No. 16-4505

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

ELIZABETH FRYBERGER,

Plaintiff-Appellee

v.

UNIVERSITY OF ARKANSAS, *et al.*,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS

BRIEF FOR THE UNITED STATES AS INTERVENOR

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JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. 1331 because plaintiff-appellee Elizabeth Fryberger's complaint arose in part under Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.* Doc. 1.[1] On November 22, 2016, the district court entered an order denying defendant-appellant

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[1] Citations to "Doc. __, at __" refer to documents in the district court record, as numbered on the district court's docket sheet, and page numbers within the documents. Citations to "Appellant Br. __" refer to page numbers in Appellants' opening brief.

University of Arkansas's motion to dismiss the Title IX claim on Eleventh Amendment immunity grounds. Doc. 17, at 1-2. On December 19, 2016, the University filed a timely notice of appeal. Doc. 18. This Court has jurisdiction under 28 U.S.C. 1291. See *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993); *Monroe* v. *Arkansas State Univ.*, 495 F.3d 591, 593 (8th Cir. 2007).

STATEMENT OF THE ISSUE AND APPOSITE AUTHORITIES

Whether 42 U.S.C. 2000d-7 validly conditions the receipt of federal funds on a State's waiver of its Eleventh Amendment immunity from suits seeking monetary relief for intentional violations of Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*

- *Franklin* v. *Gwinnett Cty. Pub. Schs.*, 503 U.S. 60 (1992)
- 42 U.S.C. 2000d-7

STATEMENT OF THE CASE

This case involves a private enforcement action by Elizabeth Fryberger for damages against the University of Arkansas under Title IX. In her complaint, Fryberger alleged intentional discrimination on the basis of sex in violation of Title IX and sought "damages, punitive damages, costs of litigation" and "other relief" that the court "deems just and proper." Doc. 1, at 29. The University moved to dismiss the complaint, arguing that Fryberger's monetary claims are barred by

Eleventh Amendment immunity. Doc. 7. The district court rejected this argument, explaining that 42 U.S.C. 2000d-7 unequivocally permits a Title IX action against a State and that the Supreme Court has held that a "damages remedy is available for an action brought to enforce Title IX." Doc. 17, at 2 (quoting *Franklin* v. *Gwinnett Cty. Pub. Schs.*, 503 U.S. 60, 76 (1992)). The court stayed proceedings pending an appeal to this Court on the immunity issue. Doc. 17, at 3.

SUMMARY OF THE ARGUMENT

This Court should affirm the district court's holding that the University of Arkansas is not immune from Elizabeth Fryberger's damages claim under Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.* As the district court correctly concluded, 42 U.S.C. 2000d-7 validly conditions the receipt of federal funds on a State's waiver of its Eleventh Amendment immunity from suits seeking monetary relief for intentional violations of Title IX.

Under the Spending Clause, Congress may impose conditions, including a waiver of Eleventh Amendment immunity, on recipients of federal funds. Legislation enacted under the Spending Clause is valid if, among other things, the conditions imposed are unambiguous.

Section 2000d-7, which conditions receipt of federal funds on a waiver of Eleventh Amendment immunity from damages actions under Title IX, is unambiguous because it expressly provides that all remedies, including remedies

"at law," are available against States "to the same extent as such remedies are available" against defendants other than States. 42 U.S.C. 2000d-7(a)(2). When Congress enacted Section 2000d-7 in 1986, the Supreme Court had already recognized an implied right of action to enforce Title IX, *Cannon* v. *University of Chi.*, 441 U.S. 677 (1979), and had held that damages are available to remedy intentional violations of another statute on which Title IX was modeled, *Guardians Ass'n.* v. *Civil Serv. Comm'n of City of N.Y.*, 463 U.S. 582 (1983).

The Court later confirmed the availability of damages to remedy intentional discrimination under Title IX in a case involving a non-state entity. *Franklin* v. *Gwinnett Cty. Pub. Schs.*, 503 U.S. 60 (1992). In so holding, the court applied the longstanding presumption that all appropriate relief is available in an implied right of action to remedy a violation of federal law, absent congressional intent to the contrary. The Court relied on Section 2000d-7 to conclude that Congress had expressed an intent to include damages among Title IX's available remedies and acknowledged that application of the presumption of all appropriate relief to Title IX would subject the States to damages under Section 2000d-7. Accordingly, at least since *Franklin*, if not before, States have been on notice by virtue of Section 2000d-7's plain text that they are subject to damages actions for intentional violations of Title IX if they accept federal funds.

Contrary to the University's primary argument on appeal, the Supreme Court's decision in *Sossamon* v. *Texas*, 563 U.S. 277 (2011), does not alter this analysis. At issue in *Sossamon* was the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. 2000cc *et seq*., which authorizes "appropriate relief against a government" to remedy violations of that statute. 42 U.S.C. 2000cc-2(a). The Court in *Sossamon* concluded that the term "appropriate relief" in RLUIPA was too ambiguous to satisfy the requirement that a statute unequivocally express Congress's intent to subject States to damages claims. 563 U.S. at 285.

Sossamon's interpretation of RLUIPA provides no support for the University's claim of Eleventh Amendment immunity. The University overlooks a critical distinction between Section 2000d-7 and RLUIPA. As previously explained, Section 2000d-7 expressly provides that States are subject to the same remedies, including damages, that are available in Title IX suits against non-state defendants—which the Supreme Court has made clear comprise damages for intentional discrimination. RLUIPA contains no comparable provision; that statute is utterly silent on the question whether States are subject to the identical remedies that private plaintiffs may obtain against non-state defendants. RLUIPA thus lacks the unequivocal waiver language that Section 2000d-7 provides for Title IX actions against States.

ARGUMENT

SECTION 2000d-7 VALIDLY CONDITIONS THE RECEIPT OF FEDERAL FUNDS ON STATES' WAIVER OF THEIR ELEVENTH AMENDMENT IMMUNITY FROM SUITS SEEKING MONETARY RELIEF FOR INTENTIONAL VIOLATIONS OF TITLE IX

The district court correctly concluded that the Eleventh Amendment does not bar private plaintiffs from bringing Title IX damages claims against States for intentional discrimination. As the court recognized, Section 2000d-7 validly conditions the receipt of federal funds upon States' waiver of immunity from such claims.[2] This Court therefore should affirm the district court's decision rejecting the University's Eleventh Amendment immunity defense.

A. Statutory Background

Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to

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[2] Although the University also suggests (Appellant Br. 11-12) that Section 2000d-7 is not a valid exercise of Congress's power under Section 5 of the Fourteenth Amendment to abrogate States' Eleventh Amendment immunity, this Court need not address that argument because Section 2000d-7 is a valid exercise of Congress's power under the Spending Clause to condition States' receipt of federal funds on a waiver of their Eleventh Amendment immunity. See, *e.g.*, *Pederson* v. *Louisiana State Univ.*, 213 F.3d 858, 875 n.15 (5th Cir. 2000) (declining to reach abrogation argument upon concluding that Section 2000d-7 validly conditions receipt of federal funding on a State's waiver of Eleventh Amendment immunity). Accordingly, the United States submits this brief to assist the Court in its review of Section 2000d-7 under the Spending Clause and reserves the argument under Section 5 of the Fourteenth Amendment.

discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. 1681. Congress patterned Title IX on Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, which prohibits discrimination on the basis of race, color, and national origin in federally funded programs and activities. See *Cannon* v. *University of Chi.*, 441 U.S. 677, 694-696 (1979) ("Title IX was patterned after Title VI," and Title IX's drafters "explicitly assumed that it would be interpreted and applied as Title VI had been during the preceding eight years."). Title VI also served as the model for Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, a statute with similar wording to Title IX that prohibits discrimination on the basis of disability in federally funded programs and activities. *Alexander* v. *Choate*, 469 U.S. 287, 293 n.7 (1985) ("Section 504 was patterned after and is almost identical to, the antidiscrimination language of [Title VI].") (citation omitted). In 1985, the Supreme Court determined that Section 504 fell "far short of manifesting a clear intent to condition participation in the programs funded under the Act on a State's consent to waive its constitutional immunity" from suit in federal court. *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 247.

In response to *Atascadero*, Congress enacted the Civil Rights Remedies Equalization Act, 42 U.S.C. 2000d-7, the following year. Section 2000d-7 provides:

> (1) A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 [29 U.S.C. 794], title IX of the Education Amendments of 1972 [20 U.S.C. 1681 *et seq.*], the Age Discrimination Act of 1975 [42 U.S.C. 6101 *et seq.*], title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d *et seq.*], or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.
>
> (2) In a suit against a State for a violation of a statute referred to in paragraph (1), remedies (*including remedies both at law and in equity*) are available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State.

42 U.S.C. 2000d-7(a) (emphasis added). As set forth above, Section 2000d-7(a)'s first subsection conditions the receipt of federal funds on States' waiver of their Eleventh Amendment immunity from suit in federal court for violations of Title IX and other civil rights statutes (including Title VI and Section 504), while the second subsection provides that the same remedies that are available against non-state entities—whether legal or equitable—are available against States.

B. Section 2000d-7 Unambiguously Conditions Receipt Of Federal Funds Upon States' Waiver Of Their Eleventh Amendment Immunity From Suits For Damages In Actions Alleging Intentional Violations Of Title IX

Under its Spending Clause powers, Congress may condition a State's receipt of federal funds upon the State's knowingly and voluntarily waiving its Eleventh Amendment immunity from suit. *College Sav. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 670 (1999). Such waivers do not

impermissibly intrude on a State's sovereign immunity because they do not obligate the State to accept the relevant funds and consent to suit "but simply extend[] an option which the state is free to accept or reject." *Massachusetts* v. *Mellon*, 262 U.S. 447, 480 (1923).

For a Spending Clause waiver to be valid, the conditions imposed must be unambiguous. *South Dakota* v. *Dole*, 483 U.S. 203, 207 (1987). This requirement reflects the understanding that "legislation enacted pursuant to the spending power is much in the nature of a contract." *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 17 (1981). Thus, "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously" to "enable the States to exercise their choice knowingly, cognizant of the consequences of their participation." *Ibid.* A State waives its Eleventh Amendment immunity by accepting federal funds that are conditioned on such a waiver. *Edelman* v. *Jordan*, 415 U.S. 651, 672 (1974).[3]

Section 2000d-7 unambiguously conditions the receipt of federal funds upon a waiver of States' Eleventh Amendment immunity in actions seeking damages so

[3] Valid Spending Clause legislation must also promote the general welfare; impose conditions related to the federal interest in the particular national program; not violate the Constitution; and offer financial inducement that is not so coercive as to pass the point at which pressure becomes compulsion. *Dole*, 483 U.S. at 207-208, 211. These separate requirements are not at issue in this case.

long as damages are available in those same actions against non-state entities. The text provides that "remedies * * * at law" are available against States "to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State." 42 U.S.C. 2000d-7(a)(2). Damages are a "quintessential legal remedy." *SCA Hygiene Prods. Aktiebolag* v. *First Quality Baby Products, LLC*, 137 S. Ct. 954, 960 (2017). Congress included remedies "at law" in response to the Supreme Court's ruling in *Atascadero*, 473 U.S. at 247, that Congress had not validly conditioned federal funds on a waiver of States' immunity against suits for monetary relief under Section 504 of the Rehabilitation Act. See p. 7, *supra*. As the Court later explained, Congress took "care" to "respond[] to [the] decision in *Atascadero* by crafting an unambiguous waiver of the States' Eleventh Amendment immunity." *Lane* v. *Pena*, 518 U.S. 187, 200 (1996). Indeed, "Congress sought to provide the sort of unequivocal waiver that [the Court's] precedents demand" and fashioned a provision that was designed to "equalize the remedies available against all defendants," including money damages. See *id.* at 198. Accordingly, under Section 2000d-7, States are not immune from suits seeking damages if damages would be available against a defendant other than a State.

Under Title IX, non-state entities are subject to suits for damages. The Supreme Court first recognized an implied right of action to enforce Title IX in

Cannon v. *University of Chicago*, 441 U.S. at 717. The Court relied heavily on the fact that Title IX was modeled after Title VI, and that "when Title IX was enacted, the critical language in Title VI had already been construed [by the lower courts] as creating a private remedy." *Id.* at 696. The Court had "no doubt that Congress intended to create Title IX remedies comparable to those available under Title VI and that it understood Title VI as authorizing an implied private cause of action for victims of the prohibited discrimination." *Id*. at 703.[4] Soon thereafter, a majority of Justices agreed that damages are available to remedy intentional violations of Title VI. See *Guardians Ass'n.* v. *Civil Serv. Comm'n of City of N.Y.*, 463 U.S. 582, 595 (1983) (White, J., joined by Rehnquist, J.); *id.* at 607-611 (Powell, J., concurring in the judgment, joined by Burger, C.J.); *id.* at 612 & n.1 (O'Connor, J.,

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[4] The University's assertion that *Cannon* was made "easier to decide" because "the plaintiff in *Cannon* sought only equitable relief" is incorrect. Appellant Br. 18. The plaintiff in that case sought damages, in addition to other relief. See *Cannon* v. *University of Chi.*, 406 F. Supp. 1257, 1259 (N.D. Ill. 1976) (describing Title IX claim as a claim for "money damages"), rev'd, 441 U.S. 677. Although the Supreme Court in *Cannon* "referred to injunctive or equitable relief in a private action," Appellant Br. 18 (quoting *Gebser* v. *Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 287 (1998)), it did so only in the context of analyzing whether an implied right of action would be consistent with Title IX's purpose of ending discrimination in education. *Cannon*, 441 U.S. at 703-705. The Court reasoned that an order requiring an institution to admit an improperly excluded applicant, for example, would eliminate the discrimination more efficiently and effectively than a complete cutoff of all federal funds. *Id.* at 704-705. In a separate part of its analysis, the Court also relied on the common law rule that the right to recover damages is implied in a statute conferring rights on a class of people. *Id.* at 689 n.10.

concurring in the judgment); *id.* at 624-628 (Marshall, J., dissenting); *id.* at 636 (Stevens, J., dissenting, joined by Brennan and Blackmun, JJ.). The Court reaffirmed this interpretation in *Consolidated Rail Corp.* v. *Darrone*, 465 U.S. 624, 630-631 & n.9 (1984), when it unanimously held that Section 504 of the Rehabilitation Act—which expressly incorporates the "remedies, procedures, and rights set forth in title VI," 29 U.S.C. 794a(a)(2)—authorizes an award of monetary relief for intentional violations. The Court has continued to apply the same analytic framework to Title IX, Title VI, and Section 504 in cases involving the scope of appropriate relief. See, *e.g.*, *Barnes* v. *Gorman*, 536 U.S. 181, 185-190 (2002); see also *Rodgers* v. *Magnet Cove Public Sch.*, 34 F.3d 642, 644-645 (8th Cir. 1994).

Thus, the Supreme Court had made clear by 1984—two years before Congress enacted Section 2000d-7—that Title VI, Section 504, and, by extension, Title IX authorize claims for monetary relief. As a result, States were aware when Congress enacted the waiver provision that by accepting federal funds, they would be subject to suits for damages under Title IX. "It is always appropriate to assume that our elected representatives, like other citizens, know the law." *Cannon*, 441 U.S. at 696-697.

If any doubt remained at the time of Section 2000d-7's passage, a unanimous Supreme Court confirmed in *Franklin* v. *Gwinnett County Public*

Schools, 503 U.S. 60 (1992), that Title IX indeed authorizes monetary damages in actions alleging intentional sex discrimination. In so holding, the Court reaffirmed *Cannon* and relied on the "longstanding rule" that where a federal statute provides a right of action (implied or express), federal courts "presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise." *Id.* at 66. The Court found no congressional intent to abandon this presumption in the enforcement of Title IX. To the contrary, the Court found congressional intent to validate the availability of money damages for intentional violations of Title IX when Congress subsequently and unambiguously conditioned the receipt of federal funds on the waiver of States' Eleventh Amendment immunity in Section 2000d-7. *Id*. at 72; accord *id.* at 78 (Scalia, J., concurring in the judgment). Importantly, the Court in *Franklin* acknowledged that its application of the presumption of all appropriate remedies to Title IX would "require state entities to pay monetary awards out of their treasuries for intentional violations of federal statutes." 503 U.S. at 75.

Thus, at least since 1992 when the Court decided *Franklin*, States have been on notice by virtue of Section 2000d-7's plain text that, if they accept federal funds, they waive immunity from damages in cases alleging intentional violations of Title IX. See, *e.g.*, *Cherry* v. *University of Wis. Sys. Bd. of Regents*, 265 F.3d 541, 555 (7th Cir. 2001) (relying on *Franklin* to conclude that, when the defendant

accepted federal funds, it was "clearly put on notice" that if it discriminated in violation of Title IX, it could not assert Eleventh Amendment immunity in a suit for damages); *Pederson*, 213 F.3d at 875-876 (rejecting state university's Eleventh Amendment defense in Title IX damages action). The University's contention that Section 2000d-7 does not clearly condition federal funds on a waiver of Eleventh Amendment immunity from suits for damages directly contravenes the plain and unambiguous language of that provision. Indeed, accepting the University's position would mean that "[i]n a suit against a State," remedies "at law" would *not* be available "to the same extent as such remedies are available against" non-state defendants. 42 U.S.C. 2000d-7(a)(2).

The University's notice argument (Appellant Br. 17-26) likely would have failed even before *Franklin*. As detailed above, by the time Congress enacted Section 2000d-7, *Cannon* had already explained that Title IX was modeled on Title VI, and the Supreme Court had already held that Title VI created an implied damages remedy for claims of intentional discrimination. See pp. 11-12, *supra*. Indeed, the Supreme Court recognized as much in *Jackson* v. *Birmingham Bd. of Educ.*, 544 U.S. 167 (2005), when it explained that "private damages actions are available only where funding recipients ha[ve] adequate notice that they could be liable for the conduct at issue" and emphasized that "[f]unding recipients have been on notice that they could be subjected to private suits for intentional sex

discrimination under Title IX since 1979, when we decided *Cannon*." *Id.* at 181-182 (citation omitted). Thus, *Franklin*'s interpretation of Title IX to include damages actions against non-state defendants was not only "an authoritative statement of what the statute meant before as well as after the decision," *Rivers* v. *Roadway Exp., Inc.*, 511 U.S. 298, 312-313 (1994), it also was consistent with how a reasonable recipient of federal funds would have interpreted Title IX at the time of Section 2000d-7's enactment in 1986. See *Franklin*, 503 U.S. at 78 (Scalia, J., concurring in the judgment) (explaining that Section 2000d-7's withdrawal of States' Eleventh Amendment immunity "must be read" as both a "validation of *Cannon*" and also an "acknowledgment that damages are available" under Title IX) (citation omitted); accord *Alexander* v. *Sandoval*, 532 U.S. 275, 279-280 (2001).[5]

[5] Even if *Franklin* could be viewed as a change in the law, the scope of a waiver of sovereign immunity may evolve with subsequent legal developments. See, *e.g.*, *West* v. *Gibson*, 527 U.S. 212 (1999). In *Gibson*, the Supreme Court held that the Equal Employment Opportunity Commission's authority to enforce Title VII of the Civil Rights Act against the federal government through "appropriate remedies" expanded to include the authority to order the government to pay damages after a related statute was amended to explicitly allow damages actions under Title VII. 527 U.S. at 217-218. The argument here is the same: because Section 2000d-7 expressly ties the scope of States' waiver of Eleventh Amendment immunity to the scope of relief available against non-state defendants, Section 2000d-7's waiver of States' immunity from Title IX actions for all remedies available against non-state entities expanded to include the Court's recognition in *Franklin* that damages are available to remedy intentional violations of Title IX.

Indeed, that Congress enacted Section 2000d-7 in the first place strongly suggests that it was intended to encompass damages actions. Before Congress passed Section 2000d-7, individuals could already sue state officials in their official capacities under *Ex Parte Young*, 209 U.S. 123 (1908), and obtain injunctive and declaratory relief to remedy violations of federal law, which indisputably included Title IX under *Cannon*. Thus, as a practical matter, Section 2000d-7 would be unnecessary if it were limited to suits for equitable relief, as the University contends.

C. Sossamon *v.* Texas *Does Not Alter The Analysis That Section 2000d-7 Validly Conditions The Receipt Of Federal Funds On States' Waiver Of Eleventh Amendment Immunity From Damages Actions Under Title IX*

Contrary to the University's primary argument on appeal (Appellant Br. 15-17, 24-30), the Supreme Court's ruling in *Sossamon* v. *Texas*, 563 U.S. 277 (2011), does not change the above analysis. *Sossamon* addressed the waiver provision of the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. 2000cc *et seq.*, and restated the well-established rule that a "State's consent to suit must be 'unequivocally expressed' in the text of the relevant statute." 563 U.S. at 284 (quoting *Pennhurst*, 451 U.S. at 99). RLUIPA authorizes "appropriate relief against a government" to remedy a violation of the statute, 42 U.S.C. 2000cc-2(a), and defines "government" to include States, counties, municipalities and other government actors, 42 U.S.C. 2000cc-5(4)(A). The Court held that RLUIPA's

express authorization of "appropriate relief against a government" was not a sufficiently unambiguous expression of state consent to be sued for monetary damages in the context of RLUIPA as a whole. *Id*. at 285-286 (quoting 42 U.S.C. 2000cc-2(a)).[6]

Sossamon's interpretation of RLUIPA provides no support for the University's claim of Eleventh Amendment immunity. The University fails to recognize a critical distinction between the RLUIPA provision at issue in that case and the language of Section 2000d-7. The Court in *Sossamon* emphasized that the RLUIPA provision lacks an "unequivocal textual waiver" of sovereign immunity from damages claims. *Sossamon*, 563 U.S. 289 n.6. Section 2000d-7, by contrast, provides the "unequivocal textual waiver" missing in RLUIPA by emphasizing that States sued under Title IX are subject to the same remedies, including

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[6] The Court in *Sossamon* also held that Section 3 of RLUIPA fell outside of Section 2000d-7's notice of waiver of Eleventh Amendment immunity for violations of "any other Federal statute prohibiting discrimination by recipients of Federal financial assistance." 563 U.S. at 291 (quoting 42 U.S.C. 2000d-7(a)(1)). The Court so held because it found that Section 3, which limits States from imposing a substantial burden on the religious exercise of institutionalized persons, is not a "statute prohibiting discrimination" within the meaning of Section 2000d-7's catch-all phrase. *Id*. at 292. The Court did not intimate that money damages would be unavailable if Section 3 of RLUIPA *did* fall within Section 2000d-7's coverage. The Court left open whether Section 2 of RLUIPA, which prohibits land-use regulations that discriminate on the basis of religion, is a "statute prohibiting discrimination" within the meaning of Section 2000d-7. See *id.* at 292; *id.* at 302 n.5 (Sotomayor, J., dissenting).

remedies "at law," that are available against non-state defendants. 42 U.S.C. 2000d-7(a)(2). There is no comparable clear statement in RLUIPA that state and non-state entities are to be treated equally in determining the remedies available.

Indeed, the clarity and specificity of the waiver provisions in these two statutes are fundamentally different. RLUIPA's waiver of immunity from "appropriate relief" is "open-ended and ambiguous about what types of relief it includes." *Sossamon*, 563 U.S. at 286. Conversely, Section 2000d-7's waiver of "remedies both at law and in equity [that] are available * * * in [a Title IX] suit against any public or private entity other than a State" is precise and objective. Section 2000d-7 pegs the remedies available against a State to an objective standard—*i.e.*, whether the remedies are available in suits against defendants other than States. And in *Sossamon*, the Court reaffirmed its holding in *Franklin* that damages are available in such suits under Title IX. 563 U.S. at 288.

The district court thus correctly concluded that Section 2000d-7 validly conditions receipt of federal funds on a State's waiver of Eleventh Amendment immunity for Title IX claims seeking damages for alleged intentional discrimination. Because such damages claims are indisputably available against non-state defendants, see *Franklin*, 503 U.S. at 76, Section 2000d-7(a)(2) makes unmistakably clear that they must also be available against the States.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's decision denying the University's motion to dismiss Fryberger's Title IX claim on Eleventh Amendment immunity grounds and hold that monetary relief is available in suits against States for intentional violations of Title IX.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing BRIEF FOR THE UNITED STATES AS INTERVENOR:

(1) complies with Federal Rules of Appellate Procedure 29 and 32(a)(7), because it contains 4,397 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f); and

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word 2016, in 14-point Times New Roman font.

(3) was scanned for viruses using Symantec Endpoint Protection version 12.1.6, and it is virus-free.

s/ Francesca Lina Procaccini
FRANCESCA LINA PROCACCINI
Attorney

Date: November 22, 2017

CERTIFICATE OF SERVICE

I hereby certify that on November 22, 2017, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS INTERVENOR with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. Not all participants in this case are registered CM/ECF users. Service will be accomplished by the appellate CM/ECF system on all registered participants, and by mail on all non-registered participants.

I further certify that, within five days of receipt of the notice that the brief has been filed by this Court, I will transmit by Federal Express two-day delivery ten paper copies of the foregoing brief to the Clerk of the Court and one paper copy to counsel for each party and unregistered CM/ECF participant.

s/ Francesca Lina Procaccini
FRANCESCA LINA PROCACCINI
Attorney