of [a legitimate reason] … the *McDonnell Douglas*

framework – with its presumptions and burdens – disappear[s], and the sole remaining issue [is] discrimination *vel non*." *Id.* (interior quotations omitted).

Regulatory Background

In 1975, the Department of Health, Education & Welfare ("HEW") issued regulations under Title IX. In several respects, the regulations address discriminatory "effects" that exceed the intentional-discrimination scope of the Title IX statute. *See, e.g.,* 45 C.F.R. §§86.3(c), .4(a); 34 C.F.R. §§106.3(c), .4(a). 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] 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. §1681(a)[4]]" 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).

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

[4] With regard to Title IX, the reference to Title VI's "section 601" refers to Title IX's analogous "section 901(a)." *Compare* 42 U.S.C. §2000d *with* 20 U.S.C. §1681(a).

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 funding 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

As the University argues, Title VII's burden-shifting analysis requires clarity on the showing that a plaintiff must make to survive a defendant's motion for summary judgment that provides a non-discriminatory rationale for the challenged actions. While that clarity is needed for discrimination law generally, it is particularly critical in the context of Spending Clause legislation like Title IX, where recipients are entitled to fair and clear notice of the conditions that come along with accepting federal funds.

With regard to the retaliation cause of action that this Court recognized in *Jackson,* this case provides an opportunity to clarify both how that motion-to-dismiss decision applies in the summary-judgment context and how it continues to apply in light of *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 554-56 (2007), which rejected pleadings – like Coach Jackson's – that allege mere "labels and conclusions, and a formulaic recitation of the elements of a cause of action." 550 U.S. at 555. Given the unlikeliness in 2013 of a major liberal university actually discriminating because of sex, as opposed to merely countenancing sex-correlated disparate impacts, what Coach Jackson cavalierly could plead pre-*Twombly* should not save plaintiffs like Ms. Emeldi, now that this Court requires more.

Finally, as with *Jackson* and most perceived violations of "Title IX," the real underlying issue is likely to be disparate impacts unrelated to sex discrimination. For these types of issues, the reach of the Title IX regulations extend beyond the

prohibitions of the Title IX statute, but the private right of action does not. While the Title IX regulations prohibit retaliation beyond the statutory prohibition recognized in *Jackson,* those regulations also include several conditions precedent to regulatory enforcement, which were not met here. As such, even the United States could not enforce those regulations in the procedural context of unmet regulatory conditions precedent to regulatory enforcement. When rights have not vested in the promisee, third-party beneficiaries such as Ms. Emeldi lack standing to enforce the underlying regulatory provisions.

ARGUMENT

I. THIS COURT SHOULD RESOLVE THE SHOWING NEEDED FOR SUMMARY JUDGMENT OF DISCRIMINATION CLAIMS GENERALLY AND TITLE IX CLAIMS SPECIFICALLY

The University has accepted *arguendo* that Title VII's burden-shifting analysis is appropriate to resolve retaliation claims under Title IX. Pet. at 13 & n.3. Even under this pro-plaintiff standard, however, Emeldi's claims fail because she neither produced direct evidence of intentional discrimination nor rebutted the University's non-discriminatory justifications for its actions.

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

The Ninth Circuit found that Emeldi established her *prima facie* case, thereby shifting the burden of production to the University. Because the University

met that burden by providing a non-discriminatory basis for its actions, "the *McDonnell Douglas* framework – with its presumptions and burdens – [should have] disappeared, and the sole remaining issue was discrimination *vel non*." *Reeves, Inc.,* 530 U.S. at 142-43. The Ninth Circuit erred by allowing Emeldi to continue her case, in the face of the University's summary-judgment motion, with her merely *prima facie* case.

Even with respect to her *prima facie* case, Emeldi has an unmet burden to establish both that she is qualified, notwithstanding both her refusal to focus her work and that the fifteen faculty members whom she approached could, in fact, have taken her on as an advisee:

> Although the *McDonnell Douglas* formula does not require direct proof of discrimination, it does demand that the alleged discriminatee demonstrate at least that his rejection did not result from the two most common legitimate reasons on which an employer might rely to reject a job applicant: an absolute or relative lack of qualifications or the absence of a vacancy in the job sought.

Int'l Broth. of Teamsters v. U.S., 431 U.S. 324, 358 (1977). For that reason, it would be particularly inappropriate to allow her to proceed against the University's summary-judgment evidence, armed only with a minimal *prima facie* case.

In any event, Emeldi's entire retaliation case rests on an inference – disputed by the University and wholly unsubstantiated by Emeldi – that Dr. Horner even knew about Emeldi's "complaints of

gender discrimination" to Dr. Friestad. Even assuming *arguendo* that that inference makes out Emeldi's *prima facie* case, it cannot rebut the University's non-discriminatory rationale for its actions. *Reeves, Inc.,* 530 U.S. at 142-43. The Ninth Circuit panel majority acknowledges that the University has the stronger case – given its corroborating email evidence and the inconsistencies in Emeldi's account – but nonetheless gives Emeldi the benefit of the doubt on what Emeldi *might* explain later. Pet. App. 20a-22a & n.8. The entire point of summary judgment is to require the non-moving parties to present their evidence *now,* not later. Because Emeldi failed to mount sufficient evidence on an issue on which she bore the burdens of production and proof, it is simply too late.

B. As Spending Clause Legislation, Title IX Requires Clear Notice to Recipients of the Federally Enforceable Terms of the Funding Agreement

As critical as it is generally to cure the lower-court confusion that the University identifies, it is even more critical that this Court do so for Spending Clause statutes like Title IX. Unlike Title VII, Title IX lacks any liability based on disparate impacts or failure to cure the results of societal discrimination. If the Ninth Circuit's decision stands, however, schools nationwide will need to bend over backwards, to back down when they should not, and to pay off dubious claims, all to avoid uncertain liability and expensive trials. Under *Sossamon v. Texas,* 131 S.Ct. 1651, 1661 (2011), and related cases, *see* Section III.A, *infra,* Congress owes federal-funding recipients

clear notice of the obligations that they take on with federal funding. *Amicus* Eagle Forum respectfully submits that, while Congress has been clear enough, this Court has not. Out of fairness both to recipients and to Congress, this Court should clarify the liability that it will deem to attach to Spending Clause legislation like Title IX.

II. THIS COURT SHOULD CLARIFY THE MOTION-TO-DISMISS HOLDING FROM *JACKSON* IN BOTH THE POST-*TWOMBLY* AND SUMMARY-JUDGMENT CONTEXTS

This case and *Jackson* have key differences as well as similarities. Most obviously, the two cases share claims of retaliation based on advocacy for female students at the respective institutions. Two differences are even more significant. First, *Jackson* came down before *Twombly* narrowed the criteria for surviving motions to dismiss. Second, this Court decided whether Coach Jackson should survive a motion to dismiss, whereas this case concerns whether Ms. Emeldi should survive a motion for summary judgment. Both of these differences require reversal and call out for this Court's clarification of the *Jackson* cause of action.

By way of background, the *Jackson* complaint was conclusory at best with respect to the existence of both sex discrimination in the first place and retaliation because of sex discrimination:

> 6. The defendant discriminated on the basis of gender against the plaintiff … with respect to his employment contract by refusing to contract with plaintiff on terms free of gender bias with respect to adverse

> terms, conditions and privileges of employment, in violation, among other laws 20 U.S.C. §1681 *et seq.* as amended.
>
> 7. … On or about December 2000, plaintiff complained to [plaintiff's direct supervisor] about gender discrimination in association with the girls' basketball. Plaintiff also noted serious infractions with regards to the expense accounts. Plaintiff also noted the girls were prohibited from using various equipment including but not limited to the sports facility. The girls team was not provided a key for the padlock for the facility. Soon thereafter plaintiff received negative evaluations[.]
>
> 8. Plaintiff was subjected to adverse terms of employment because of gender discrimination.

Am. Compl. at 2-3, *Jackson v. Birmingham Bd. of Educ.,* No. CV-01-TMP-1866-S (N.D. Ala. 2001).[5]

Significantly, the *Jackson* complaint did not allege key elements of either statutory or regulatory claims for Title IX retaliation:[6] (a) that Birmingham received federal funds; (b) that Coach Jackson's complaints caused Birmingham to retaliate; (c) that

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[5] In his petition for a writ of *certiorari,* Coach Jackson clarified that the "girls' team was denied equal funding and equal access to athletic equipment and facilities." Pet. for Cert. at 3, *Jackson v. Birmingham Bd. of Educ.,* 544 U.S. 167 (2005) (No. 02-1672). As indicated in the text, these allegations – if true – do not *necessarily* violate the Title IX statute.

[6] As explained in Section III, *infra,* statutory and regulatory claims differ both substantively and procedurally.

Coach Jackson filed or otherwise participated in an administrative complaint; (d) that Birmingham acted because of sex, either against Coach Jackson or against the girls' basketball team, or (e) that Birmingham treated boy athletes any differently with respect to expense accounts, equipment, facilities, or padlocks. These omissions are relevant both to whether *Jackson* remains persuasive after *Twombly* and to what showing plaintiffs must make to defeat a motion for summary judgment.

A. Coach Jackson's Claim Likely Would Not Survive *Twombly* at the Motion-to-Dismiss Phase

With respect to the sports context at issue in *Jackson,* Title IX does not statutorily prohibit "unequal expenditures for male and female teams" *per se,* 34 C.F.R. §106.41(c), although the failure to provide equal expenditures or facilities can constitute a violation of the equal-opportunity provisions of the regulations. *Id.*[7] By contrast, Title IX does statutorily prohibit disparate treatment *because of sex,* 20 U.S.C. §1681(a), which Coach Jackson alleged in only conclusory terms.

Neither *amicus* Eagle Forum nor this Court can know whether there was any actual discrimination "because of sex" in the *Jackson* incident. Had Birmingham moved for a more definite statement, FED. R. CIV. P. 12(e), we might know whether Coach

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[7] Violating mandates for equal opportunity need not violate prohibitions of intentional discrimination. *Compare Horner v. Kentucky High Sch. Athletic Ass'n,* 43 F.3d 265, 276 (6th Cir. 1995) *with Horner v. Kentucky High Sch. Athletic Ass'n,* 206 F.3d 685, 694 (6th Cir. 2000).

Jackson alleged statutory violations of Title IX, as opposed to violations of the Title IX regulations that do not violate the Title IX statute or even conduct that violates neither the regulations nor the statute.

Because this Court decided *Jackson* in the pre-*Twombly* era, however, Coach Jackson could avoid dismissal 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) (emphasis added). Clearly, there were some sets of facts on which the *Jackson* majority held that Coach Jackson could prevail (*e.g.,* he advocated against "discrimination because of sex" and Birmingham retaliated because of that advocacy).

In resolving the motion to dismiss under the pre-*Twombly Conley* standard, this Court thus *assumed* that Birmingham retaliated against Coach Jackson for complaining about Title IX violations, *Jackson,* 544 U.S. at 171-72, which the Court analogized to the intentional, race-based retaliation in *Sullivan:*

> 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. The difference, of course, is that the *Sullivan* discrimination was intentional, race-based discrimination, whereas the procedural posture in *Jackson* concerned the pleadings only and did not require proving actual discrimination.

B. Ms. Emeldi's Claim Cannot Survive at the Summary-Judgment Phase

Under *Jackson,* Title IX retaliation claims based on advocacy require "discrimination" "on the basis of sex." *Jackson,* 544 U.S. at 176-77. Two factors make it unlikely that many Title IX complainants who – like Coach Jackson – survive a motion to dismiss also will survive a motion for summary judgment,

First, the public perception of the phrase "Title IX" involves an equality or proportionality of *results,* as distinct from either equal *opportunity* or *non-discrimination.*[8] These Title IX "rights" rest not in the intentional-discrimination statute but rather in disparate-impact and equal-opportunity regulatory mandates and administrative policies, which are not enforceable in court. *See* Section III, *infra.*

Second, if we are honest, there is not really much intentional sex-based discrimination against women and girls in our schools, much less at premier liberal universities like the University of Oregon. Here, too, most advocacy on perceived "women's issues" will not in fact relate to sex discrimination at all. For example, championing better day care for graduate students may sound like a women's issue, but it is in fact a *parents'* issue, one that – as far as standards of intentional conduct go – applies equally to mothers and fathers.[9] In a more disturbing part of this case,

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[8] Title IX's enforcers apply this approach selectively to fields where men and boys predominate (*e.g., sports,* mathematics, engineering) rather than to all fields (*e.g.,* nursing, admissions).

[9] Someone who protests that mothers need daycare more than fathers misses the point. For example, in *Pers. Adm'r v. Feeney,* 442 U.S. 256, 279 (1979), the passed-over female civil

Ms. Emeldi apparently lobbied the University to discriminate based on sex to hire women academics, and now wants that activity protected by Title IX.

As a consequence, retaliation with respect to most advocacy for Title IX "rights" will not be actionable, once the plaintiff is forced to reveal his or her legal theory through motions for a more definite statement or motions for summary judgment. FED. R. CIV. P. 12(e), 56(a). By granting the petition for a writ of *certiorari* in this case, the Court will clarify the truly limited nature of its *Jackson* decision.

III. THIS COURT SHOULD CLARIFY THE DISTINCTIONS BETWEEN REGULATORY AND STATUTORY VIOLATIONS UNDER *SANDOVAL* AND ARTICLE III

In *Sandoval,* this Court distinguished between regulatory and statutory violations under Spending Clause anti-discrimination laws. Most notably, the Court held that violations of the regulations are not enforceable under the private right of action recognized in *Cannon v. University of Chicago,* 441 U.S. 677, 689 (1979), unless the challenged conduct violates the statute in question. *Sandoval,* 532 U.S. at 284. To the extent that Emeldi proceeds under the

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servant alleged that Massachusetts' veteran-preference law for civil-service promotions and hiring discriminated based on sex. Because women then represented less than two percent of veterans, *Feeney,* 442 U.S. at 270 n.21, men were more than *fifty times* more likely to benefit from that state law. Nonetheless, Massachusetts did not discriminate *because of sex* when it acted because of another, permissible criterion (veteran status). *Id.* at 272. Parental status is the same. *Cf. Bray v. Alexandria Women's Health Clinic,* 506 U.S. 263, 271 (1993) (action taken because of pregnant status is not *because of sex*).

Title IX regulations against retaliation – as distinct from the Title IX statute – her claim must be dismissed both under *Sandoval* and under Article III for failure to exhaust administrative remedies.[10]

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. 45 C.F.R. §80.8(d). As explained below, 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. Both failures are equally fatal. *Elk Grove Unified School Dist. v. Newdow,* 542 U.S. 1, 11-12 (2004) (prudential standing); *Ortiz v. Fibreboard Corp.,* 527 U.S. 815, 830-31 (1999) (statutory standing). 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.

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[10] In *Cannon,* this Court held that a victim of statutory discrimination could bring her implied statutory right of action without first exhausting administrative remedies. 441 U.S. at 687-89 & n.8. Just as *Sandoval* confined *Cannon* to implied rights of action for statutory discrimination, this Court's observations that Title IX has no administrative exhaustion or notice requirements apply to statutory violations, not regulatory ones. *See Cannon,* 441 U.S. at 706-08; *Jackson,* 544 U.S. at 182 (retaliation); *Fitzgerald v. Barnstable Sch. Comm.,* 555 U.S. 246, 254-56 (2009) (harassment).

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 a recipient based on its federal funding, 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). This 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,* 131 S.Ct. at 1661 (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 III.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 (1) determine that compliance cannot be

secured voluntarily, (2) notify recipients of planned actions, and (3) 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 anyone's 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 recipients' obligations, the *entire* regulation constitutes the 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). 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 III.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 III.A *supra* and Section III.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).[11]

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; *Holbrook v. Pitt,* 643 F.2d 1261, 1273 n.24 (7th Cir. 1981); *Seguin v. City of Sterling Heights,* 968 F.2d 584, 592 (6th Cir. 1992). Whatever federal agencies may say, schools

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[11] 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.

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.

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 of Title IX

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 Eleventh Circuit 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. This Court rejected the regulations as the basis for finding a Title IX cause of action for retaliation:

> 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 both statutory violations and "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.[12]

As indicated in Sections III.A-III.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 contracts because the regulations' enforceability has not vested. *See* Section III.A, *supra.* Either way, Emeldi cannot prevail on any Title IX regulatory claims.

CONCLUSION

The Court should grant the petition for a writ of *certiorari.*

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[12] 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).