No. 10-3595

# United States Court of Appeals for the Seventh Circuit

AMBER PARKER, *ET AL.*,
*Plaintiff-Appellant,*

vs.

FRANKLIN COUNTY COMMUNITY SCHOOL CORPORATION, *ET AL.*,
*Defendants-Appellees,*

ON APPEAL FROM U.S. DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA, CIVIL ACTION NO. 09-CV-00885, HON. WILLIAM T. LAWRENCE

## SUPPLEMENTAL BRIEF OF *AMICUS CURIAE* EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND

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## CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 10-3595

Short Caption: Amber Parker et al. v. Indiana High School Athletic Ass'n et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** [X] **No** [ ]

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## IDENTITY, INTEREST AND AUTHORITY TO FILE

*Amicus curiae* Eagle Forum Education & Legal Defense Fund ("Eagle Forum"), a nonprofit Illinois corporation, seeks leave to file this supplemental brief for the reasons outlined in the accompanying motion. Consistent with FED. R. APP. P. 29(c)(5), the undersigned counsel certifies that: counsel for *amicus* authored this brief in whole; no counsel for a party authored this brief in any respect; and no person or entity – other than *amicus*, its members, and its counsel – made a monetary contribution to the preparation or submission of this brief.

## INTRODUCTION

The Court's post-argument order requests briefing on three issues:

1. Whether the plain statement doctrine as articulated in *Sossamon v. Texas,* 131 S.Ct. 1651 (2011), and earlier decisions has any bearing on the correct outcome of this case;

2. Whether the defendants have preserved any argument based on the plain statement doctrine articulated in *Sossamon* and its predecessors; and

3. The bearing on the Eleventh Amendment question of *Regents of the University of California v. Doe,* 519 U.S. 425 (1997), and other decisions such as *Lapides v. Bd. of Regents of Univ. System of*

*Georgia,* 535 U.S. 613 (2002).

Sections I and II, *infra,* address the first two of these issues in sequence. Eagle Forum's views on the third issue do not differ from those that the school appellees (collectively, "Schools") addressed in their supplemental brief. Before addressing the first two issues, however, *amicus* Eagle Forum provides background relevant to analyzing regulatory versus statutory claims under Title IX. The regulatory-statutory distinction is critical both to the notice issue under *Sossamon* and to the immunity issue under the Eleventh Amendment.

## STATUTORY AND REGULATORY 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, 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.

To prove intentional discrimination, Plaintiffs must prove "more than intent as volition or intent as aware of consequences" and instead

must prove "that the decisionmaker ... selected or reaffirmed a course of action at least in part 'because of,' not merely 'in spite of' its *adverse* effects upon an identifiable group." *Pers. Adm'r v. Feeney,* 442 U.S. 256, 279 (1979) (emphasis added); *accord Franklin v. City of Evanston,* 384 F.3d 838, 846 (7th Cir. 2004).

In *Cannon v. Univ. of Chicago,* 441 U.S. 694 (1979), the Supreme Court recognized an implied private right of action to enforce purely statutory violations of Title IX. By contrast, purely regulatory provisions that go beyond the statute's intentional discrimination to prohibit or require more than the statute prohibits are not privately enforceable at all. *Sandoval,* 532 U.S. at 291 ("Agencies may play the sorcerer's apprentice but not the sorcerer himself"). Complicating that analysis is the possibility that a regulation may interpret statutory discrimination, in which case an action to enforce a regulation *could* fall within an action to enforce the statute.

At oral argument, Judge Wood suggested that the boys' 95-percent primetime levels constituted clear *statutory* discrimination, compared with the girls' 50-percent primetime levels. *Amicus* Eagle Forum respectfully submits that that approximately two-to-one ratio (2:1) does

not demonstrate discrimination *because of sex*. In *Feeney,* the passed-over civil servant alleged that Massachusetts' veteran-preference law for civil-service promotions and hiring constituted sex discrimination. Although women then represented less than two percent of veterans, *Feeney,* 442 U.S. at 270 n.21, Massachusetts did not discriminate *because of sex* when acting because of another criterion (veteran status). *Id.* at 272. With women then constituting two percent of all veterans, men were *fifty times* more likely (50:1) to benefit from the challenged law. While it *could* result from outright sex discrimination, Plaintiffs' 2:1 disparity also could result from a variety of other, *statutorily* permissible criteria (*e.g.,* existing contracts, students' preferences, other scheduling obligations, etc.). Like Massachusetts, the Schools here acted *because of* permissible criteria, and that does not violate Title IX, even if it arguably violates Title IX's equal-opportunity regulations.

## I. *SOSSAMON* NOTICE ISSUES REQUIRE DISMISSAL

*Sossamon* upholds, in the context of an alleged waiver of sovereign immunity, the principle that Congress must express any conditions attached to federal funds unambiguously before courts enforce those conditions under the Spending Clause. *Sossamon,* 131 S.Ct. at 1661

(requiring "clear statement"); *accord* Eagle Forum *Amicus* Br. at 12 (citing *Barnes v. Gorman,* 536 U.S. 181, 186 (2002)). *Sossamon* clarifies 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 in original).

### A. The Regulations Are Not Enforceable beyond the Statute's Prohibiting Intentional Sex Discrimination

To the extent that they go further than prohibiting intentional discrimination on the basis of sex, Title IX's regulations are unenforceable under *Sossamon* against *any* federal recipient for two reasons: (1) the regulations themselves say so, and (2) the Supreme Court has held that Congress said so.[1] Thus, notwithstanding any appellate "Title IX lore" from the federal Courts of Appeals, both the clear-notice holding of the *Sossamon* line of cases and the express holding of the *Sandoval* line of cases compel dismissal of this action. As Chief Judge Easterbrook observed at oral argument, this Court should follow the Supreme Court, not the Courts of Appeals.

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[1] Section I.B, *infra,* demonstrates that arms of the State have a third argument for dismissal, based on sovereign immunity.

As explained in the Eagle Forum *Amicus* Brief (at 9-10), the regulations themselves prohibit regulatory enforcement by any "means authorized by law" until regulatory preconditions have been met:

> *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).[2] Assuming *arguendo* that this lawsuit even is "authorized by law," it nonetheless is premature for failure to meet these regulatory preconditions to regulatory enforcement. Thus, far from *failing to provide clear notice* that the Schools might face regulatory enforcement here, the regulations *provide clear notice* that the Schools will *not* face

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[2] The Title IX regulations incorporate these Title VI procedures by reference. 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).

such enforcement. This lawsuit turns *Sossamon* on its head.[3]

At oral argument, Chief Judge Easterbrook expressed concern that "equal athletic opportunity" and its particular application to scheduling was too loose a standard under *Sossamon* to put recipients on notice of their potential obligations or violations. While that certainly is true, perhaps the regulations' structure best answers that concern. The regulations expressly require that the relevant funding agency advise the school of its violation at least ten days prior to taking any "action authorized by law" to effectuate compliance. Without that notice, neither *Sossamon* nor the regulatory preconditions to enforcement have been met.

Even if the regulations did not expressly prohibit this litigation, the Supreme Court's decision in *Sandoval* does. As this Court explained, the *Sandoval* plaintiff sought to enforce regulations that "forbade funding recipients from utiliz[ing] criteria or methods of

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[3] 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,* 441 U.S. at 706-08; *Jackson v. Birmingham Bd. of Educ.,* 544 U.S. 167, 182 (2005) (retaliation); *Fitzgerald v. Barnstable Sch. Comm.,* 129 S.Ct. 788, 795 (2009) (harassment).

administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin." *Indiana Protection & Advocacy Services v. Indiana Family & Social Services Admin.,* 603 F.3d 365, 376 (7th Cir. 2010) (internal quotations omitted, alteration in original). Even with that direct regulatory link to "discrimination," the Supreme Court found no implied right of action because "statutes that focus on the person regulated rather than the individuals protected create 'no implication of an intent to confer rights on a particular class of persons.'" *Sandoval,* 532 U.S. at 289 (*quoting California v. Sierra Club,* 451 U.S. 287, 294 (1981)).

Indeed, *Sandoval* found that congressional intent appears to *prohibit* private regulatory enforcement:

> Nor do the methods that § 602 goes on to provide for enforcing its authorized regulations manifest an intent to create a private remedy; if anything, they suggest the opposite. Section 602 empowers agencies to enforce their regulations either by terminating funding to the "particular program, or part thereof," that has violated the regulation or "by any other means authorized by law[.]" No enforcement action may be taken, however, "until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means." … Whatever these elaborate restrictions

> on agency enforcement may imply for the private enforcement of rights created outside of § 602, *compare Cannon v. University of Chicago, supra,* at 706, n. 41, 712, n. 49, they tend to contradict a congressional intent to create privately enforceable rights through § 602 itself. *The express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others.*

*Sandoval,* 532 U.S. at 289-90 (citations omitted, emphasis added).

As the Schools note, the *Sossamon* notice issue extends to the definition of what constitutes *discrimination*: "[t]he requirement that recipients receive adequate notice of Title IX's proscriptions also bears on the proper definition of 'discrimination' in the context of a private damages action." Schools' Suppl. Br. at 3 (*quoting Davis v. Monroe County Bd. of Educ.,* 526 U.S. 629, 649 (1999)). For example, in *Grandson v. University of Minnesota,* 272 F.3d 568, 571-72 (8th Cir. 2001), the Eighth Circuit relied on a lack of notice under *Gebser v. Lago Vista Ind. Sch. Dist.,* 524 U.S. 274, 284, 288-90 (1998), to dismiss a Title IX disparate -treatment action by women soccer players.

Here, the regulation in question does not even purport to define discrimination. Instead, Section 41(a) prohibits discrimination in athletics, and Section 41(c) requires equal athletic opportunity.

*Compare* 45 C.F.R. §86.41(a) *with* 45 C.F.R. §86.41(c); 34 C.F.R. §§106.41(a), (c) (same). Mandating equal opportunity differs profoundly from prohibiting intentional discrimination. *Horner v. Kentucky High Sch. Athletic Ass'n,* 206 F.3d 685, 694 (6th Cir. 2000) (distinguishing the regulations' equal-opportunity provisions from intentional discrimination). School have many possible reasons for disparate schedules – *e.g.,* existing contracts, community interest, other scheduling obligations, the athletes' desires – that do not constitute statutory discrimination *because of* sex. Title IX does not *statutorily* prohibit disparate scheduling that impacts girls (or boys) without singling them out *because of sex.*

### B. The Waiver of Sovereign Immunity Applies Only to Statutory Violations and Not to Regulatory Violations

Under 42 U.S.C. §2000d-7(a)(1), "State[s] shall not be immune under the Eleventh Amendment… from suit in Federal court for a violation of… [T]itle IX … or the provisions of *any other Federal statute* prohibiting discrimination by recipients of Federal financial assistance" (emphasis added). Particularly in light of the *Sandoval* distinction between regulatory and statutory actions, the foregoing waiver of sovereign immunity – with its focus on "Federal statutes" – cannot be

read as an unambiguous waiver of sovereign immunity for *regulatory* challenges: "where a statute is susceptible of multiple plausible interpretations, including one preserving immunity, [courts] will not consider a State to have waived its sovereign immunity." *Sossamon,* 131 S.Ct. at 1659. Thus, if the Schools are arms of the State, this Court must dismiss the Title IX claims on sovereign-immunity grounds.

### C. The Plaintiffs' Regulatory Cherrypicking Cannot Stand under the Spending Clause

As indicated in the prior section, the Title IX regulations plainly put schools on notice that *no-one* – not the United States as promisee and not students as third-party beneficiaries – will enforce the regulations without regulatory conditions precedent to regulatory enforcement. While plaintiffs *generally* cannot cherrypick a law to enforce only their favored provisions, *Sossamon* gives Spending-Clause plaintiffs even less right to cherrypick form the legal provisions that govern a recipient's bargain with the federal government.

As the Supreme Court recently held in the context of qualified immunity, courts cannot cherrypick in support of plaintiffs in doctrinal areas that require concern for defendants. *Ashcroft v. al-Kidd,* 131 S.Ct. 2074, 2085 (2011) ("Qualified immunity gives government officials

breathing room to make reasonable but mistaken judgments about open legal questions"). While qualified immunity and the Spending Clause's clear-notice rule differ, they both counsel against allowing plaintiffs to use expansive interpretations to extend liability as the plaintiffs do here. Similarly, and even if the Schools are only subdivisions (*i.e.,* not arms of the State), "[t]he distinction between an intention to benefit a third party and an intention that the third party should have the right to enforce that intention is emphasized where the promisee is a governmental entity." *Astra USA, Inc. v. Santa Clara County, Cal.,* 131 S.Ct. 1342, 1348 (2011) (*quoting* 9 J. Murray, Corbin on Contracts §45.6, p. 92 (rev. ed. 2007)). For all of these reasons, the Plaintiffs cannot show the requisite congressional intent that private plaintiffs can enforce the regulations under the circumstances here.

## II. THIS COURT CERTAINLY *CAN* AND ARGUABLY *MUST* ADDRESS *SOSSAMON* NOTICE ISSUES

The Schools argue that they raised the *Sossamon* clear-notice rule in both the district court and this Court. Schools' Suppl. Br. at 7-8. As outlined above, *amicus* Eagle Forum raised several additional arguments not raised by the Schools, which also fall under the clear-notice rubric of *Sossamon*. As to the arguments that the Schools made,

the Schools of course preserved those arguments. In this Section, *amicus* Eagle Forum argues that this Court also may consider arguments that the Schools *did not raise.*

### A. Schools' Non-Vested Obligations to the United States Are *Jurisdictionally* Unenforceable by these Plaintiffs as Third-Party Beneficiaries

Whether this action presents a purely regulatory claim or a mixed regulatory-statutory claim, the regulations themselves prohibit enforcement by any means until the satisfaction of the regulatory preconditions to suit. *See* Section I.A, *supra;* Eagle Forum *Amicus* Br. at 12-19; 45 C.F.R. §§80.8(d), 86.71; 34 C.F.R. §§100.8(d), 106.71. Under the circumstances, the United States itself could not bring this lawsuit to enforce its regulations as the promisee.

Third-party beneficiaries "generally have no greater rights in a contract than does the promise[e]." *United Steelworkers of Am. v. Rawson,* 495 U.S. 362, 375 (1990); *Holbrook v. Pitt,* 643 F.2d 1261, 1273 n.24 (7th Cir. 1981) ("tenants, as third-party beneficiaries, are bound by the terms and conditions of the Contracts"). Under the circumstances, *amicus* Eagle Forum respectfully submits that the Plaintiffs lack both statutory and constitutional standing to proceed with this litigation.

Under Title VII, such pre-litigation notice is a procedural prerequisite to suit, *Zipes v. Trans World Airlines, Inc.,* 455 U.S. 385, 398 (1982), while environmental statutes require such notice "to give … an opportunity to bring [the alleged violator] 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). At a minimum, the lack of such notice means that "citizens lack statutory standing … to sue for violations that have ceased by the time the complaint is filed." *Id.* at 175. Even a lack of statutory standing is fatal here because "both Article III and statutory standing requirements must be satisfied." *Frey v. E.P.A.,* 270 F.3d 1129, 1136 (7th Cir. 2001). By failing to meet a precondition of the very regulations that they seek to enforce, the Plaintiffs plainly lack statutory standing.

But even if unmet conditions precedent implicated only statutory standing *for federal agencies,* it nonetheless implicates constitutional standing for third-party beneficiaries, who lack standing to enforce non-vested claims. *OEC-Diasonics, Inc. v. Major,* 674 N.E.2d 1312, 1314-15 (Ind. 1996) ("intent of the contracting parties to bestow rights upon a

third party must affirmatively appear from the language of the instrument when properly interpreted and construed") (internal quotations omitted); *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); Eagle Forum *Amicus* Br. at 17 (collecting cases). As third-party beneficiaries, Plaintiffs would lack standing to enforce the United States' non-vested rights.

At oral argument, Plaintiffs admitted that schools *can* satisfy Title IX's regulations by benefiting other facets of the girls' program, without changing the girls' basketball schedule at all.[4] Under both *Sandoval* and Indiana law, such group-based requirements do not rise to the level of enforceable rights at all. *Luhnow v. Horn,* 760 N.E.2d 621, 628-29 (Ind. App. 2001) (requiring a "*direct* benefit" to Plaintiffs) (emphasis added); Eagle Forum *Amicus* Br. at 18. Plaintiffs' admission is fatal to their standing because those "not parties or third-party beneficiaries … do not have standing to enforce the terms of [an] agreement." *U.S. v.*

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[4] Citing an extra-circuit decision and regulatory interpretations, the Plaintiffs argued at oral argument that the Schools bear the burden of proof on this issue. However true that may be under the regulations, the regulatory preconditions to enforcement have not been met here, which makes the regulations and regulatory interpretations irrelevant.

*Andreas,* 216 F.3d 645, 664 (7th Cir. 2000). Plaintiffs do not even qualify as third-party beneficiaries and so lack standing.

### B. Schools May Raise Sovereign-Immunity Arguments at Any Stage of the Proceedings

Federal courts may ignore sovereign immunity until a State asserts it. *Wisconsin Dep't of Corrections v. Schacht,* 524 U.S. 381, 389 (1998). Once a State asserts its immunity, however, even on appeal, courts must respect the Eleventh Amendment's limitation on their power. *Edelman v. Jordan,* 415 U.S. 651, 678 (1974). Indeed, sovereign-immunity arguments blend with the redressability prong of Article III standing because – unlike most elements of a federal judgment – the immunity question is one that a State can challenge collaterally in a subsequent proceeding to enforce the judgment. *Travelers Indem. Co. v. Bailey,* 129 S.Ct. 2195, 2205-06 & n.6 (2009). A judgment open to collateral attack cannot redress anything until that collateral attack is resolved in the plaintiff's favor.

### C. Even if Not Jurisdictional, the *Sossamon* Notice Issues Are Decidable in this Appeal

Assuming *arguendo* that this Court finds the *Sossamon* notice issue waiveable, this Court nonetheless may rely on this issue in deciding this appeal. Procedurally, if the Court reverses the district

court's grant of summary judgment, it nonetheless should remand the case to the district court to resolve the case. On remand, the Schools would be free to raise the *Sossamon* notice issue, which would bring the issue back to this Court in a second appeal. Rather than allow that circuitous – and wasteful – path, this Court can resolve the issue now:

> The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases.

*Singleton v. Wulff,* 428 U.S. 106, 120-21 (1976). For example, an appellate court may resolve an issue not decided by the district court where "the proper resolution [of that issue] is beyond any doubt." *Id.* at 121. *Amicus* Eagle Forum respectfully submits that the *Sossamon* clear-notice rule falls within the Court's discretion to resolve and that this Court should exercise that discretion to resolve the issue here.

In exercising its discretion under *Singleton,* this Court has "resolved issues which were not resolved below where, *inter alia,* both parties have briefed and argued [the issue's] merits, and where the benefit of a district court hearing is minimal because proper resolution of the issue is clear." *AAR Intern., Inc. v. Nimelias Enterprises S.A.,* 250

F.3d 510, 523 (7th Cir. 2001) (interior quotations omitted, alterations in original). In addition, appellate courts may consider issues of "judicial economy." *Id.* In "determin[ing] whether the resolution of this issue is sufficiently clear to permit [deciding] it instead of remanding it," this Court may first "determine what legal standards govern a court's analysis" of the issue. *AAR Intern.,* 250 F.3d at 524. Thus the question of when "proper resolution of the issue is clear" is not the same as whether a court can *easily* resolve the issue without serious thought.

For example, in *AAR Intern,* this Court resolved an issue on which the circuits were split where the "issue was fully briefed by both of the parties on appeal, the resolution of the issue is clear, and the dispositive issue … is a question of law which we review *de novo*." *AAR Intern.,* 250 F.3d at 526-27. Notwithstanding the need to analyze the threshold legal standard, this Court found that "nothing would be gained by remanding this issue to the district court for further consideration." *Id.* Similarly here, this Court should resolve a purely legal issue that the parties now have briefed on appeal and on which the district court's views would be irrelevant to this Court's *de novo* review.

Dated: June 14, 2011

Respectfully submitted,

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## CIRCUIT RULE 31(e)(1) CERTIFICATION

The undersigned hereby certifies that, pursuant to Circuit Rule 31(e), this brief has been filed electronically.

Dated: June 14, 2011

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

1. The Court's Order requesting supplemental briefing by the parties did not set a type-volume limitation. This brief contains 4,641 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii) and Circuit Rule 32.2.

2. The foregoing brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in Century Schoolbook 14-point font.

Dated: June 14, 2011

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