NO. 16-4505

In the
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

ELIZABETH FRYBERGER,
Plaintiff-Appellee
v.
THE UNIVERSITY OF ARKANSAS
and
THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ARKANSAS
Defendants – Appellants

On Appeal from the United States District Court
For The Western District of Arkansas
Case No. 5:16-CV-5224 PKH

BRIEF OF THE STATES OF ARKANSAS, ARIZONA, KANSAS, LOUISIANA, NEBRASKA, SOUTH CAROLINA AND TEXAS AS AMICI CURIAE

In Support of Appellants and in Support of Reversal

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STATEMENT OF AMICI CURIAE

This amicus brief is submitted on behalf of the States of Arizona, Arkansas, Kansas, Louisiana, Nebraska, South Carolina and Texas, which are authorized to file an amicus-curiae brief without consent of the parties or leave of court pursuant to Rule 29(a)(2) of the Federal Rules of Appellate Procedure. The Amicus States are interested in this case because it involves substantial issues of sovereign immunity. This Court's decision will be controlling authority for two of the Amicus States.

ARGUMENT

Elizabeth Fryberger asks for an award of damages based on an alleged violation of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq*. The parties appear to agree that the University of Arkansas and its Board of Trustees are instrumentalities of the State of Arkansas, ordinarily immune from federal suits for money damages. Ms. Fryberger argued in the District Court that section 1003 of the Rehabilitation Act Amendments of 1986[1] strips the States' immunities to damages in cases brought under Title IX.

The U.S. Supreme Court has never directly addressed the issue raised by the parties to this case, but fundamental principles of sovereignty, and decisions examining similar legislation, provide the analytical framework. These principles establish that damages are not available against a state unless Congress has clearly expressed in the law's text an intent to allow damages against a state. Neither Title IX nor 42 U.S.C. § 2000d-7 establishes a damages remedy applicable to states or, for that matter, non-state entities. How, then, can damages be available in a private action brought against a State under Title IX?

[1] 42 U.S.C. § 2000d-7.

I. **The States are Immune from Private Damages Suits Absent Their Consent or a Valid Act of Congress Clearly Expressing an Intent to Abrogate Immunity**

When the United States Constitution was ratified "the doctrine that a sovereign could not be sued without its consent was universal." *Alden v. Maine*, 527 U.S. 706, 715 (1999). The States entered the Union "with their sovereignty intact." *Blatchford v. Native Village of Noatak and Circle Village*, 501 U.S. 775, 779 (1991).

The Federal Government's power to exercise authority over the States is limited by the Constitution. The Constitution "reserves to [the States] a substantial portion of the Nation's primary sovereignty, together with the dignity and essential attributes inhering in that status." *Alden*, 527 U.S. at 714.

> [E]ven as to matters within the competence of the National Government, the constitutional design secures the founding generation's rejection of "the concept of a central government that would act upon and through the States" in favor of "a system in which the State and Federal Governments would exercise concurrent authority over the people—who were, in Hamilton's words, "the only proper objects of government."

Id. Immunity from private suits lies at the heart of this sovereignty. *Id.* at 715. More particularly, protection from levies against the public fisc is the "primeval sovereign right" secured by immunity. *Alabama v.*

North Carolina, 560 U.S. 330, 341 (2010). This means that the States decide where and how to resolve claims against them. "[T]here is no color to pretend that the State governments would, by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith." *Alden* 527 U.S. at 717 (quoting Alexander Hamilton in *The Federalist No. 81*).

The States' immunities from suit in federal court have two sources: the Eleventh Amendment and "the structure of the original Constitution itself." *Alden*, 527 U.S. at 728. The Eleventh Amendment, of course, deprives the federal courts of jurisdiction over un-consenting states unless Congress, pursuant to a valid exercise of power, unequivocally expresses its intent to subject the States to jurisdiction. *See Green v. Mansour*, 474 U.S. 64, 68 (1985).

The second form of immunity is separate and apart from the Eleventh Amendment. *Alden*, 527 U.S. at 728. This immunity is broader than the Eleventh Amendment's jurisdictional prohibition; it protects un-consenting States from private claims in state or federal courts. *Id.* at 754.

Exceptions to the States' immunities are few and narrow. For example, under a judicially created Eleventh Amendment exception, a federal court may exercise jurisdiction over a state official (but not the State) in order to prospectively enjoin actions that are contrary to the U.S. Constitution. *Ex parte Young*, 209 U.S. 123 (1908). But the Court has been careful to rule out damages in these cases. So, for instance, retrospective relief is not available when it is "in practical effect indistinguishable in many aspects from an award of damages against the State," even though the remedy is described as equitable. *Edelman v. Jordan*, 415 U.S. 651, 668 (1974). Nor may a court issue a declaratory judgment finding that a State's past conduct was unlawful, because such a judgment might have a preclusive effect in another forum, effecting a "partial 'end run'" around the decision in *Edelman*. *Green*, 474 U.S. at 73.

Title IX is so-called spending-clause legislation – it purports to bind only programs or activities receiving federal assistance. 20 U.S.C. § 1681(a). Spending-clause legislation can exact a waiver of immunity in exchange for receiving federal funds. The constitutional principle is that, by receiving federal funds, a state may consent to suit. But a

state's participation in federal programs does not, without more, establish consent to be sued in the federal courts. *Edelman*, 415 U.S. at 673. The obligations imposed by accepting federal money must be unambiguously imposed by Congress. *Barnes v. Gorman*, 536 U.S. 181, 186 (2002). More specifically, spending-clause legislation does not exact a waiver of damages immunity unless "Congress has given clear direction that it intends to *include* a damages remedy." *Sossaman v. Texas*, 563 U.S. 277, 289 (2011) (emphasis in original). Title IX contains no such clear direction.

Section 1003 of the Rehabilitation Act Amendments of 1986 purports to waive the States' jurisdictional Eleventh Amendment immunity in Title IX cases. 42 U.S.C. § 2000d-7(a). The Eleventh Amendment's jurisdictional bar is not at issue in this appeal, however. Although Congress specifically mentioned the Eleventh Amendment, it has not made any express reference to the States' separate sovereign immunity or to damages.

II. Congress did not Unambiguously Subject the States to Monetary Damages for Violations of Title IX

The District Court held that the State of Arkansas is not immune from a private suit for damages pursuant to Title IX. J.A. 39. The District Court found a waiver of immunity from two sources: 42 U.S.C. § 2000d-7, and the holding in *Franklin v. Gwinnett Cty. Pub. Schs.*, 503 U.S. 60 (1992). But these authorities do not address a state's immunity from money damages when they participate in Title IX programs.

A. Title IX does not clearly waive the States' immunity.

As enacted, the text of Title IX provides neither a private right of action nor a damages remedy – only federal administrative enforcement is addressed. 20 U.S.C. §§ 1682, 1683. The private right now recognized for Title IX arose from judicial construction, not the text of the law. *Cannon v. University of Chicago*, 441 U.S. 677 (1979). The defendant in *Cannon* was a private university, and so sovereign immunity was not at issue.

A private right to damages in Title IX was recognized by the Supreme Court in 1992, when the Court found that a school district could be liable for damages to a private citizen. *Franklin*, 503 U.S. 60.

The Court did not find a right to damages from the text of Title IX; it presumed that, "absent a contrary indication in the text or history of the statute," Congress had in mind the traditional rule that federal courts have the power to award "any appropriate relief in a cognizable cause of action brought pursuant to a federal statute." *Id.* at 70-73. "Appropriate relief," the Court said, includes damages. Sovereign immunity was not at issue in *Franklin* because local school districts are not entitled to the same immunity as the States. *See Miener v. State of Missouri*, 673 F.2d 969, 980 (8th Cir. 1982).

As enacted, neither Title IX nor the Rehabilitation Act of 1973 addressed the Eleventh Amendment, or any other issue of sovereignty. In *Atascadero State Hosp. v. Scanlon*, the Supreme Court found that the Eleventh Amendment prohibited a suit against a State under the Rehabilitation Act, 29 U.S.C. § 791, *et seq.* The Court held that Congress did not make it unmistakably clear that it intended to subject states to federal-court jurisdiction. 473 U.S. 234 (1985). Like Title IX, the Rehabilitation Act is spending-clause legislation.

In an apparent reaction to *Atascadero*, Congress passed 42 U.S.C. § 2000d-7. Sub-section (a)(1) of section 2000d-7 provides that "[a] State

shall not be immune under the Eleventh Amendment" to a suit brought under specified legislation, including the Rehabilitation Act and Title IX. 42 U.S.C. § 2000d-7(a)(1). While this language addresses the Eleventh Amendment jurisdictional issue, it does not mention the States' separate immunity – and particularly their immunity from damages.

The only potential textual source of an immunity waiver applicable to Title IX – 42 U.S.C. §2000d-7(a)(2) – provides that:

> In a suit against a State for a violation of a statute referred to in paragraph (1), remedies (including remedies at law and in equity) are available to the same extent as such remedies are available in the suit against any public or private entity other than a state.

The quoted subparagraph *mentions* states, but it does not expressly provide a damages remedy or override the States' separate sovereign immunity under any of the statutes mentioned in subsection 2000d-7(a)(1).

The Supreme Court addressed section 2000d-7 in the context of the Rehabilitation Act in *Lane v. Pena,* 518 U.S. 187 (1996).[2] The *Lane*

[2] *Lane* involved a claim of federal sovereign immunity, but the same principles apply to the States. *See Sossaman,* 563 U.S. at 285 n.4.

Court applied the clear statement rule to the federal government, reiterating that a Congressional waiver of sovereign immunity must be unequivocally expressed in the statutory text. *Id.* at 192. The Court rejected the argument that the Rehabilitation Act Amendments expressed a waiver of the government's immunity from damages. And the Court noted a lack of clarity in section 2000d-7(a)(2), finding it to be subject to at least two inconsistent interpretations. "[I]f the same remedies are available against all governmental and non-governmental defendants under § 504(a) [of the Rehabilitation Act], the 'public or private' language is entirely superfluous" and "[t]he fact that §1003(a)(2)[3] itself separately mentions public and private entities suggests there is a distinction to be made in terms of the remedies available against the two classes of defendants." *Lane*, 518 U.S. at 199-200. The Court observed that the existence of two possible interpretations means the statute lacks the clear statement required to subject the federal government to an award of damages. *Id.* at 200. The same principle applies here: at best, the remedies available against

[3] 42 U.S.C. 2000d-7(a)(2)

states under 2000d-7 are ambiguous. The text of the law does not expressly make damages available against sovereign states.

Recently, in the *Sossaman* case, the Supreme Court examined the States' immunity from damages under another spending-clause act, the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc, *et seq*. RLUIPA's remedy provision is more specific than Title IX – it explicitly provides for "appropriate relief against a government" rather than leaving the remedy to implication. *Sossaman*, 563 U.S. at 281-281. RLUIPA defines "government" to include a state.

The *Sossaman* Court rejected the argument that this language provided the clear statement of intent required to subject a state to damages. The Court found the term "appropriate relief" open-ended and ambiguous, and given "multiple plausible interpretations," RLUIPA would not be interpreted to include waiver of a States' immunity from damages. 563 U.S. at 286-287. Moreover, the use of the phrase "appropriate relief" in *Franklin* did not properly put the States on notice that the use of the same phrase in RLUIPA would subject them to suits for monetary damages. *Sossaman*, 563 U.S. at 289 n.6.

Title IX does not go as far as RLUIPA in defining a party's rights against a state. But even if Title IX specified that private parties may have "appropriate relief" against a state, Arkansas would be immune from damages liability, because *Sossaman* teaches that this is not a sufficiently clear statement of intent to waive such immunity.

The only right to damages under Title IX is the implied right to "appropriate relief" against a non-sovereign. *Franklin*, 503 U.S. at 68 (concluding that, under the Court's longstanding default rule regarding the extent of available remedies, "all appropriate relief is available in an action brought to vindicate a federal right when Congress has given no indication of its purpose with respect to remedies."). Unlike RLUIPA, the concept of "appropriate relief" cannot be found in the text of Title IX or any statute that cross-references it. An express waiver of immunity to damages cannot be gleaned from such a judicially implied remedy.

In summary, neither Title IX, nor 42 U.S.C. § 2000d-7, provides for damages in private suits against the States. Congress clearly understood how to subject the States to federal jurisdiction – section 2000d-7 very plainly prescribes a waiver of the Eleventh Amendment

jurisdictional bar. But Congress did not address the States' separate immunity from damages. Consequently, the States are not subject to damage claims in cases brought under Title IX.

B. *Franklin* did not address immunity.

The District Court identified the *Franklin* case as a source of authority for Ms. Fryberger to side-step Arkansas' immunity. But the *Franklin* Court had no issue of state sovereign immunity before it because the defendant was a local school district, not a state.

In fact, to find *any* right to damages in Title IX, the Supreme Court applied the inverse of the clear statement rule: it assumed a right to "all appropriate relief" to fill the gap left by Congress. *Franklin*, 503 U.S. at 71. But that assumption can't apply when analyzing the immunity question because a waiver "must be unequivocally expressed in statutory text." *Lane,* 518 U.S. at 192.

In any event, *Franklin's* finding of a private damages remedy does not resolve the immunity issue because "when it comes to an award of money damages, sovereign immunity places the [States] on an entirely different footing than private parties." *Lane*, 581 U.S. at 196. "The presumption [of the availability of an appropriate remedy] is irrelevant

to construing the scope of an express waiver of sovereign immunity." *Sossaman*, 563 U.S. at 288. *Franklin* cannot be expanded beyond its precise holding – that non-sovereigns (such as public school districts and private entities) may be liable for money damages under Title IX. As the Court pointed out in *Sossaman*, the remedy crafted in *Franklin* does not supply the clear statement of Congressional intent required to overcome the States' sovereign immunity from damages claims. *Id.*

CONCLUSION

To overcome the States' sovereign immunity Congress must observe basic principles: it must act pursuant to a power conveyed by the Constitution, and the statutory text must make it clear that Congress intended to abrogate immunity. Where damages are claimed under spending-clause legislation, Congress must have left no doubt that it intended participating states to be liable for damages. But neither Title IX nor 42 U.S.C. 2000d-7 reveal an unambiguous intent to subject the States to damages. Accordingly, the judgment of the District Court should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(B)(4) because it contains 2,567 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word 2010 in Century Schoolbook 14 –point font.

/s/ Patrick Hollingsworth
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CERTIFICATE OF SERVICE AND VIRUS SCAN

I, Patrick E. Hollingsworth, Assistant Attorney General, do hereby certify that on February 6, 2017, I electronically filed the forgoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit using the CM/ECF system, which will distribute the electronic copies to all counsel of record.

I further certify that the foregoing brief has been scanned for viruses and is virus free.

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