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Keywords

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PENCIL ME IN: THE USE OF TITLE IX AND § 1983 TO OBTAIN EQUAL TREATMENT IN HIGH SCHOOL ATHLETICS SCHEDULING

By Leigh E. Ferrin*

In 1998, Communities for Equity, a non-profit organization comprised of female high school student-athletes in Michigan and their parents, sued the Michigan High School Athletic Association (hereafter “MHSAA”).¹ Communities for Equity alleged that the MHSAA discriminated against female high school athletes by scheduling girls’ sports in different seasons than boys’ sports.²

After eight years of litigation, the Sixth Circuit, on remand from the United States Supreme Court, affirmed the district court’s holding that the MHSAA was (and still is) in violation of Title IX, the Equal Protection Clause, and the Michigan civil rights act known as the Elliott-Larsen Civil Rights Act.³ The Sixth Circuit also held that the federal statutory claim (the Title IX claim) did not preclude Communities for Equity’s equal protection claim under § 1983.⁴ The implication of this decision is that Communities for Equity will now have the full array of remedies, including injunctive relief, declaratory relief, and monetary damages, from the organization in violation and the individuals responsible for the discriminatory treatment. The MHSAA appealed the Sixth Circuit’s decision to the United States Supreme Court, arguing that Title IX precluded Communities for Equity from also bringing constitutional claims under § 1983.⁵ The Supreme Court denied certiorari,⁶ so the MHSAA will now be required to implement a previously approved compliance plan. Different remedies are available under each of the two causes of action, so if Title IX were to preclude a plaintiff from bringing an equal protection claim under § 1983, that plaintiff may be denied access to certain remedies.

This case note analyzes whether a Title IX claim should preclude a constitutional claim brought under § 1983, an issue on which the circuits are split. After the Sixth Circuit’s holding in *Communities for Equity*, three circuits agree that a Title IX claim does not preclude an equal protection claim under § 1983, while three circuits have reached the opposite conclusion.⁷ Part II sets out the facts and disposition of *Communities for Equity v. Michigan High School Athletic Association*. Part III analyzes Title IX, § 1983, and the Equal Protection Clause, and the interaction between the three. This section also contains an explanation of the cases and the legislative intent behind the preclusion of a § 1983 claim by a Title IX claim. Part IV discusses the Sixth Circuit’s analysis and the reasons for the circuit split. Finally, Part V concludes that the Sixth Circuit’s reasoning better comports with congressional intent, and furthers the important social goals embodied in Title IX and our federal

constitution. This case note asserts that future plaintiffs, defendants, and judges would benefit from a Supreme Court decision resolving the circuit split.

COMMUNITIES FOR EQUITY V. MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION

A. PARTIES

Communities for Equity was formed due to a concern that discrimination by the MHSAA would impact the female athletes’ psychological well-being, as well as their ability to continue their athletic education in college.⁸ The case was filed as a class action, with the class defined as all current and future female high school student-athletes in Michigan and their parents.⁹

The MHSAA is a non-profit organization in charge of high school sports in Michigan. The MHSAA decides which sports to

sanction; when to schedule games; how, when and where to organize statewide championship tournaments; and what rules the high schools must abide by.¹⁰

While not officially a state

organization, the state of Michigan has essentially ceded control of its high school athletics to the MHSAA, and the majority of the tournaments are held in state-owned facilities or properties.¹¹ In addition, public school administrators make up the majority of the MHSAA advisory committee.¹² Therefore, the district court found that the MHSAA was a state actor for purposes of the Fourteenth Amendment and a recipient of federal funds for the purposes of Title IX.¹³

B. ASSERTED CLAIMS

Communities for Equity sought to establish an equal protection claim under § 1983, as well as claims under Title IX and the Michigan state Civil Rights Act. The allegations were based on the fact that the MHSAA treats Michigan high school female athletes differently than their male counterparts. Six of the fourteen sports offered for females in Michigan are played in their non-traditional seasons; whereas, all fourteen of the sports offered for males are played in their traditional seasons. A “traditional” season is considered to be the season in which the sport is usually played and generally corresponds to when the sport is sponsored by the National Collegiate Athletic Association (hereafter “NCAA”).¹⁴ For example, girls’ basketball in Michigan is played in the fall instead of the winter, girls’ volleyball is played in the winter instead of the fall, and girls’ soccer is played in the spring instead of the fall.¹⁵ This

Non-traditional season scheduling subjects the female athletes to heightened risk of injury and reduces their chances of being recruited by college coaches.

schedule was originally adopted when Michigan introduced girls' high school sports in the 1970s.¹⁶ The purpose was to ensure that the girls' sports were not interfering with the boys' sports.¹⁷

Non-traditional season scheduling subjects the female athletes to heightened risk of injury¹⁸ and reduces their chances of being recruited by college coaches.¹⁹ Gender-based discrimination can also influence females' future career options and earning power, as well as their mental health.²⁰

C. CASE DISPOSITION

While *Communities for Equity* originally alleged seven violations of Title IX, the Equal Protection Clause, and the Elliott-Larsen Civil Rights Act,²¹ all claims except for the non-traditional season claim were settled prior to trial.²² In 2001, the Federal District Court in the Western District of Michigan held that the MHSAA's current scheduling of high school girls' sports in Michigan was in violation of Title IX, the Equal Protection Clause, and the Elliott-Larsen Civil Rights Act.²³ The court ordered the MHSAA to submit a compliance plan within six months, outlining how the violations would be remedied.²⁴ The first plan that the MHSAA submitted left "girls throughout the state in disadvantageous seasons in basketball, volleyball and soccer."²⁵ Having rejected the MHSAA's plan, the court created three plans for the MHSAA and allowed them to choose which version they would rather implement.²⁶ The MHSAA chose to switch girls' basketball and girls' volleyball to their traditional seasons; to switch two of the remaining four girls' sports to their traditional season; and to switch two boys' teams to their non-traditional seasons.²⁷ In the fall of 2007, the MHSAA is beginning to implement the compliance plan and, after nine years of litigation, Michigan female athletes are finally seeing relief.²⁸

The district court stayed its decision pending appeal.²⁹ The MHSAA appealed the district court's decision to the Sixth Circuit Court of Appeals and lost.³⁰ The MHSAA then appealed to the Supreme Court of the United States, arguing that *Communities for Equity's* equal protection claim under § 1983 was subsumed by their Title IX claim.³¹ The Supreme Court declined to decide the case and remanded it to the Sixth Circuit to reconsider their holding in light of the Court's recent holding in *Rancho Palos Verdes v. Abrams*.³² The MHSAA conceded that they were subject to Title IX for the purposes of the appeal and claimed that Title IX precluded the plaintiffs from bringing the equal protection claim, even though the MHSAA adamantly argued that Title IX did not apply to them in the court below.³³

In August 2006, the Sixth Circuit held that Title IX contained no comprehensive enforcement scheme indicating that Congress intended to preclude recovery under § 1983 for an equal protection claim.³⁴

Most recently, in January 2007, the MHSAA appealed to the United States Supreme Court to resolve two issues, one of which was whether Title IX should have precluded the plaintiffs from bringing their equal protection claim under § 1983.³⁵ The Court has denied certiorari³⁶ and the MHSAA has run out of appeals. All that is left now in *Communities for Equity* is the discussion surrounding the compliance plan accepted by the district court in 2002.³⁷

LEGAL BACKGROUND

A. TITLE IX

Social scientists have established that the physical and emotional benefits of education and athletics are many: girls who participate in athletics have fewer instances of depression; they are less likely to become teen mothers; they are less likely to become obese; and they are more likely to graduate from high school and go to college.³⁸

Despite these positive results, women are still discouraged from participating in athletics.³⁹ Nationwide, male high school athletes receive 1.2 million more participation opportunities than female high school athletes.⁴⁰ In some states, the difference between opportunities is only a few thousand; in other states, the high schools offer close to twice as many opportunities for male high school athletes as they offer for female high school athletes.⁴¹

Those women's teams that are established often receive less funding, less attention, and less support than their male counterparts.⁴² Additionally, studies have found that 85% of females between the eighth and eleventh grades experience some form of sexual harassment.⁴³

Congress' recognition of the significant problems in education and athletics led them to enact Title IX of the Education Amendments of 1972.⁴⁴ The legislative history indicates that the principle purpose of Title IX was to prevent federal funds from being used for discriminatory practices, which is why the only express remedy written into the statute is the removal of federal funding.⁴⁵ A secondary purpose was to provide a remedy for individuals affected by discriminatory practices.⁴⁶ The Supreme Court reinforced this secondary purpose in 1979 when it decided *Cannon v. University of Chicago*, holding that there was a private right of action implicit in Title IX.⁴⁷ Congress intended Title IX to apply to educational institutions, including high schools, as long as they received federal funding.⁴⁸ At these institutions, discrimination in

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employment,⁴⁹ admission programs,⁵⁰ athletic programs,⁵¹ scholarship awards,⁵² sexual harassment,⁵³ and retaliation are all covered by Title IX.⁵⁴ If a policy or circumstance discriminates on the basis of sex or acts as a barrier to a female participating in educational or extracurricular activities, it would be a violation of Title IX.

There are two procedural mechanisms for asserting a Title IX claim. Written into the statute is an administrative procedure, whereby a Title IX complaint could be filed with the U.S. Department of Education's Office of Civil Rights (hereafter "OCR").⁵⁵ Pursuant to the statute, OCR then conducts an investigation to determine if federal funding should be removed from the institution.⁵⁶ The *Cannon* Court held that there is an implied private right of action in Title IX, meaning that an individual plaintiff can bring a lawsuit against the institution alleged to be in violation.⁵⁷ Using the *Cort v. Ash*⁵⁸ factors, the Court in *Cannon* found that: (1) the plaintiff was a member of the class that Title IX was intended to protect; (2) the legislative history indicated Congress' intent to create a private right of action for the person discriminated against on the basis of her sex; (3) the implication of a private right of action was consistent with the enforcement of Title IX; and (4) this was not an area of particular concern to the states.⁵⁹

The question then is: what relief can a plaintiff bringing a Title IX claim receive? The primary remedy for Title IX plaintiffs is the removal of federal funding from the institution found in violation.⁶⁰ Removing federal funding, however, does not necessarily eliminate the discrimination. As an alternative and preferred remedy, courts can order the institution to eliminate the discrimination through a court-sanctioned compliance plan.⁶¹ The content of compliance plans can vary greatly — from equalizing funding, to establishing a new team, or moving a girls' sport to its traditional season.⁶² The second problem with the defunding remedy is that it does not redress the harm that the discrimination has already done to the plaintiff. Damages are not available for unintentional violations of the statute.⁶³ However, attorneys' fees are available under 42 U.S.C. § 1988, which allows recovery of attorneys' fees in suits involving violations of plaintiffs' civil rights.⁶⁴

There are two significant limitations to the Title IX relief. The first is that relief, whether or not it is defunding, elimination of the discrimination through a compliance plan, or monetary damages can be obtained only from an institution receiving federal funding.⁶⁵ A particular individual who engaged in a discriminatory act cannot be sued under the statute.⁶⁶ The second limitation is that, in order to pursue relief under Title IX, the plaintiff must show that "an appropriate person" at the

institution had notice and an opportunity to remedy the situation.⁶⁷ An institution cannot be held liable for monetary damages for the actions of a rogue employee.⁶⁸

B. SECTION 1983 AND THE EQUAL PROTECTION CLAUSE

Section 1983⁶⁹ is the primary means by which an individual can obtain damages from state officials for violations of federal statutory and constitutional law.⁷⁰ Section 1983 was enacted by Congress in 1871, under section five of the Fourteenth Amendment, in order to enforce the provisions of the Fourteenth Amendment.⁷¹ The purpose was to protect individual U.S. residents from discriminatory actions by state actors abusing their authority.⁷² Section 1983 can be used to enforce all federal constitutional and statutory provisions.⁷³

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides in relevant part, "[n]o State shall ... deny to any person within its jurisdiction the equal protection of the laws."⁷⁴ The Fourteenth Amendment was enacted in 1868 to provide protection to African Americans but has since been expanded to cover discrimination against other impacted groups, such as women.⁷⁵ Under section five, the prohibition on discrimination is applicable to the states.⁷⁶

Under a § 1983 claim for a violation of the Equal Protection Clause, the plaintiff must show that the defendant is a state actor or is acting under color of state law.⁷⁷ Included are private organizations using state funds or public facilities or engaging in activities of the state that the state has entrusted to the private organization.⁷⁸ To establish an equal protection claim of sex discrimination, the plaintiff must show that the state actor has treated one sex differently from the other sex.⁷⁹ The burden then

shifts to the defendant to show that there is an important governmental objective behind the differential treatment, and that the means chosen are substantially related to the achievement of those objectives.⁸⁰ A plaintiff using § 1983 to bring a claim under the Fourteenth Amendment

can receive injunctive, declaratory, and/or pecuniary relief. Injunctive relief is allowed only when a plaintiff can show that there is a possibility that they will again be deprived of their constitutional or statutory rights in the future. As with Title IX, successful plaintiffs are entitled to attorneys' fees under § 1988 because there has been a violation of the plaintiff's civil rights.⁸¹

C. TITLE IX AND § 1983 INTERACTION

Because Title IX was enacted with the purpose of eliminating discrimination⁸² and § 1983 was enacted to provide an enforcement mechanism for federal statutory and constitutional rights,⁸³ a plaintiff bringing a claim under Title IX often has a concurrent constitutional or statutory claim under

The primary remedy for Title IX plaintiffs is the removal of federal funding from the institution found in violation.

§ 1983. However, not every federal statute can be enforced through § 1983 because certain federal statutes have been written so as to preclude a § 1983 action for violation of the statute.⁸⁴ This is the case when Congress has intended the statutory remedy to be exclusive, or when the enforcement scheme in the statute is so comprehensive that enforcement under § 1983 would be incompatible.⁸⁵

1. SECTION 1983 INTERACTION USED TO ENFORCE A STATUTORY RIGHT

In 1981, the Supreme Court decided *Middlesex County Sewerage Authority v. National Sea Clammers Association*,⁸⁶ holding that plaintiffs' claims under the Federal Water Pollution Control Act (hereafter "FWPCA") and the Marine Protection, Research and Sanctuaries Act of 1972 (hereafter "MPRSA") precluded plaintiffs' use of § 1983 to obtain damages under those same statutes.⁸⁷ Notably, the plaintiffs first asked that the Court recognize an implied private right of action under both the FWPCA and the MPRSA.⁸⁸ The Court declined to do so, reasoning that the "Acts contain[ed] unusually elaborate enforcement provisions," which indicated that Congress did not intend "to authorize...additional judicial remedies for private citizens."⁸⁹

The Court then turned to the question of whether the plaintiffs could use § 1983 to collect damages for violations of the FWPCA and the MPRSA, because neither of the statutes provided a remedy authorizing monetary damages.⁹⁰ Both of the statutes contained comprehensive remedial schemes, such as: provisions for civil suits brought by the government, civil or criminal penalties for violations, judicial review of the government's enforcement attempts and express citizen-suits which allow an individual to sue for injunctive relief.⁹¹ In analyzing "whether Congress had foreclosed private enforcement of that statute in the enactment itself,"⁹² the Court focused on the numerous specific statutory remedies in the FWPCA and the MPRSA. It particularly focused on the citizen-suit provisions, as an indication that Congress "intended to supplant any remedy that otherwise would be available under § 1983."⁹³

More recently, in *Rancho Palos Verdes v. Abrams*,⁹⁴ the Court followed *National Sea Clammers* and held that a plaintiff bringing a claim under the Telecommunications Act of 1996 (hereafter "TCA") could not use § 1983 to obtain monetary damages.⁹⁵ Using a similar analysis, the Court asked "whether Congress meant the judicial remedy expressly authorized by [the TCA] to coexist with an alternative remedy available in a § 1983 action."⁹⁶ The TCA provided for an individual to obtain judicial review of an unfavorable zoning decision.⁹⁷ The Court

recognized that in only two other instances had the "existence of more restrictive remedies...in the violated statute itself" led to the conclusion that § 1983 was unavailable to remedy violations of a statute.⁹⁸ In his concurrence, Justice Stevens pointed out that "only an exceptional case — such as one involving an unusually comprehensive and exclusive statutory scheme — will lead us to conclude that a given statute impliedly forecloses a § 1983 remedy."⁹⁹ Stevens recognized that the Court normally presumes Congress intended to provide, not preclude, a remedy under § 1983 to enforce federal statutory rights.¹⁰⁰

2. SECTION 1983 INTERACTION USED TO ENFORCE A CONSTITUTIONAL RIGHT

In slightly different circumstances, the Court in *Smith v. Robinson*¹⁰¹ held that where the constitutional claims pursuant to § 1983 were "virtually identical" to the statutory claims, the § 1983 claims were precluded.¹⁰² In *Smith*, the plaintiff was alleging violations of the Education of the Handicapped Act (hereafter "EHA"), as well as violations of the Equal Protection and Due Process Clauses under § 1983.¹⁰³ As opposed to *National Sea Clammers* and *Abrams*, in *Smith*, § 1983 was being used to enforce a constitutional right, rather than to obtain monetary damages under the federal statute in question.

The Court again looked to the provisions of the statute itself and to Congressional intent to determine whether Congress intended EHA plaintiffs with constitutional rights to be able to pursue those claims outside of the remedies set out in the EHA.¹⁰⁴ The EHA provides for an elaborate remedial process, beginning on the local level, with the parents making numerous appeals before the School Committee and the Associate Commissioner of Education.¹⁰⁵ The procedural safeguards in place were designed to provide due process to the parents of a handicapped child when the State planned to make changes to their child's education.¹⁰⁶ EHA plaintiffs also have a right to judicial review of the State agency's decisions.¹⁰⁷ The Court felt strongly that Congress intended for remedies available under the EHA to be exclusive, because Congress indicated the importance of the "the parents and the local education agency work [ing] together to formulate an individualized plan for each handicapped child's education."¹⁰⁸ In the end, the Court relied most heavily on its perception of Congress' intent that the EHA be the exclusive remedy for a handicapped child being denied a free and appropriate public education.¹⁰⁹ The Court determined that allowing a right of action under § 1983 to enforce the EHA would be "inconsistent with Congress' carefully tailored scheme."¹¹⁰

Because Title IX was enacted with the purpose of eliminating discrimination and § 1983 was enacted to provide an enforcement mechanism for federal statutory and constitutional rights, a plaintiff bringing a claim under Title IX often has a concurrent constitutional or statutory claim under § 1983.

THE SIXTH CIRCUIT'S REASONING IN COMMUNITIES FOR EQUITY AND THE CIRCUIT SPLIT

A. TITLE IX'S REMEDY IS NOT COMPREHENSIVE

The issue of whether Title IX precludes a plaintiff from also bringing a constitutional claim under § 1983 is important for several reasons. One of the primary reasons is that § 1983 and Title IX apply to different defendants. Both individual defendants and institutions or organizations may be held liable for violations of a person's constitutional and federal statutory rights under § 1983, as long as the defendant acted under color of state law.¹¹¹ Title IX is a federal statute with a more limited scope and assigns liability only to "educational program[s]" or "activities receiving Federal financial assistance."¹¹² This is particularly important when the discrimination is a result of a particular individual's actions, such as in a sexual harassment case. Discrimination resulting from an athletic or educational program usually involves an institutional problem, though occasionally there are particular individuals that have the power to remedy discriminatory treatment.

On remand from the Supreme Court, the primary question for the Sixth Circuit in *Communities for Equity* was whether or not Title IX precluded the plaintiffs from bringing an equal protection claim under § 1983.¹¹³ First, the Sixth Circuit recognized that in both *National Sea Clammers* and *Abrams*, the plaintiffs brought a federal statutory claim and then used § 1983 to assert those same federal statutory rights.¹¹⁴ The statutes in those cases did not authorize monetary damages, so the plaintiffs attempted to use § 1983 to obtain damages. The *Communities for Equity* court said that allowing a § 1983 claim for damages would clearly "create an end-run around the substantive statutory remedies and contravene Congress' intent."¹¹⁵ The Sixth Circuit distinguished *National Sea Clammers* and *Abrams* from the instant case because *Communities for Equity* was asserting a constitutional claim under § 1983, not using § 1983 to obtain damages under Title IX.¹¹⁶

The court looked to *Smith* to provide the framework for its analysis.¹¹⁷ The first question was: "whether Congress intended to abandon the rights and remedies set forth in Fourteenth Amendment equal protection jurisprudence when it enacted Title IX in 1972."¹¹⁸ The second question was: whether Title IX provided a remedy comprehensive enough to be exclusive?¹¹⁹ The Sixth Circuit noted that these two questions were to be independently evaluated, and that if both were not met, then the statute would not preclude a constitutional claim under § 1983.¹²⁰ In other words, if one factor is clearly unsatisfied, then the other prong does not need to be discussed.¹²¹

The court chose to address the second prong first, and examined Congress' intent when they were enacting Title IX in 1972.¹²² In 1996, the Sixth Circuit in *Lillard v. Shelby County Board of Education*,¹²³ held that Title IX does not preclude a plaintiff from using § 1983 to bring a substantive due process claim.¹²⁴ Following *Lillard*, the court in *Communities for Equity*

distinguished the express remedies in Title IX from the comprehensive administrative and judicial remedies set out in the EHA.¹²⁵ The only express remedy written into Title IX is a "procedure for the termination of federal financial support for institutions" in violation of Title IX.¹²⁶ The court further recognized that if Title IX did not exist, *Communities for Equity* would still have a cause of action under the Equal Protection Clause.¹²⁷ This reasoning indicates that the two claims are separate, despite the fact that the claims arise from the same set of underlying facts.

As with most other defendants who have challenged a plaintiff's right to recover under both Title IX and § 1983, the MHSAA relies on the implied private right of action in its argument.¹²⁸ The MHSAA argued that because a Title IX plaintiff has available to it the full range of remedies, Title IX is comprehensive enough to preclude recovery under § 1983.¹²⁹ The Sixth Circuit did not agree with this position.¹³⁰ Instead, the court used the implied private right of action as evidence of Congress' intent not to limit a Title IX plaintiff's claims to the express remedy in the statute itself.¹³¹

B. CIRCUITS THAT DISAGREE WITH THE SIXTH CIRCUIT

The Second, Third, and Seventh Circuits, over the last seventeen years, have all held that a plaintiff bringing a claim under Title IX cannot also bring a claim under § 1983.¹³² The three courts have reached the same conclusion in four diverse cases but have all relied on the reasoning expressed by the Supreme Court in *National Sea Clammers*.¹³³ The most discussed issue was whether or not Title IX provided a comprehensive remedy for plaintiffs.

In 1990, the Third Circuit held that Pfeiffer, a student who was dismissed from the local chapter of the National Honor Society due to her pregnancy, could not bring both a Title IX and an equal protection claim under § 1983.¹³⁴ The court relied on the district court's reasoning on this issue and said, "[t]he *Sea Clammers* doctrine has been applied consistently in analogous cases."¹³⁵ Three years later, the Third Circuit again faced the question of whether a Title IX claim precluded a § 1983 claim.¹³⁶ This time, the district court had previously decided the constitutional claim, and the Third Circuit was analyzing the issue on appeal.¹³⁷ The court relied on the previous decision in *Pfeiffer*, and "the Supreme Court's admonition that courts should exercise restraint before reaching federal constitutional claims."¹³⁸ The court explained that the "Supreme Court has made clear that where a federal statute provides its own comprehensive enforcement scheme, Congress intended to foreclose a right of action under § 1983."¹³⁹ The court stated that it considered Title IX's enforcement scheme to be comprehensive; thus, it precluded recovery under § 1983.¹⁴⁰

In 1996, the Seventh Circuit faced the issue in a case involving employment discrimination.¹⁴¹ Ultimately, the court held that the plaintiff was required to exhaust her administrative remedies under Title VII before resorting to sex discrimination claims under Title IX.¹⁴² On its way to that conclusion,

however, the court discussed whether the remedies provided by Title IX precluded the plaintiff from bringing an equal protection claim under § 1983, arising from the same set of facts.¹⁴³ The Seventh Circuit read *National Sea Clammers* to indicate that when a statute and a constitutional provision “prohibit the same kind of conduct and provide compensatory and punitive damages as remedies for that conduct,” that type of

... a plaintiff specifically claiming intentional discrimination cannot allege that she has causes of action under both Title IX and the Equal Protection Clause through § 1983.

overlap is “intolerable.”¹⁴⁴ Based on the Third Circuit’s decisions in *Pfeiffer* and *Williams*, the court said a plaintiff specifically claiming intentional discrimination cannot allege that she has causes of action under *both* Title IX and the Equal Protection Clause through § 1983.¹⁴⁵ The court decided that Congress did not intend for individual officials to remedy alleged instances of discrimination, but rather placed the burden squarely on the institution itself.¹⁴⁶ To that end, the Seventh Circuit held that Congress did intend for the remedial scheme in Title IX to be exclusive.¹⁴⁷ Thus, the Title IX claim, if it were allowed in this case, would subsume the § 1983 claim.¹⁴⁸

Finally, the Second Circuit had an opportunity to decide this issue in 1998.¹⁴⁹ The plaintiff brought a hostile environment sexual harassment claim against the school district, under both Title IX and § 1983.¹⁵⁰ The court rejected the use of § 1983 to enforce the plaintiff’s Title IX rights and also rejected a constitutional rights exception to the *National Sea Clammers* doctrine.¹⁵¹ The Second Circuit stated that there was an intricate administrative enforcement scheme in Title IX, whereby an individual could file a complaint with OCR, which would then conduct an investigation.¹⁵² The court also explained that the fact that the Supreme Court had found an implied private right of action for Title IX convinced the court that “the Title IX plaintiff has access to a full panoply of remedies.”¹⁵³ The Second Circuit felt that the circuits that had found the private right of action to be outside the statutory enforcement scheme had read the remedies available too narrowly.¹⁵⁴ In rejecting a constitutional rights exception, the court relied on their previous reasoning and the analysis in *Smith*.¹⁵⁵ When a statute contains a “sufficiently comprehensive enforcement scheme,” as the court believed Title IX did, the indication is that Congress intended to replace § 1983 as an available remedy.¹⁵⁶ This means that if a plaintiff were asserting a violation of a constitutional right under § 1983, which did not

The most popular reasoning was that because Title IX is considered to have an implied private right of action plaintiffs have access to all possible remedies.

overlap with her Title IX claim, she would not be allowed to bring both causes of action.

The Second, Third, and Seventh Circuits have spent little time discussing the issue. The most popular reasoning was that because Title IX is considered to have an implied private right of action plaintiffs have access to all possible remedies.¹⁵⁷ Therefore, Congress did not intend for plaintiffs to have access to a remedy under § 1983 as well.¹⁵⁸ The Sixth, Eighth, and Tenth Circuits have recognized that because the private right of action in Title IX is implied, Congress likely did not intend for the explicit remedies in Title IX to be exclusive.

C. CIRCUITS THAT SIDE WITH THE SIXTH CIRCUIT

The Eighth and Tenth Circuits have held that a Title IX claim does not preclude a plaintiff from bringing a concurrent constitutional claim under § 1983.¹⁵⁹ These circuits have agreed with the Sixth Circuit that the Title IX remedial scheme is not comprehensive. The Sixth, Eighth, and Tenth Circuits have read the Supreme Court’s decision in *National Sea Clammers* as a way of distinguishing federal statutes from each other. The three circuits examined not only the explicit remedies provided in Title IX, but also the legislative history of Title IX. The courts concluded that Congress did not intend for the remedies provided in Title IX to be the exclusive remedies available to a plaintiff.

In *Crawford v. Davis*,¹⁶⁰ the plaintiff, suing under Title IX and the Equal Protection Clause, made an allegation of sexual harassment.¹⁶¹ The Eighth Circuit stated that “*Sea Clammers* in no way restricts a plaintiff’s ability to seek redress via § 1983 for the violation of independently existing constitutional rights.”¹⁶² The court said this is true even if the constitutional right arises from the same set of facts as the Title IX rights.¹⁶³ Although the Supreme Court found an implied private right of action in Title IX, the court saw the removal of federal funding as the only express remedy.¹⁶⁴ The court compared Title IX’s

express remedy to the enforcement scheme in the statutes in *National Sea Clammers*, which contained elaborate procedures including citizen suits and enforcement by government agencies.¹⁶⁵ The Eighth Circuit felt that if Congress intended for Title IX to preclude a claim under § 1983, the enforcement scheme in Title IX would have been more elaborate, similar to the schemes in the statutes in

National Sea Clammers.¹⁶⁶

The Tenth Circuit was also dealing with a sexual harassment lawsuit when this issue arose.¹⁶⁷ Similar to the Eighth Circuit, the Tenth Circuit held that § 1983 claims are not supplanted by the private right of action implicit in Title IX.¹⁶⁸ Title IX plaintiffs who bring a constitutional claim under § 1983 “do not circumvent Title IX procedures or gain access to remedies not available under Title IX.”¹⁶⁹ It reasoned that Title IX plaintiffs have the whole panoply of remedies available to

them,¹⁷⁰ so bringing a concurrent constitutional claim through § 1983 does not allow plaintiffs to get damages they otherwise would not be entitled to under Title IX.

D. OTHER COURTS' RULINGS THAT SIDE WITH THE SIXTH CIRCUIT

The Fifth Circuit has implied that, if squarely presented with the issue, it would likely hold that Title IX's remedial scheme was not "sufficiently comprehensive to indicate... that Congress intended to foreclose § 1983 suits based upon rights created by Title IX."¹⁷¹ The plaintiff's claims in *Lakoski v. James* were employment discrimination claims, so the Fifth Circuit held that Title VII precluded all other claims, including the Title IX and constitutional claims brought under § 1983.¹⁷² Although the Fifth Circuit's discussion of Title IX and § 1983 in this case was dicta, it gives us an idea of what to expect from that court.

Lower federal courts in other circuits have also come to the similar conclusion that a plaintiff is allowed to bring both a Title IX claim and a constitutional claim under § 1983.¹⁷³ *Alston v. Virginia High School League*¹⁷⁴ involved an issue similar to the one presented in *Communities for Equity*.¹⁷⁵ Plaintiffs contended that the Virginia High School League (hereafter "VHSL") discriminated on the basis of sex because boys' sports were uniformly scheduled across school classifications, but girls' sports were not.¹⁷⁶ The result was that if the size of the school required it to switch from one classification to another, some girls might be prevented from playing sports they previously played if two of their sports were in the same season.¹⁷⁷ Just like the MHSAA, the VHSL challenged the plaintiff's ability to bring both a Title IX claim and an equal protection claim.¹⁷⁸ However, the court rejected the challenge.¹⁷⁹ Instead, it recognized that "the *National Sea Clammers* doctrine 'speaks only to whether federal statutory rights can be enforced both through the statute itself and through section 1983'; it does not 'stand for the proposition that a federal statutory scheme can preempt independently existing constitutional rights, which have contours distinct from the statutory claim.'"¹⁸⁰

Finally, a district court in the First Circuit analogized Title IX to Title VI of the Civil Rights Act of 1964.¹⁸¹ The court noted that in *Cannon*, the Supreme Court found that "the only difference between the two statutes is the 'substitution of the word 'sex' in Title IX to replace the words 'race, color or national origin' in 'Title VI.'"¹⁸² The judge in *Doe v. Old Rochester Regional School District* spent a significant amount of his opinion discussing the possibility of Title IX prohibiting a concurrent § 1983 claim.¹⁸³ The judge noted that the Supreme Court has held that § 1983 remedies are considered to be "an

alternative and express cause of action under Title VI."¹⁸⁴ Thus, he reasoned that § 1983 remedies would also be permissible under Title IX.

The result of the preceding analysis is that, of the courts that have faced this issue, only three Circuit Courts of Appeals have held that Title IX does preclude a constitutional claim under § 1983. Three circuits have expressly held that Title IX does not preclude a § 1983 claim, and lower courts in three other circuits have reached the same conclusion. As the judge in *Old Rochester* mentioned, "[u]nfortunately... [no] subsequent Supreme Court decisions give a clear lead."¹⁸⁵ At the same time that the *Old Rochester* judge was issuing his opinion, his colleague in the same district was issuing the opposite holding in a companion case.¹⁸⁶ The fact that two judges within the same district are coming to different conclusions speaks to the need of a decision from the First Circuit. A decision from the Supreme Court would give the First Circuit, and all of the other circuits, guidance for future decisions. A Supreme Court decision on this important issue would also prevent delays and provide guidance to plaintiffs and defendants who are alleging and defending Title IX claims.

TITLE IX SHOULD NOT PRECLUDE A CONSTITUTIONAL CLAIM UNDER § 1983

All of the federal circuit courts have recognized that the only enforcement mechanism expressly authorized by Title IX is the withdrawal of federal funds, and that the private right of action under Title IX is implied. Where the courts disagree is whether those two remedies, taken together, are sufficiently comprehensive to bar the pursuit of a constitutional claim under § 1983.¹⁸⁷ Previously, when the Supreme Court has held that a federal statute precludes a plaintiff from also bringing a federal constitutional claim, it has reasoned that allowing both claims would allow the plaintiff to recover twice for the same right.¹⁸⁸ The interaction between Title IX and the Equal Protection Clause does not present that problem. While the claims under Title IX and § 1983 may generally arise from the same set of facts, a plaintiff asserting a constitutional right in addition to a federal statutory claim is asserting a different right.

A. POSSIBLE SUPREME COURT RULING

Future plaintiffs will certainly bring Title IX suits that include equal protection claims, and the defendants will try to argue that the Title IX claim precludes an equal protection claim brought under § 1983. This argument should fail for several reasons. First, Title IX applies only to federally-funded institutions, so individuals cannot be held liable for discrimination under Title IX. Depending on the type of claim,

*A Supreme Court decision
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would also prevent delays
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and defendants who are alleging
and defending
Title IX claims.*

this could hamper a plaintiff's ability to remedy the alleged discrimination. Second, although a defendant is considered to be a state actor under the Equal Protection Clause of the Fourteenth Amendment, that does not necessarily mean that they are a recipient of federal funds. Thus, allowing both avenues of recovery for a plaintiff could increase the likelihood that a defendant would be subject to liability for discriminatory treatment.

If the Supreme Court adheres to the path set out in *National Sea Clammers*, *Abrams*, and *Smith*, it seems likely that the Court would hold that Title IX does not preclude a constitutional claim under § 1983. The Court has previously looked at the explicit language of the statute and the congressional intent at the time of enactment. As discussed above, the express language of Title IX provides for a very limited administrative remedy and no private right of action. The fact that the Court has found an implied private right of action in Title IX should not affect its decision. What is significant is that Congress took no action after the Court's decision in *Cannon* to amend Title IX. This failure to act indicated Congress' intent to allow for additional remedies, outside of those explicitly stated in the statute. Based on precedent, and the holdings of the previous cases involving federal statutory claims and separate constitutional claims under § 1983, if the Supreme Court decides the issue in a future case, it should find that a plaintiff is allowed to bring both a Title IX claim and a federal constitutional claim under § 1983.

VI. CONCLUSION

While much of the discussion in this note has involved the legal issues surrounding Title IX and the Equal Protection Clause, what is equally important is that the purposes of anti-discrimination laws are recognized. Both Title IX and the Equal Protection Clause prohibit females from being subjected to

discriminatory treatment. Because *Communities for Equity* involves teenage females, the issue is more urgent. It is hard to fully understand or know the damage that could be done to a female who is repeatedly discriminated against. Additionally, females who are discriminated against in high school athletics are denied opportunities to participate in athletics in college. While the individual female certainly suffers from discrimination, so too does her community, because that particular female is less likely to be an active participant in politics, in the economy, and in life in general. These consequences

may sound drastic, but that does not make them less likely. More importantly, less extreme consequences would be no more acceptable.

Resolving the circuit split surrounding whether or not Title IX precludes a constitutional claim under § 1983, in accordance with the Sixth Circuit's holding, will discourage future discrimination. It will provide Title IX plaintiffs with an additional remedy when faced with discrimination. It will also encourage educational institutions to be more careful in their treatment of females. If the Supreme Court agrees with the Sixth Circuit, the institution as a whole and the individuals in charge of enforcing discriminatory policies will be liable for discriminatory treatment. Finally, a resolution of this issue will also promote judicial economy. Since the parties will not have to argue whether or not Title IX precludes a constitutional claim under § 1983 in future cases, plaintiffs and defendants will know which claims are allowed and will focus their efforts on proving or defending those claims.

Resolving the circuit split surrounding whether or not Title IX precludes a constitutional claim under § 1983, in accordance with the Sixth Circuit's holding, will discourage future discrimination.

ENDNOTES

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¹ *Communities for Equity*, About CFE, available at <http://www.communitiesforequity.com/about.html> (last visited Oct. 4, 2007).

² *Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n*, 80 F. Supp. 2d 729, 731 (W.D. Mich. 2000).

³ *Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n*, 459 F.3d 676 (6th Cir. 2006).

⁴ *Id.* at 691.

⁵ Brief of Petitioner at 14, *Mich. High Sch. Athletic Ass'n v. Cmtys. for Equity*, 2007 WL 244971 (2007) (No. 06-1038).

⁶ *Mich. High Sch. Athletic Ass'n v. Cmtys. for Equity*, 127 S.Ct. 1912 (2007).

⁷ Brief of Petitioner, *supra* note 5, at 14.

⁸ *Id.*

⁹ *Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n*, 178 F. Supp. 2d 805, 809 (W.D. Mich. 2001).

¹⁰ *Id.* at 810-15.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 856-58.

¹⁴ Kristen Boike, Note, *Rethinking Gender Opportunities: Nontraditional Sports Seasons and Local Preferences*, 39 U. MICH. J. L. REFORM 597, 599 (Spring 2006).

¹⁵ *Communities for Equity*, CFE v. MHSAA Lawsuit, available at <http://www.communitiesforequity.com/mhsaa.html> (last visited Oct. 13, 2007).

¹⁶ *Cmtys. for Equity*, 178 F. Supp. 2d at 815.

¹⁷ *Id.*

¹⁸ *See id.* at 828-830 (noting that the scheduling causes female soccer players to play more games per week than male soccer players, causing more injuries and allowing for less recovery time from injuries).

ENDNOTES CONTINUED

- ¹⁹ See *Communities for Equity*, CFE v. MHSAA, available at <http://www.communitiesforequity.com/mhsaa.html> (last visited Oct. 13, 2007) (asserting that there are fewer recruitment opportunities and fewer scholarship opportunities due to NCAA recruiting restrictions that conflict with the Michigan female athletes' schedules).
- ²⁰ See *id.* (stating that "girls who are treated inequitably . . . transfer their diminished expectations . . . into diminished expectations in their careers").
- ²¹ *Cmtys. for Equity*, 80 F. Supp. 2d at 729.
- ²² *Cmtys. for Equity*, 178 F. Supp. 2d at 805.
- ²³ *Id.* at 862.
- ²⁴ *Id.*
- ²⁵ *Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n*, No. 1:98-CV-479, 2002 U.S. Dist. LEXIS 14220, at *7-8 (W.D. Mich. 2002) (leaving basketball, volleyball and soccer in their non-traditional seasons would leave 46.5% of female athletes in Michigan at a disadvantage, while only disadvantaging 12.3% of male athletes).
- ²⁶ *Id.* at *19-20.
- ²⁷ *Id.*
- ²⁸ Press Release, *Communities for Equity*, Long Overdue Equity for Girls: Season Changes Underway (Aug. 13, 2007), available at <http://www.communitiesforequity.com/images/PR%20Aug.pdf> (last visited Oct. 14, 2007).
- ²⁹ *Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n*, No. 1:98-CV-479, 2003 U.S. Dist. LEXIS 2872 (W.D. Mich. 2003).
- ³⁰ *Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n*, 377 F.3d 504 (6th Cir. 2004).
- ³¹ Reply Brief of Petitioner at 8-10, *Mich. High Sch. Athletic Ass'n v. Cmtys. for Equity*, 544 U.S. 1012 (2005) (No. 04-1021).
- ³² *Mich. High Sch. Athletic Ass'n v. Cmtys. for Equity*, 544 U.S. 1012 (2005); *Rancho Palos Verdes v. Abrams*, 544 U.S. 113 (2005).
- ³³ Reply Brief of Petitioner, *supra* note 31, at 9.
- ³⁴ *Lillard v. Shelby County Bd. of Educ.*, 76 F.3d 716 (6th Cir. 1996).
- ³⁵ Brief of Petitioner, *supra* note 5, at 25-27.
- ³⁶ *Mich. High Sch. Athletic Ass'n v. Cmtys. for Equity*, 127 S. Ct. 1912 (2007).
- ³⁷ See, e.g., *Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n*, No. 1:98-CV-479, 2007 U.S. Dist. LEXIS 50836 (W.D. Mich. 2007) (denying two motions to intervene by parents and coaches of certain boys' and girls' soccer teams who sought to modify the compliance plan).
- ³⁸ NATIONAL COALITION FOR WOMEN AND GIRLS IN EDUCATION, TITLE IX AT 30: REPORT CARD ON GENDER EQUITY 10 (June 2002), www.ncwge.org/PDF/title9at30-6-11.pdf (last visited Oct. 14, 2007).
- ³⁹ *Id.* at 2.
- ⁴⁰ WOMEN'S SPORTS FOUNDATION, ATHLETIC GENDER GAP (2006), http://womenssportsfoundation.org/binary-data/WSF_ARTICLE/pdf_file/1110.pdf (last visited Oct. 19, 2007).
- ⁴¹ *Id.* (For example, New Mexico, ranked 4th, offers 25,918 opportunities for male high school athletes and 22,586 opportunities for female high school athletes, with a disparity of only -2.5%. Michigan, ranked 25th in terms of disparities, offers 185,873 opportunities for male athletes and 135,377 opportunities for female high school athletes, with a disparity of -6.9%. Finally, South Carolina, ranked 47th, offers 52,760 opportunities for male high school athletes and 30,955 opportunities for female high school athletes, with a disparity of -13.1%. The rankings are based on a comparison of the percentage of females enrolled in the state's high schools and the percentage of females participating in athletics).
- ⁴² NATIONAL COALITION FOR WOMEN AND GIRLS IN EDUCATION, *supra* note 38, at 3.
- ⁴³ *Id.* at 36-37.
- ⁴⁴ Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (1972).
- ⁴⁵ 117 CONG. REC. 39252 (1971) (comments of Senator Mink).
- ⁴⁶ 118 CONG. REC. 5806-5807 (1972) (comments of Senator Bayh).
- ⁴⁷ *Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979).
- ⁴⁸ Education Amendments of 1972, Pub. L. No. 92-318, § 901, 86 Stat. 235, 373-74 (1972).
- ⁴⁹ See *Grove City College v. Bell*, 465 U.S. 555 (1984).
- ⁵⁰ See *Berkelman v. San Francisco Unified Sch. Dist.*, 501 F.2d 1264 (9th Cir. 1974).
- ⁵¹ See *Cohen v. Brown Univ.*, 101 F.3d 155 (1st Cir. 1996).
- ⁵² Title IX of the Education Amendments of 1972: A Policy Interpretation: Title IX & Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,415 (Dec. 11, 1979) (codified at 45 C.F.R. § 86) [hereinafter Policy Interpretation].
- ⁵³ See *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999).
- ⁵⁴ Education Amendments of 1972, Pub. L. No. 92-318, § 901, 86 Stat. 235, 374 (1972).
- ⁵⁵ Education Amendments of 1972, Pub. L. No. 92-318, § 902, 86 Stat. 235, 374 (1972).
- ⁵⁶ *Id.*
- ⁵⁷ *Cannon*, 441 U.S. at 703.
- ⁵⁸ *Cort v. Ash*, 422 U.S. 66 (1975).
- ⁵⁹ *Cannon*, 441 U.S. at 689-709 (citing *Cort*, 422 U.S. 66).
- ⁶⁰ See Policy Interpretation, *supra* note 52.
- ⁶¹ *Cmtys. for Equity*, 178 F. Supp. 2d at 862.
- ⁶² See, e.g., *Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n*, No. 1:98-CV-479, 2002 U.S. Dist. LEXIS 14220 (W.D. Mich. 2002); see also *Alston v. Va. High Sch. League, Inc.*, 108 F. Supp. 2d 543 (W.D. Va. 2000).
- ⁶³ See *Horner v. Kentucky High Sch. Athletic Ass'n*, 206 F.3d 685 (6th Cir. 2000).
- ⁶⁴ 42 U.S.C. § 1988 (2006).
- ⁶⁵ 20 U.S.C. § 1681 (2006).
- ⁶⁶ *Id.*
- ⁶⁷ *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998).
- ⁶⁸ *Id.*
- ⁶⁹ 42 U.S.C. § 1983 (2006).
- ⁷⁰ *Id.*
- ⁷¹ See *Monroe v. Pape*, 365 U.S. 167 (1961).
- ⁷² See *Maine v. Thiboutot*, 448 U.S. 1 (1980).
- ⁷³ See *id.* at 4 (1980) (Section 1983 "means what it says" and authorizes suits to enforce individual rights under federal statutes as well as the Constitution).
- ⁷⁴ U.S. CONST. amend. XIV.
- ⁷⁵ See *Shelley v. Kraemer*, 334 U.S. 1 (1948).
- ⁷⁶ U.S. CONST. amend. XIV, § 5.
- ⁷⁷ *Cmtys. for Equity*, 80 F. Supp. 2d at 739.
- ⁷⁸ *Id.* at 741-43; *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288 (2001) (indicating that the private organization's leadership was comprised primarily of school officials from public schools and that the State board of education recognized the organization's authority over interscholastic athletics within the state).
- ⁷⁹ *Cmtys. for Equity*, 178 F. Supp. 2d at 848.
- ⁸⁰ *Id.*
- ⁸¹ 42 U.S.C. § 1988 (2006).
- ⁸² See 118 CONG. REC. 5806-5807 (1972) (comments of Senator Bayh).
- ⁸³ *Bruneau v. S. Kortright Cent. Sch. Dist.*, 163 F.3d 749, 756 (2d Cir. 1998).
- ⁸⁴ See generally *Abrams*, 544 U.S. 113; *Smith v. Robinson*, 468 U.S. 992 (1984); See also *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1 (1981).
- ⁸⁵ See *Abrams*, 544 U.S. 113; *Smith*, 468 U.S. 992; *Middlesex County Sewerage Auth.*, 453 U.S. 1.
- ⁸⁶ *Middlesex County Sewerage Auth.*, 453 U.S. 1.
- ⁸⁷ *Id.* at 20-21.
- ⁸⁸ *Id.* at 10-11.
- ⁸⁹ *Id.* at 13-14.
- ⁹⁰ *Id.* at 19.
- ⁹¹ *Id.* at 13-14.
- ⁹² *Middlesex County Sewerage Auth.*, 453 U.S. 1, 19 (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1 (1981)).
- ⁹³ *Id.* at 21.
- ⁹⁴ See generally *Abrams*, 544 U.S. 113 (2005).
- ⁹⁵ *Id.* at 127.
- ⁹⁶ *Id.* at 120-21.
- ⁹⁷ *Id.* at 116.
- ⁹⁸ *Id.* at 121.
- ⁹⁹ *Id.* at 130-31 (Stevens, J., concurring).
- ¹⁰⁰ *Abrams*, 544 U.S. at 131 (Stevens, J., concurring).
- ¹⁰¹ *Smith*, 468 U.S. 992.
- ¹⁰² *Id.* at 1009.
- ¹⁰³ *Id.* at 994.
- ¹⁰⁴ *Id.* at 1009.
- ¹⁰⁵ *Id.* at 997.
- ¹⁰⁶ *Id.* at 997.
- ¹⁰⁷ *Smith*, 468 U.S. at 1011.
- ¹⁰⁸ *Id.* at 1012.
- ¹⁰⁹ *Id.* at 1012-13.
- ¹¹⁰ *Id.* at 1012.
- ¹¹¹ *Doe v. Old Rochester Reg'l Sch. Dist.*, 56 F. Supp. 2d 114, 116 (D. Mass. 1999).
- ¹¹² *Id.* (citing 20 U.S.C. § 1681(a)).
- ¹¹³ *Cmtys. for Equity*, 459 F.3d at 679-80.
- ¹¹⁴ *Id.* at 684.

ENDNOTES CONTINUED

- ¹¹⁵ *Id.*
¹¹⁶ *Id.* at 683-84.
¹¹⁷ *Id.* at 685.
¹¹⁸ *Id.*
¹¹⁹ *Cmtys. for Equity*, 459 F.3d at 685 (citing *Smith*, 468 U.S. 992).
¹²⁰ *Id.*
¹²¹ *Id.* (citing *Lillard*, 76 F.3d at 723).
¹²² *Id.*
¹²³ See generally *Lillard*, 76 F.3d 716.
¹²⁴ *Id.* at 723-24.
¹²⁵ *Cmtys. for Equity*, 459 F.3d at 685 (citing *Lillard*, 76 F.3d at 723).
¹²⁶ *Cannon*, 441 U.S. at 683.
¹²⁷ *Cmtys. for Equity*, 459 F.3d at 684.
¹²⁸ Reply Brief of Petitioner, *supra* note 31, at 8-9
¹²⁹ *Id.*
¹³⁰ *Cmtys. for Equity*, 459 F.3d at 691.
¹³¹ *Id.* at 686.
¹³² *Bruneau v. S. Kortright Cent. Sch. Dist.*, 163 F.3d 749, 756 (2d Cir. 1998); *Waid v. Merrill Area Pub. Schs.*, 91 F.3d 857 (7th Cir. 1996); *Williams v. Sch. Dist. of Bethlehem*, 998 F.2d 168 (3d Cir. 1993); *Pfeiffer v. Sch. Bd. for Marion Ctr. Area*, 917 F.2d 779 (3d Cir. 1990).
¹³³ *Bruneau*, 163 F.3d 749; *Waid*, 91 F.3d 857; *Williams*, 998 F.2d 168; *Pfeiffer*, 917 F.2d 779.
¹³⁴ See generally *Pfeiffer*, 917 F.2d 779.
¹³⁵ *Id.* at 789.
¹³⁶ *Williams*, 998 F.2d 168.
¹³⁷ *Id.* at 170.
¹³⁸ *Id.* at 176.
¹³⁹ *Id.*
¹⁴⁰ *Id.*
¹⁴¹ See generally *Waid*, 91 F.3d 857
¹⁴² *Id.* at 861.
¹⁴³ *Id.* at 862.
¹⁴⁴ *Id.*
¹⁴⁵ *Id.*
¹⁴⁶ *Id.*
¹⁴⁷ *Waid*, 91 F.3d at 862-63.
¹⁴⁸ *Id.*
¹⁴⁹ *Bruneau*, 163 F.3d at 749.
¹⁵⁰ *Id.* at 753-54.
¹⁵¹ *Id.* at 756-59.
¹⁵² *Id.* at 756.
¹⁵³ *Id.*
¹⁵⁴ *Id.* at 756-57.
¹⁵⁵ *Bruneau*, 163 F.3d at 758-59.
¹⁵⁶ *Id.* at 757-58.
¹⁵⁷ *Cmtys. for Equity*, 459 F.3d at 689.
¹⁵⁸ *Id.*
¹⁵⁹ *Crawford*, 109 F.3d at 1281; *Seamons v. Snow*, 84 F.3d 1226 (10th Cir. 1996).
¹⁶⁰ *Crawford*, 109 F.3d at 1282.
¹⁶¹ *Id.* at 1284.
¹⁶² *Id.*
¹⁶³ *Id.*
¹⁶⁴ *Id.*
¹⁶⁵ *Id.*
¹⁶⁶ *Crawford*, 109 F.3d at 1284.
¹⁶⁷ *Seamons*, 84 F.3d 1226 (10th Cir. 1996).
¹⁶⁸ *Id.* at 1234.
¹⁶⁹ *Id.* at 1233.
¹⁷⁰ *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992).
¹⁷¹ *Lakoski v. James*, 66 F.3d 751, 755 (5th Cir. 1995).
¹⁷² *Id.* at 754-55.
¹⁷³ See *Jennings v. Univ. of N.C.*, 240 F. Supp. 2d 492 (M.D.N.C. 2002); *Doe*, 56 F. Supp. 2d 114; *Alston*, 176 F.R.D. 220.
¹⁷⁴ *Alston*, 176 F.R.D. 220.
¹⁷⁵ *Id.*
¹⁷⁶ *Id.* at 221.
¹⁷⁷ *Id.*
¹⁷⁸ *Id.* at 223-24.
¹⁷⁹ *Id.*
¹⁸⁰ *Alston*, 176 F.R.D. at 223 (citing *Seamons*, 84 F.3d at 1233 quoting *Lillard*, 76 F.3d at 723).
¹⁸¹ *Doe*, 56 F. Supp. 2d at 119 (citing 42 U.S.C. § 2000d (2006)).
¹⁸² *Id.* (quoting *Cannon*, 441 U.S. at 694-95).
¹⁸³ *Id.* at 116-20.
¹⁸⁴ *Id.* (quoting *Cannon*, 441 U.S. at 697).
¹⁸⁵ *Id.* at 118-119.
¹⁸⁶ *Canty v. Old Rochester Reg'l Sch. Dist.*, 54 F. Supp. 2d 66 (D. Mass. 1999).
¹⁸⁷ *Cmtys. for Equity*, 459 F.3d at 686 (citing *Lillard*, 76 F.3d at 723).
¹⁸⁸ See, e.g., *Abrams*, 544 U.S. at 122-23; *Middlesex County Sewerage Auth*, 453 U.S. at 20-21.