08-16330

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AREZOU MANSOURAN, *et al.,*
Plaintiffs/Appellees,

vs.

REGENTS OF THE UNIVERSITY OF CALIFORNIA, *et al.,*
Defendants/Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF CALIFORNIA
NO. 2:03-CV-02591-FCD-EFB
HON. FRANK C. DAMRELL, JR., U.S. DISTRICT JUDGE

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

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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 ("Eagle Forum ELDF"): (1) No publicly held company owns 10% or more of Eagle Forum ELDF's stock, and (2) Eagle Forum ELDF has no parent company.

Dated: May 1, 2009

Respectfully submitted,

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STATEMENT OF RELATED CASES

Amicus Curiae Eagle Forum Education & Legal Defense Fund is not aware of any related cases pending in this Court.

Dated: May 1, 2009

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the FEDERAL RULES OF APPELLATE PROCEDURE, I certify that the "Brief for *Amicus Curiae* Eagle Forum Education & Legal Defense Fund Filed in Support of Defendants-Appellees in Support of Affirmance" is proportionately spaced, has a typeface of Century Schoolbook, 14 points, and contains 6,999 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 2007, and I have relied on that software's word-count feature to calculate the word count.

Dated: May 1, 2009

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

LEGISLATIVE HISTORY

REGULATIONS AND RULES

OTHER AUTHORITIES

IDENTITY AND INTEREST OF *AMICUS CURIAE*

Amicus curiae Eagle Forum Education & Legal Defense Fund ("Eagle Forum ELDF") is a nonprofit organization founded in 1981. From its inception, Eagle Forum ELDF has defended American sovereignty, promoted adherence to the U.S. Constitution, and defended federalism. In connection with Title IX specifically and federalism generally, Eagle Forum ELDF has sought to protect the ability of States (and local governments) to set their own course, free from federal control of areas that the Constitution reserves to the people and the States. For these reasons, Eagle Forum ELDF has a direct and vital interest in the issues before this Court. Because some parties withheld consent, Eagle Forum ELDF seeks leave to file this brief for the reasons set forth in the accompanying motion.

INTRODUCTION

A group of female wrestlers ("Plaintiffs") sued their *alma mater,* the University of California at Davis ("University"), to establish a women's wrestling team under Title IX's regulatory regime, notwithstanding that they have graduated and notwithstanding that the U.S. Department of Education ("DOE") did not find a Title IX violation, but instead chose to resolve Plaintiffs' administrative

complaints via the informal and voluntary means contemplated by Title IX and its regulations. Because similar lawsuits across the country attempt to shake down athletic departments nationwide, this Court should affirm the district court's dismissal. In doing so, however, this Court should dismiss on the alternate grounds that Plaintiffs lack constitutional and statutory standing and fail to state a claim.

STATEMENT OF FACTS

Amicus curiae Eagle Forum ELDF understands the pertinent facts as follows: (1) the Plaintiffs filed several administrative complaints over their elimination from the wrestling team, based on what they perceived as violations of the Title IX regulatory regime; (2) DOE never determined that compliance could not be secured by voluntary means and, to the contrary, secured compliance by voluntary means; (3) accordingly, the University did not receive notice of its regulatory noncompliance, and to the contrary had every indication that it had complied with the regulations; and (4) then Plaintiffs filed suit.

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), *Pers. Adm'r v. Feeney,* 442 U.S. 256, 279 (1979), and prohibits all gender-based "quotas," "ceilings," "even splits," "arbitrary ratios," and "specific percentage balances." *See* 117 Cong. Rec. 30,409, 39,251 39,259, 39,262 (1971); 118 Cong. Rec. 5812-13 (1972).

In a significant departure from Title VI, Congress included Title VII's restriction against preferential treatment based on imbalances with the total population, 20 U.S.C. §1681(b), which is "designed to prevent…. undue 'Federal Government interference…. because of some Federal employee's ideas of…. balance.'" *United Steelworkers of Am. v. Weber,* 443 U.S. 193, 206-07 (1979) (citations omitted). Although §901(b) allows courts and agencies to consider "statistical evidence" in a specific "hearing or proceeding," 20 U.S.C. §1681(b), it "would be contrary to Congress' clearly expressed intent" to allow "quotas and preferential treatment [to] become the only cost-effective means of avoiding expensive litigation." *Watson v. Fort Worth Bank & Trust,* 487 U.S. 977, 993 (1988) (plurality); *accord Wards Cove Packing Co., Inc. v. Atonio,* 490 U.S. 642, 652-53 (1989).

REGULATORY BACKGROUND

In 1975, DOE's predecessor promulgated regulations to implement Title IX. As pertinent here, those regulations require schools to provide equal athletic opportunity, based on interest and abilities. 45 C.F.R. §86.41(c)(i). Consistent with Title IX's legislative history and Title VI template,[1] the initial Title IX regulations incorporated the procedural provisions of the Title VI regulations. 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). Title IX's procedural requirements mirror Title VI's, as Congress intended.

Among other things, those provisions prohibit filing a regulation-based lawsuit until at least ten days after a relevant agency official

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[1] 118 Cong. Rec. 5803 (Title IX would have the same procedural protections afforded under Title VI) (Sen. Bayh); *id.* at 5808 ("These provisions [including what became §902] parallel Title VI of the 1964 Civil Rights Act") (Sen. Bayh); *Sex Discrimination Regulations: Hearings Before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor,* 94th Cong., at 170 (1975) ("the setting up of an identical administrative structure and the use of virtually identical statutory language substantiates the intent of the Congress that the interpretation of Title IX was to provide the same coverage as had been provided under Title VI") (prepared statement of Sen. Bayh).

determines that compliance cannot be achieved voluntarily and the recipient receives at least ten days' notice in writing of the action planned 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.

45 C.F.R. §80.8(d); 34 C.F.R. §100.8(d) (same); 45 C.F.R. §80.8(a) ("compliance with this part may be effected by… any… means authorized by law" "[i]f 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"); 34 C.F.R. §100.8(a) (same).

In 1979, DOE's predecessor issued a "Policy Interpretation." 44 Fed. Reg. 71,413 (1979). As relevant here, that Policy Interpretation lists three options for demonstrating regulatory compliance: (1) have "participation opportunities" substantially proportional to enrollment ratios, (2) show progress on the way to prong one, and (3) fully

accommodate the underrepresented gender's interest. 44 Fed. Reg. at 71,418.

ARGUMENT

I. THIS COURT SHOULD AFFIRM DENIAL OF LEAVE TO AMEND THE COMPLAINT

The district court denied Plaintiffs' motion to file an amended complaint, which would have added current students as plaintiffs and sought monetary damages for the Plaintiffs as past students. Because it came after the entry of a scheduling order, the district court denied leave under the good-cause standard of Rule 16(b).

A. Standard of Review

Amicus Eagle Forum ELDF agrees with the University that this Court must evaluate the district court's denial of Plaintiffs' motion to amend their complaint for abuse of discretion under Rule 16(b)'s good-cause standard, not under Rule 15(a)'s more liberal standard. Univ. Br. at 23-24; *cf.* FED. R. CIV. P. 15(a)(2) (leave to amend a complaint "shall be freely given when justice so requires"). Because Rule 16(b) overlays a good-cause standard over Rule 15(a), this Court cannot interpret Rule 16(b) *more liberally* than Rule 15(a), which denies leave for undue delay, bad faith or dilatory motive, repeated failure to cure deficiencies

by amendments previously allowed, undue prejudice to the defendant, and the futility of the amendment. *Foman v. Davis,* 371 U.S. 178, 182 (1962). "Futility includes the inevitability of a claim's defeat on summary judgment." *Johnson v. Am. Airlines, Inc.,* 834 F.2d 721, 724 (9th Cir. 1987); *accord California v. Neville Chemical Co.,* 358 F.3d 661, 673-74 (9th Cir. 2004). Nothing in either Rule 16(b) or Rule 15(a) requires granting leave to file a futile amended complaint.

B. Amendment is Futile

For the reasons set forth in Sections II and III, *infra,* granting leave to file the amended complaint would be futile because the Plaintiffs cannot prevail. Accordingly, this Court should affirm the denial of leave to amend on the basis that the proffered amendment is futile. *Foman,* 371 U.S. at 182.[2] Significantly, this Court can uphold

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[2] *See also Denoo v. Kerr,* 298 Fed.Appx. 621, 622 (9th Cir. 2008) (denying leave to amend complaint as futile where "[t]here is no evidence, beyond [plaintiff's] conclusory allegations, that [defendants] acted with an intent to discriminate *based on [plaintiff's] age*") (emphasis in original); *Klamath-Lake Pharmaceutical Ass'n v. Klamath Medical Service Bureau,* 701 F.2d 1276, 1293 (9th Cir. 1983) (amendment regarding damages is futile because plaintiff "does not have compensable damages unless it proves its case"); *Smith v. Commanding Officer, Air Force Accounting and Finance Center,* 555 F.2d 234, 235 (9th Cir. 1977) ("amendment would be 'futile' because

(Footnote cont'd on next page)

denial of leave to amend the complaint as futile for reasons different from those on which the district court based its denial of leave to amend the complaint. *See Townsend v. University of Alaska,* 543 F.3d 478, 485 (9th Cir. 2008); *cf. Jackson v. Bank of Hawaii,* 902 F.2d 1385, 1388 n.4 (9th Cir. 1990) (recognizing that futility "analysis is inextricably tied to the propriety of the trial court's granting appellees' summary judgment motion"). Although the *Townsend* panel cited only the *Foman* line of cases, an appellate court's ability to affirm on a different basis also flows from the fact that appellate courts review judgments, not decisions. *Chevron U.S.A., Inc. v. N.R.D.C.,* 467 U.S. 837, 842 (1984) ("this Court reviews judgments, not opinions"); *E.P.I.C. v. Pacific Lumber Co.,* 257 F.3d 1071, 1075 (9th Cir. 2001). For the reasons set forth in the following two sections, this Court should find amendment futile, either jurisdictionally or on the merits.

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[plaintiff] could not prevail on the merits because of the Government's immunity").

II. THIS COURT SHOULD AFFIRM DISMISSAL OF THE TITLE IX CLAIMS

The district court relied on *Grandson v. University of Minnesota,* 272 F.3d 568 (8th Cir. 2001), to dismiss the Plaintiffs' Title IX claims for failure to provide notice that would have allowed the University to correct the perceived violations without litigation. Because the Plaintiffs lack constitutional and statutory standing to assert their Title IX claims, this Court should dismiss on that basis and on California's sovereign immunity.

For reasons of their own, the parties ignore whether the Title IX regulations are privately enforceable. *See Sandoval,* 532 U.S. at 288-89; *Save Our Valley v. Sound Transit,* 335 F.3d 932, 961 (9th Cir. 2003). Other than explaining the issue in Section II.E.2, *infra,* Eagle Forum ELDF's brief joins the parties by assuming *arguendo* that the Title IX regulations are privately enforceable under the statute. As explained in that section, however, the regulations are not privately enforceable.

A. Standard of Review

Amicus curiae Eagle Forum ELDF agrees with the parties that this Court conducts *de novo* review of the district courts' rulings on summary judgment motions. Appellants' Opening Br., at 33-34;

Appellees' Br. at 42; *accord Cascade Health Solutions v. PeaceHealth,* 515 F.3d 883, 912 (9th Cir. 2008). In their *de novo* review, courts review jurisdictional issues before merits issues. *Steel Co. v. Citizens for a Better Environment,* 523 U.S. 83, 94-95 (1998) ("requirement that jurisdiction be established as a threshold matter spring[s] from the nature and limits of the judicial power of the United States and is inflexible and without exception") (citations and interior quotations omitted, alteration in original).

Appellate courts "presume that federal courts lack jurisdiction unless the contrary appears affirmatively from the record." *Renne v. Geary,* 501 U.S. 312, 316 (1991).

> [I]f the record discloses that the lower court was without jurisdiction [an appellate] court will notice the defect, although the parties make no contention concerning it. [When the lower federal court] lack[s] jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit.

Steel Co., 523 U.S. at 95 (first and second alterations added, interior quotations omitted). Although not raised below, "no action of the parties can confer subject-matter jurisdiction upon a federal court." *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee,* 456 U.S.

694, 702 (1982). Instead, "every federal appellate court has a special obligation to satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review, even though the parties are prepared to concede it." *FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215, 231 (1990) (interior quotations omitted). "And if the record discloses that the lower court was without jurisdiction [an appellate] court will notice the defect." *Id.* (interior quotations omitted).[3] If the district court lacked jurisdiction over any claims, this Court must dismiss them.

B. Failure of Regulatory Notice Requires Dismissal

Assuming *arguendo* that the relevant Title IX rules create enforceable individualized rights, *but see* Sections II.C.2 (regulations do not create individualized rights), II.E.2 (regulations do not create enforceable rights), *infra,* the district court nonetheless correctly decided that Plaintiffs failed to provide the pre-litigation notice that Title IX requires. Significantly, however, the district court grounded its holding on the judge-made notice requirements that the Supreme Court

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[3] Indeed, even a party's consent to judgment does not preclude its challenging the district court's subject-matter jurisdiction on appeal. *Clapp v. C.I.R.,* 875 F.2d 1396, 1398 (9th Cir. 1989) (collecting authorities).

has developed to comport Title IX's implied private remedy with its express statutory remedy. *See Grandson,* 272 F.3d at 571-72 (citing *Gebser v. Lago Vista Ind. Sch. Dist.,* 524 U.S. 274, 284, 288-90 (1998)). For regulation-based suits, however, the relevant notice requirements fall within the regulations themselves.

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); *cf. Bering Strait Citizens for Responsible Resource Development v. U.S. Army Corps of Engineers,* 524 F.3d 938, 957 (9th Cir. 2008) (no cherry picking

on factual issues). Accepting the regulations as implementing the statute dooms the Plaintiffs' regulation-based Title IX claims.

The regulations pose several prerequisites to regulatory enforcement: namely, the relevant federal agency must have determined that compliance cannot be secured by voluntary means, the recipient must have received notice of the failure to comply and of the action to be taken to effect compliance, and ten days must have passed. *See* 45 C.F.R. § 80.8(a), (d); 34 C.F.R. § 100.8(a), (d) (same). None of these prerequisites occurred.

Under "traditional principles of contract interpretation," third-party beneficiaries such as the Plaintiffs 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); *accord Spinks v. Equity Residential Briarwood Apartments,* 171 Cal.App.4th 1004, 1024 (Cal. App. 2009) ("a third-party beneficiary may not obtain a greater recovery than that which would have been available to the promisee") (quoting *Souza v. Westlands Water Dist.,* 135 Cal.App.4th 879, 894 (2006)). Here, not even DOE could have brought

litigation to enforce the regulations without first meeting the regulatory prerequisites to regulation-based litigation.[4] What DOE cannot do directly, private parties 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." *Laidlaw,* 528 U.S. at 175; *see also*

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[4] In essence, the district court and the *Grandson* court erred by focusing on the unique fact that DOE had received a complaint and achieved voluntary compliance. *See Grandson,* 272 F.3d at 573. In fact, the regulatory notice requirements apply equally where no federal agency has even considered the achievement of voluntary compliance. That the private parties here and in *Grandson* attempted to second-guess DOE's determination of compliance certainly worked an impermissible *surprise* on the recipient, but the regulatory notice requirements apply equally in the absence of a DOE determination.

Section II.C.3, *infra.* Regardless of "whether the notice provision is jurisdictional or procedural," if this Court accepts the Plaintiffs' view of the regulations as implementing the statute, the Plaintiffs' "action is barred by the terms of a statute," so "it must be dismissed." *Hallstrom v. Tillamook County,* 493 U.S. 20, 32-33 (1989).

C. Plaintiffs Lack Standing to Enforce Proportionality

To "invoke[e] federal jurisdiction, the [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). Before addressing constitutional and statutory standing, however, Eagle Forum ELDF first offers three answers to the Plaintiffs' likely reply that no other court has found constitutional or statutory standing lacking in a women's Title IX lawsuit:[5]

First, *amicus curiae* Eagle Forum ELDF respectfully submits that no other court found those issues because no other court considered

[5] In addition, Plaintiffs rely on their pleadings to defeat summary judgment, Appellants' Br. at 27, which they cannot do. *Summers v. Earth Island Institute,* 129 S.Ct. 1142, 1151 (2009).

them. As such, "drive-by jurisdictional rulings of this sort" implicit in another court's having reached a merits issue without even considering jurisdiction obviously "have no precedential effect" on the jurisdictional question. *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 94-95 (1998); *Waters v. Churchill,* 511 U.S. 661, 678 (1994) ("cases [cited by Plaintiffs] cannot be read as foreclosing an argument that they never dealt with"). "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *U.S. v. Rivera-Guerrero,* 377 F.3d 1064, 1071 (9th Cir. 2004) (quoting *Webster v. Fall,* 266 U.S. 507, 511 (1925)). Because those other courts never considered the jurisdictional issues, they plainly never decided them.

Second, the extra-circuit cases on which the Plaintiffs rely lacked subject-matter jurisdiction for the same reason that Plaintiffs' claims lack subject-matter jurisdiction. As such, those cases cannot serve as precedents that guide this Court:

> A lack of subject matter jurisdiction goes to the very power of a court to hear a controversy; ... [the] earlier case can be accorded no weight either as precedent or as law of the case.

Orff v. U.S., 358 F.3d 1137, 1149-50 (9th Cir. 2004) (quoting *U.S. v. Troup,* 821 F.2d 194, 197 (3rd Cir. 1987) (alterations in *Troup*). Because those other courts never had jurisdiction to reach the merits of the Title IX regulatory regime's enforceability, this Court cannot rely on their holdings for *any* purpose.

Third, the Title IX cases cited by the Plaintiffs either pre-date or fail to address *Sandoval.* As such, they failed to consider the distinction between actions to enforce the regulations versus actions to enforce the statute. *See* Appellants' Br. at 5-6 (citing pre-*Sandoval* authority for "well-established" principles). Because those other courts never considered the additional impediments to enforcing Title IX regulations, as distinct from enforcing the statute, this Court cannot rely on their holdings to enforce the regulations.

1. Plaintiffs Lack Constitutional Standing as Third Party Beneficiaries

Constitutional standing requires "an invasion of a *legally protected interest,*" *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992) (emphasis added), which Plaintiffs fail to allege, much less prove. Moreover, Congress may create statutory rights, the denial of which confers standing. *Warth v. Seldin,* 422 U.S. 490, 501 (1975). By

contrast, agencies cannot create rights that do not already exist in the statute, *Sandoval,* 532 U.S. at 291, although agency regulations are enforceable if they merely implement the statute. *Global Crossing,* 550 U.S. at 59. While critical elsewhere, this regulatory-statutory distinction does not affect Plaintiffs' constitutional standing.

As indicated above, Spending-Clause legislation such as Title IX allows beneficiaries to enforce funding recipients' obligations as third-party beneficiaries. *Barnes v. Gorman,* 536 U.S. 181, 186 (2002). Thus, to the extent that beneficiaries depend on the University's obligations to federal agencies, beneficiaries' rights are subject to the same conditions as the rights of those federal agencies. RESTATEMENT (SECOND) OF CONTRACTS §304 comment b ("right of the beneficiary, like that of the promisee, may be conditional"); *Rawson,* 495 U.S. at 375 (quoted *supra*); *Spinks,* 171 Cal.App.4th at 1024 (quoted *supra*).[6] Under §302 of the

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[6] Under *Miree v. DeKalb County,* 433 U.S. 25, 28 (1977), federal courts look to state law for a third-party beneficiary's standing to enforce federal obligations. California follows the RESTATEMENT (SECOND) OF CONTRACTS on these issues. *Martinez v. Socoma Companies, Inc.,* 11 Cal.3d 394, 401-02, 404-05 (1974) (citing RESTATEMENT OF CONTRACTS and then-tentative drafts of the RESTATEMENT (SECOND) OF CONTRACTS); *Outdoor Services, Inc. v.*

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RESTATEMENT, a beneficiary of a promise is an "intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties" and "the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance." *Outdoor Services, Inc.,* 185 Cal.App.3d at (*quoting* RESTATEMENT (SECOND) OF CONTRACTS §302). That restriction is fatal to Plaintiffs' standing.

Under these basic legal principles, one who is not an intended beneficiary is a mere interloper who lacks standing to sue to enforce a contract between other parties. *More v. Churchill,* 155 Cal. 368, 369-70 (1909). Moreover, when a "contract is made to depend upon a condition precedent" and "[b]y its terms no right is to vest … until certain acts … have been done by [a party]," "a court of equity no more than a court at law will relieve [the party], under such circumstances … in the absence of an equitable showing to excuse his default." *Glock v. Howard &*

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Pabagold, Inc., 185 Cal.App.3d 676, 683-84 (Cal. App. 1986) (citing RESTATEMENT (SECOND) OF CONTRACTS).

Wilson Colony Co., 123 Cal. 1, 16-17 (1898). While ancient, these principles apply equally today and govern this litigation in two respects.

First, to have standing to enforce an agreement, a third party must be an intended beneficiary. *Karo v. San Diego Symphony Orchestra Ass'n,* 762 F.2d 819, 821-22 (9th Cir. 1985); *Garcia v. Truck Insurance Exchange,* 36 Cal.3d 426, 436-37 (1984). In the absence of DOE's actions on their administrative complaints, Plaintiffs might have appeared to be intended beneficiaries.[7] In the end, their beneficiary status does not matter because Plaintiffs fail the second criterion.

Second, the intended beneficiary must assert a vested right, *Karo,* 762 F.2d at 822 ("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

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[7] To be an intended beneficiary, a "third person need not be named or identified individually" but may instead "show[] that he is a member of a class of persons for whose benefit it was made." *Spinks,* 171 Cal.App.4th at 1023 (interior quotations omitted). On the contracting parties' intent to benefit the third party, it is enough that the promisor understood the promisee to have intended the benefit, and "a court may consider the subsequent conduct of the parties in construing an ambiguous contract." *Id.* at 1023-24.

because he had no vested rights." *Karo,* at 824. The question then, is do Plaintiffs have a vested right to enforce the regulations?

A "vested right" is one "not subject to a condition precedent." *In re Marriage of Bouquet,* 16 Cal.3d 583, 591 n.7 (1976); *Skookum Oil Co. v. Thomas,* 162 Cal. 539, 545 (1912) ("[n]either will equity relieve such [party] who … has not fulfilled conditions precedent to the vesting of his right of action"); *Knudson v. City of Ellensburg,* 832 F.2d 1142, 1147 (9th Cir. 1987). Given that DOE could not have brought this action without first completing the regulatory prerequisites to filing suit, 45 C.F.R. § 80.8(a), (d); 34 C.F.R. § 100.8(a), (d), this Court cannot conclude that either DOE or the University intended third-party beneficiaries to enforce the regulations without satisfying the regulatory prerequisites. Without meeting the conditions precedent, the Plaintiffs lack standing to enforce Title IX regulations.

Because this Court lacks jurisdiction over their regulatory claims, the Plaintiffs can assert a legally protected interest (if at all) only under Title IX's statutory protection against intentional gender-based

discrimination.[8] Because the University did not impose any gender-based criteria on who made the wrestling team, the University did not violate a legally protected interest under Title IX's *statutory* protections against gender-based discrimination. Of course, "if none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of [herself] or any other member of the class." *O'Shea v. Littleton,* 414 U.S. 488, 494 (1974). In sum, the Plaintiffs lack constitutional standing.

2. Plaintiffs Lack Constitutional Standing to Enforce Proportionality

Because the Title IX regulatory approach is based on the proportion (by gender) of full-time undergraduates at the University versus the proportion (by gender) of the athletic department, it is not sufficiently *individual* enough to constitute an injury in fact. Under this group-based standard, schools can satisfy proportionality by elevating

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[8] The Supreme Court's observations that Title IX has no administrative exhaustion or notice requirements apply to statutory violations, not regulatory ones. *See, e.g., Cannon v. Univ. of Chicago,* 441 U.S. 694, 706-08 (1979); *Jackson v. Birmingham Bd. of Educ.,* 544 U.S. 167, 182 (2005) (retaliation); *Fitzgerald,* 129 S.Ct. at 795 (harassment).

an entirely different team, without benefiting the complaining plaintiff at all. Indeed, Plaintiffs admit that Title IX protects individuals, whereas the regulations apply to "overall opportunities" in the athletic "program as a whole," not to "opportunities in a particular sport." Appellants Br. at 27-28.

To be sure, a plaintiff need not improve his or her station to redress an equal-protection injury:

> [W]hen the right invoked is that of equal treatment, the appropriate remedy is a mandate of *equal* treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class.

Heckler v. Mathews, 465 U.S. 728, 740 (1984) (emphasis in original, interior quotations omitted). But that form of equal-protection redress applies to regulations or laws that apply individually, across the board, to each members of the relevant class. Here, there are no individual rights, only group-based proportions that need not benefit the Plaintiffs or any other individual.

Nor can Plaintiffs cure their lack of standing by purporting to represent all women athletes, rather than merely women wrestlers. A collection of individuals without standing cannot aggregate to a group

with standing. *Pub. Citizen, Inc. v. NHTSA,* 489 F.3d 1279, 1294 (D.C. Cir. 2007). "The law of averages is not a substitute for standing." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.,* 454 U.S. 464, 489 (1982). Plaintiffs lack constitutional standing to enforce the proportionality-based Title IX regulations.

3. Plaintiffs Lack Statutory Standing under the Regulations if the Regulations Are Enforceable

This Circuit treats statutory standing as the "second part" of the standing inquiry, falling under failure to state a claim, not under subject-matter jurisdiction:

> If a plaintiff has shown sufficient injury to satisfy Article III, but has not been granted statutory standing, the suit must be dismissed under Federal Rule of Civil Procedure 12(b)(6), because the plaintiff cannot state a claim upon which relief can be granted.

Salmon Spawning & Recovery Alliance v. Gutierrez, 545 F.3d 1220, 1225 (9th Cir. 2008) (citing *Canyon County v. Syngenta Seeds, Inc.,* 519 F.3d 969, 975 n.7 (9th Cir.2008)). As such, this Court could avoid statutory standing if the Plaintiffs lack constitutional standing. *Paulsen v. CNF Inc.,* 559 F.3d 1061, 1073, 1075 (9th Cir. 2009); *cf. Potter v. Hughes,* 546 F.3d 1051, 1055 (9th Cir. 2008) (including statutory standing as one of the "non-constitutional grounds on which we may

dismiss a suit before considering the existence of federal subject matter jurisdiction"); *Ortiz v. Fibreboard Corp.,* 527 U.S. 815, 830-31 (1999) (courts may address statutory standing before constitutional standing).

The Supreme Court analogizes Spending-Clause programs to a contract struck between the government and recipients, with the public as third-party beneficiaries. *Gorman,* 536 U.S. at 186. To impose conditions on recipients, Congress must express statutory conditions unambiguously. *Id.* Provided that it receives that notice, the recipient becomes subject to enforcement for violations of the statute. 536 U.S. at 187-89. Federal agencies like DOE, of course, are bound by their own regulations and cannot enforce the regulations until they determine that compliance cannot be secured voluntarily, notifies the recipient of the planned action, and allows at least ten days to pass. 45 C.F.R. §80.8(d); 34 C.F.R. §100.8(d). Because the University and DOE achieved voluntary compliance, the conditions precedent to regulatory enforcement remain unmet, defeating statutory standing.

D. California Is Immune from Suit

As an arm of the State of California, the University and its officers generally are entitled to immunity from suit in federal court. U.S.

CONST. amend. XI. Congress has abrogated that immunity for Title IX actions. 42 U.S.C. §2000d-7(a). By it terms, however, that abrogation applies only to *statutory* violations. *Id.* Because they do not assert statutory Title IX claims, the Plaintiffs cannot rely on §2000d-7(a)'s abrogation of California's sovereign immunity.

E. Plaintiffs' Claims Lack Merit for Several Reasons Not Raised by University

If the Court rejects the foregoing threshold arguments that are either raised by the University (notice) or that this Court can consider *sua sponte* (standing and immunity), it should consider several merits-related arguments that support dismissal of the Plaintiffs' lawsuit for failure to state a claim.

1. Title IX's Application to Athletics Exceeds the Spending Clause's Authority

Although Congress may attach conditions on federal grants, "the financial inducement offered by Congress might be so coercive" as to be unconstitutional. *South Dakota v. Dole,* 483 U.S. 203, 210-11 (1987). Here, although Congress does not provide *any* funding for athletics, the Title IX regulations impose substantial federal control over athletics, backed by the threat of terminating *all* federal funds to the University. The Congresses that first adopted the Spending-Clause anti-

discrimination statutes understood that their conditions reached only the specific program or activity that the federal government directly funded. *Grove City College v. Bell,* 465 U.S. 555, 573-74 (1984). After the Supreme Court recognized that obvious limitation, Congress expanded Title IX's conditions institution-wide, over President Reagan's veto. 20 U.S.C. §1687. While politically popular for members of Congress who need not live with the details of implementing the athletics regime, such congressional overreaching is not constitutional.

2. *Sandoval* Denies a Cause of Action for Plaintiffs' Regulation-Based Litigation

Under *Sandoval,* 532 U.S. at 288-89, statutes like Title IX create an implied private right of action to enforce the statutory ban on 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 291 ("[l]anguage in a regulation may

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[9] It is "absurd to think that *Cannon* meant, without discussion, to ban under Title IX [§901(a)] the very disparate-impact discrimination that *Bakke* said Title VI [§601] permitted." *Sandoval,* 532 U.S. at 282 n.2. Whether one characterizes them as affirmative action, equal opportunity, or disparate impact, the requirements of the Three-Part Test and §41(c) clearly exceed the statutory prohibition. *Compare, e.g., Horner v. Kentucky High School Athletic Ass'n.,* 43 F.3d 265 (6th Cir.

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invoke a private right of action that Congress through statutory text created, but it may not create a right that Congress has not").

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 (here, §902) applies to the enforcing agencies, not individual beneficiaries or even the regulated recipients; and (3) the regulations themselves (even if they could create rights) do not create any individual rights, but instead confer group-wide benefits. *Sandoval,* 532 U.S. at 288-89; *Save Our Valley,* 335 F.3d at 935-37; *Three Rivers Ctr. for Indep. Living v. Hous. Auth. of City of Pittsburgh,* 382 F.3d 412, 419

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1995) (plaintiff failed to establish intentional discrimination) *with Horner v. Kentucky High School Athletic Ass'n,* 206 F.3d 685, 694 (6th Cir. 2000) (same plaintiff on same facts subsequently prevails by establishing violation of Title IX's regulatory "equal opportunity mandate" under the Three-Part Test). For example, a school could meet the intentional-discrimination statute by fielding only teams that generate enough revenue to pay their expenses (*e.g.,* only men's football or basketball), without imposing any gender-specific barriers to fundraising. While that school clearly would violate §41(c) and the Three-Part Test, it would not violate §901(a) or §41(a).

(3rd Cir. 2004) ("systemic legislation may in fact benefit a group of individuals [without] confer[ing] a personal right on those individuals").

Given the many steps of removal between the statute's prohibition against intentional gender discrimination and the equal-opportunity regulations, the Plaintiffs plainly seek to enforce §902, not §901(a). But even assuming *arguendo* that enforcing the regulations qualified as enforcing §901(a), the regulations themselves create systemic or group-wide requirements, not privately enforceable individual rights. *See Save Our Valley,* 335 F.3d at 937-38; *Three Rivers Ctr.,* 382 F.3d at 429-30. Thus, even under *their* interpretation of the regulations, the Plaintiffs fail to state a claim that is enforceable in federal court.

3. *Neal* Is Not the Law of this Circuit

Neither party questions the viability *Neal v. Bd. of Trustees,* 198 F.3d 763, 772-73 (9th Cir. 1999), which upheld the use of the Three-Part Test against men's wrestling under an intermediate-scrutiny analysis. As indicated above, Congress patterned Title IX on Title VI, a strict-scrutiny statute, and the legislative history rejects all gender-based "quotas," "ceilings," "even splits," "arbitrary ratios," and "specific percentage balances." *See* 117 Cong. Rec. 30,409, 39,251 39,259, 39,262

(1971); 118 Cong. Rec. 5812-13 (1972). Consistent with Title IX's legislative template and history, this Court found Title IX to be a strict-scrutiny statute. *Jeldness v. Pearce,* 30 F.3d 1220, 1227-28 (9th Cir. 1994). But *Neal* cannot control on the lawfulness of the Three-Part Test because its panel lacked power to overrule prior Circuit precedent on this point. *Atonio v. Wards Cove Packing Co., Inc.,* 810 F.2d 1477, 1478-79 (9th Cir. 1987) (*en banc*).

III. THIS COURT SHOULD AFFIRM DISMISSAL OF THE CONSTITUTIONAL CLAIMS

The district court dismissed Plaintiffs' constitutional claims under 42 U.S.C. §1983 as preempted by Title IX's implied private right of action. While this case was on appeal, the Supreme Court resolved a longstanding circuit split on that question in the favor of dual review under both Title IX and 42 U.S.C. §1983. *Fitzgerald v. Barnstable Sch. Comm.,* 129 S.Ct. 788, 795-96 (2009). Notwithstanding that the district court's *decision* was wrong, this Court can affirm the district court's *judgment* on any basis supported in the record. *Chevron,* 467 U.S. at 842; *E.P.I.C.,* 257 F.3d at 1075. Because the Plaintiffs' constitutional claim is baseless, this Court should dismiss it.

A. Standard of Review

Amicus curiae Eagle Forum ELDF agrees with the parties that this Court conducts *de novo* review of the district courts' rulings on motions to dismiss on the pleadings. Appellants' Opening Br., at 22; Appellees' Br. at 29; *accord Oregon Natural Desert Ass'n v. U.S. Forest Service,* 550 F.3d 778, 782 (9th Cir. 2008). This Court must affirm a judgment on the pleadings "when, taking all the allegations in the non-moving party's pleadings as true, the moving party is entitled to judgment as a matter of law." *Ventress v. Japan Airlines,* 486 F.3d 1111, 1114 (9th Cir. 2007) (interior quotations omitted). In addition, a "complaint must be dismissed" where "plaintiffs … have not nudged their claims across the line from conceivable to plausible." *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 570 (2007). For the reasons set forth in Section II.A, *supra,* moreover, the parties' agreement does not confer subject-matter jurisdiction on federal courts, and this Court has the obligation to dismiss for lack of subject-matter jurisdiction, even if the parties to do not raise the issue.

B. Plaintiffs Have No Constitutional Right to a Separate Team for their Gender

There is no *constitutional* right to a separate team for every sport played by the other gender. *Lavin v. Illinois High School Ass'n,* 527 F.2d 58, 60 (7th Cir. 1975); *Seamons v. Snow,* 84 F.3d 1226, 1234-35 (10th Cir. 1996); *Lowery v. Euverard,* 497 F.3d 584, 588 (6th Cir. 2007). If there were such a right, schools across the country could not eliminate men's track, swimming, and soccer teams while maintaining the counterpart women's teams under the Title IX proportionality regime that Plaintiffs advocate.[10] Instead, schools have the constitutional freedom to apportion their resources in a non-discriminatory manner of their choosing. *Epperson v. State of Arkansas,* 393 U.S. 97, 104-05 (1968). That a few women wish to wrestle does not elevate their relatively minor, unmet interest into a constitutional mandate,[11] which is where the federal courts' constitutional jurisdiction ends.

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[10] To recognize the Plaintiffs' perceived constitutional right would require recognizing the even-greater rights, based on higher interest and viability, in men's gymnastics, lacrosse, rowing, and volleyball, all sports that the University sponsors only for women.

[11] That a state school does not violate Title IX does not excuse it from constitutional review. *Mississippi Univ. for Women v. Hogan,* 458

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Citing Justice Stevens' in-chambers decision as a circuit justice, the Plaintiffs suggest that courts have "repeatedly upheld separate but equal athletic programs … as constitutionally permissible." Appellants' Br. at 58.[12] Even if the cases supported Plaintiffs, "it is important to distinguish between what the Constitution permits and what it requires." *Gannett Co., Inc. v. DePasquale,* 443 U.S. 368, 385 (1979). To state a claim for constitutional gender discrimination, Plaintiffs must show actions taken *because of gender,* not those *in spite of gender. Pers. Adm'r v. Feeney,* 442 U.S. 256, 279 (1979). Because the Plaintiffs have neither made that constitutional showing nor even plausibly alleged it, *Twombly,* 550 U.S. at 570, dismissal is required.

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U.S. 718, 731-33 (1982). Similarly, that a state school complies with Title IX does not shield it from constitutional review. *U.S. v. Am. Library Ass'n,* 539 U.S. 194, 203 (2003). What Plaintiffs fail to grasp is that constitutional review looks only to *constitutional violations.*

[12] The Plaintiffs misleadingly suggest that Justice Stevens wrote for the Court. *See id.* Whatever precedential value his in-chambers decision has in the Seventh Circuit, it has none here. The few courts that have cited it relate to appellate stays. *See, e.g., Garcia-Mir v. Smith,* 469 U.S. 1311, 1313 (1985) (citing *O'Connor v. Board of Education,* 449 U.S. 1301, 1304 (1980) (Stevens, J., in chambers)).

C. Plaintiffs Lack Subject-Matter Jurisdiction to Assert their Constitutional Claims

Plaintiffs bear the burden of establishing subject-matter jurisdiction, which – with respect to claims for declaratory and injunctive relief – they cannot do for two reasons. ***First,*** their claims for injunctive and declaratory relief are moot because they no longer attend the University (*i.e.,* injunctive and declaratory relief no longer can redress their injuries). *Arizonans for Official English v. Arizona,* 520 U.S. 43, 66-67 (1997). ***Second,*** insofar as the University allowed them the opportunity to try out for the wrestling team, their failure to make the team could make it difficult for them to establish redressability, even if they still were students, *Steel Co.,* 523 U.S. at 105-06, assuming *arguendo* that a co-educational team is an appropriate remedy for a constitutional violation. *But see* Section III.E, *infra.* Thus, aside from money damages, Plaintiffs cannot recover on their perceived constitutional injuries.

D. California Is Immune from Suit under the Eleventh Amendment

Nothing in 42 U.S.C. §1983 or the Fourteenth Amendment waives California's immunity from suit under the Eleventh Amendment. As the University argues, its officers have immunity from claims for money

damages in their individual capacities, Univ. Br. at 32-39, and no liability at all in their official capacities. *Kentucky v. Graham,* 473 U.S. 159, 165-66 (1985). That leaves the Plaintiffs to the officer-suit fiction of *Ex parte Young,* 209 U.S. 123 (1908), to circumvent sovereign immunity by suing officers for prospective injunctive and declaratory relief to halt their alleged violations of the Constitution. Although such officer suits indeed circumvent sovereign immunity, they require an *ongoing* violation of federal law: "when there is no ongoing violation, the issuance of a declaratory judgment ... is barred." *Cardenas v. Anzai,* 311 F.3d 929, 936 (9th Cir. 2002); *accord Green v. Mansour,* 474 U.S. 64, 68 (1985); *Bank of Lake Tahoe v. Bank of America,* 318 F.3d 914, 918 n.4 (9th Cir. 2003). Because the University is not committing an ongoing constitutional violation, and *a fortiorari* the Plaintiffs are not suffering an ongoing constitutional injury, the Plaintiffs cannot resort to *Ex parte Young* to circumvent the University's sovereign immunity.

E. Co-Educational Teams Are Not Appropriate Remedies

As indicated in Section III.B, supra, the Plaintiffs have not stated a claim for a constitutional violation. If they had, a Court could not compel a school to create a co-educational team in a contact sport.

Requiring that men combat women in contact sports needlessly runs counter to deeply held moral views, recklessly exposes women athletes to injury because of men's greater strength and speed, and exacerbates and lowers the threshold for violence between the genders. Finally, recognizing the Equal Protection Clause as a nineteenth-century enactment, no-one can credibly argue that its framers intended to mandate co-educational wrestling.

CONCLUSION

For the foregoing reasons, *amicus curiae* Eagle Forum ELDF respectfully submits that this Court should affirm the denial of leave to amend as futile and affirm the dismissal of Plaintiffs' substantive claims for lack of subject-matter jurisdiction, under California's sovereign immunity, and for failure to state a claim.

Dated: May 1, 2009

Respectfully submitted,

/s/ Lawrence J. Joseph

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CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of May, 2009, I electronically filed the foregoing "Brief for *Amicus Curiae* Eagle Forum Education & Legal Defense Fund Filed in Support of Defendants-Appellees in Support of Affirmance," as an exhibit to the accompanying motion, with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I further certify that, on that date, the appellate CM/ECF system's service-list report did not show any participants in the case as unregistered for CM/ECF use.

/s/ Lawrence J. Joseph

Lawrence J. Joseph