No. 20-

IN THE

Supreme Court of the United States

THE BOARD OF SUPERVISORS OF LOUISIANA STATE UNIVERSITY AND AGRICULTURAL AND MECHANICAL COLLEGE,

Petitioner,

v.

STEPHEN M. GRUVER, INDIVIDUALLY AND ON BEHALF OF MAXWELL R. GRUVER; RAE ANN GRUVER, INDIVIDUALLY AND ON BEHALF OF MAXWELL R. GRUVER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Can Congress, in the exercise of Article I Spending Power, unilaterally expand federal judicial power for private civil damages actions asserted against the states by requiring states to waive Eleventh Amendment immunity to suit in federal court as a condition tethered to the receipt of federal funds accepted and used by the states to assist in providing public education to the citizens?

2. In the Civil Rights Remedies Equalization Act, 42 U.S.C. § 2000d-7, Congress conditioned LSU's receipt of federal funds and required LSU to waive Eleventh Amendment immunity to private actions brought under Title IX as Article I Spending Power legislation. This condition was imposed over 100 years after LSU, an arm of Louisiana, commenced receiving federal resources to assist, in part, academic research and higher education of students without any adverse impact on Louisiana's sovereignty and fourteen years after Title IX was enacted without any adverse impact on Louisiana's sovereignty. Did Congress exceed its Article I Spending Powers by conditioning continued receipt of federal educational funds on LSU's waiver of Eleventh Amendment sovereign immunity?

PARTIES TO THE PROCEEDING

The Board of Supervisors of Louisiana State University and Agricultural and Mechanical College, petitioner on review, was the appellant below and a defendant in the trial court.

Stephen M. Gruver and Rae Ann Gruver, individually and on behalf of their deceased son, Maxwell R. Gruver, are respondents on review. Mr. and Mrs. Gruver were appellees below and plaintiffs in the trial court.

RELATED PROCEEDINGS

United States District Court (M.D. La.):

Gruver, et al. v. La. through the Bd. of Supervisors of La. State Univ. and Agric. & Mech. Coll., et al., No. 18-cv-772 (Oct. 19, 2018) (granting in part motion to stay discovery)

Gruver, et al. v. La. through the Bd. of Supervisors of La. State Univ. and Agric. & Mech. Coll., et al., No. 18-cv-772 (July 19, 2019) (granting in part and denying in part motion to dismiss)

Gruver, et al. v. La. through the Bd. of Supervisors of La. State Univ. and Agric. & Mech. Coll., et al., No. 18-cv-772 (Nov. 22, 2019) (denying interlocutory certification and denying motion to certify appeal as frivolous and dilatory)

United States Court of Appeals (5th Cir.):

Gruver, et al. v. La. Bd. of Supervisors of La. State Univ. and Agric. & Mech. Coll., No. 19-30670 (Jan. 31, 2020) (denying hearing en banc)

Gruver, et al. v. La. Bd. of Supervisors of La. State Univ. and Agric. & Mech. Coll., No. 19-30670 (May 12, 2020) (panel decision)

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The Board of Supervisors of Louisiana State University and Agricultural and Mechanical College ("**LSU**") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on May 12, 2020 in No. 19-30670.

OPINIONS BELOW

The opinion of the court of appeals is reported at 959 F.3d 178. Pet. App. 1a–12a. The opinion of the district court is reported at 401 F. Supp. 3d 742. Pet. App. 13a–56a.

BASIS FOR JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered judgment on May 12, 2020 in No. 19-30670. This Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(a). This Petition for a Writ of Certiorari is timely under the Court's March 19, 2020 Order extending the deadline to file a petition for a writ of certiorari to 150 days from the date of the lower court judgment.

Petitioner is challenging the constitutionality of the Civil Rights Remedies Equalization Act, 42 U.S.C. § 2000d-7. Accordingly, 28 U.S.C. § 2403(a) may apply. The court of appeals did not certify to the Attorney General the fact that the constitutionality of an Act of Congress was drawn into question pursuant to 28 U.S.C. § 2403(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The appendix reproduces the Constitution's Spending Clause, U.S. Const. Art. I, § 8, cl. 1, and the Eleventh

Amendment, U.S. Const. amend. XI. It also reproduces the pertinent part of Title IX of the Educational Amendments of 1972, 20 U.S.C.A. § 1681(a), and Section 1003 of the Rehabilitation Act Amendments of 1986, 42 U.S.C.A. § 2000d-7.

STATEMENT

Respondents, Stephen Gruver and Rae Ann Gruver, individually and on behalf of Maxwell R. Gruver, filed this civil action in United States District Court for the Middle District of Louisiana on August 16, 2018 against multiple defendants, including LSU, seeking damages exceeding $25 million for the fraternity hazing death of Maxwell Gruver, an LSU student pledging the Phi Delta Theta fraternity.

Respondents assert a novel claim for damages against LSU pursuant to Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681, *et seq.* ("**Title IX**"), alleging Mr. Gruver's death was caused by intentional gender discrimination by LSU. No allegation is made that an LSU representative or employee participated in the hazing or was present when the tragic death occurred. Respondents allege that LSU engaged in gender-based discriminatory enforcement of fraternity and sorority anti-hazing policies that created risk of harm to Mr. Gruver. *See* Pet. App. 15a. Respondents also assert various causes of action against LSU and other defendants under Louisiana state law. The other defendants include Mr. Gruver's fraternity, Phi Delta Theta, and individual fraternity members, who Respondents allege are liable for Mr. Gruver's wrongful death under Louisiana state law tort theories.

The United States District Court for the Middle District of Louisiana exercised federal question jurisdiction under 28 U.S.C. § 1331 over this civil action asserting private claims for damages brought under Title IX.

In response to the suit, LSU moved to dismiss Respondents' Title IX and state law claims based on Eleventh Amendment immunity.[1] LSU is an arm of the State of Louisiana. *Raj v. La. State Univ.*, 714 F.3d 322, 328 (5th Cir. 2013). Neither LSU nor the State of Louisiana has consented to suit in federal court. The State of Louisiana, by statute, has unambiguously expressed the State's intent to preserve its sovereign immunity, as guaranteed by the Eleventh Amendment's ratification of constitutional dual sovereignty. *See* La. R.S. 13:5106(a) ("No suit against the state or a state agency or political subdivision shall be instituted in any court other than a Louisiana state court."). Louisiana has not waived Eleventh Amendment immunity by state constitutional provision or state statute. LSU argued in its motion that Section 1003 of the Rehabilitation Act Amendments of 1986, 42 U.S.C.A. § 2000d-7, which forces Title IX funding recipients to waive Eleventh Amendment immunity, is an unconstitutional forced-waiver of the state's sovereign immunity.

The District Court granted in part and denied in part LSU's motion. Pet. App. 13a–56. The District Court

1. LSU also moved to dismiss Respondents' Title IX claim pursuant to Federal Rule of Civil Procedure 12(b)(6). The trial court denied LSU's motion to dismiss for failure to state a claim upon which relief may be granted. Pet. App. 38a–56a. The trial court's ruling on the Rule 12(b)(6) motion is not at issue in this petition.

granted LSU's motion as to Respondents' state law negligence claims against LSU. Pet. App. 56a. The District Court denied protecting LSU's immunity to suit finding that LSU constructively waived Eleventh Amendment immunity by accepting federal funds based on the Fifth Circuit's prior decisions in *Pace v. Bogalusa City School Board*, 403 F.3d 272 (5th Cir. 2005) and *Miller v. Texas Tech University Health Sciences Center*, 421 F.3d 342 (5th Cir. 2005). Pet. App. 23a–38a.

LSU timely filed a Notice of Appeal seeking review of the District Court's ruling denying LSU's motion to dismiss premised on Eleventh Amendment immunity pursuant to the Collateral Order Doctrine. *Mitchell v. Forsyth*, 472 U.S. 511 (1985). On May 12, 2020, the Fifth Circuit issued its Opinion affirming the District Court and overruling LSU's Eleventh Amendment immunity to the Title IX private right of action asserted by Mr. Gruver's parents. Pet. App. 1a–12a.

REASONS FOR GRANTING THE PETITION

I. CONGRESS CANNOT USE ARTICLE I SPENDING POWER TO EXPAND FEDERAL JUDICIAL POWER OVER THE STATES THROUGH ABROGATION OR CONSTRUCTIVE WAIVERS OF THE STATES' ELEVENTH AMENDMENT IMMUNITY.

"The Framers created a Federal Government of limited powers, and assigned to this Court the duty of enforcing those limits." *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 588 (2012). Pursuant to the "unconstitutional conditions" doctrine,

the federal government may not place a condition on the receipt of a benefit or subsidy that infringes upon the recipient's constitutionally protected rights, even if the government has no obligation to offer the benefit in the first instance. *See Perry v. Sindermann*, 408 U.S. 593, 597 (1972). This Petition for a Writ of Certiorari asks this Court to determine that the Civil Rights Remedies Equalization Act ("**CREA**"), 42 U.S.C. § 2000d-7, imposes an unconstitutional condition on a recipient of federal education funds.

This Court has not reviewed whether Congress can invoke Article I Spending Power, which empowers Congress to enact Title IX, to condition, require or force a state's waiver of Eleventh Amendment immunity to suit in federal court brought by private individuals based on a state university's receipt of federal funds to support public education. This Court has never ruled that Congress can use Article I Spending Power to directly regulate the states' Eleventh Amendment sovereign immunity. This Court has never ruled that Congress can use federal funds to expand federal judicial power over the states and direct how the states govern their own sovereign immunity with "conditions."

In the absence of such guidance, lower courts are ubiquitously failing to apply and enforce this Court's decisions applicable to the Eleventh Amendment that should otherwise support LSU's Eleventh Amendment immunity to this Title IX hazing suit. These erroneous rulings are eroding, and will continue to erode, state sovereignty contrary to the states' ratification of the shared balance of federal and state power guaranteed by the Constitution. Bit by bit, an important foundation

of constitutional federalism is being eroded. This Court's judicial review is warranted and necessary to protect state sovereign immunity that comports with the text and original understanding of the Constitution and this Court's decisions that are contrary to the Fifth Circuit's rejection of LSU's Eleventh Amendment immunity in this action.

A. Article I Spending Power cannot be used by Congress to expand federal judicial power over the states through abrogation.

"The very object and purpose of the 11th Amendment [is] to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties." *In re Ayers,* 123 U.S. 443, 505 (1887); *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993). Although Eleventh Amendment immunity is not absolute, this Court has "recognized two circumstances in which an individual may sue a State" in federal court. *Coll. Sav. Bank v. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 670 (1999). Congress, in limited circumstances, may abrogate Eleventh Amendment immunity and authorize a suit against a state "in the exercise of its power to enforce the Fourteenth Amendment." *Id.* As discussed in Section I.B, *infra*, states may also knowingly and voluntarily waive sovereign immunity by expressly consenting to suit.

Title IX of the Educational Amendments of 1972, 20 U.S.C. §§ 1681–88, prohibits gender discrimination in educational institutions, whether public or private, that receive any federal funding. When enacted by Congress in 1972, Title IX did not originally require a funding recipient

to forfeit Eleventh Amendment immunity as a condition precedent to receiving federal funds for education. The non-discrimination condition tethered to the receipt of federal funds in Title IX had no adverse impact on a state's Eleventh Amendment immunity for states that received federal funds to assist educating the nation's citizens.

The statute relied upon by the Fifth Circuit to overrule LSU's Eleventh Amendment immunity to this Title IX hazing suit was enacted fourteen years after Title IX was enacted. In 1986, Congress enacted CREA as an abrogation of sovereign immunity on any state funding recipient for even alleged, but ultimately unproven, violations of Title IX:

> 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 . . . Title IX of the Education Amendments of 1972. . . or the provisions of any other Federal statute prohibiting discrimination of Federal financial assistance.

42 U.S.C.A. § 2000d-7(a)(1).

Title IX was not enacted by Congress as Fourteenth Amendment enabling legislation. Title IX was enacted to ensure that recipients of federal education funds did not use those resources to support gender-based discriminatory practices and "to provide individual citizens effective protections against those practices." *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 286 (1998). Title IX does not regulate the states as states—the necessary target of Fourteenth Amendment legislation. Instead,

Title IX regulates federal fund recipients, irrespective of whether a recipient of federal funds is private or public. The Fifth Circuit has correctly ruled that Article I Spending Power was the operative constitutional power authorizing Congress to enact Title IX in 1972. *Rosa H. v. San Elizario Independent School Dist.*, 106 F.3d 648,654 (5th Cir. 1997); *Canutillo Indep. School Dist. v. Leija*, 101 F.3d 393,398 (5th Cir. 1996); *Rowinsky v. Bryan Independent School District*, 80 F.3d 1006, 1013 n. 14 (5th Cir. 1996). The enactment of CREA fourteen years after Title IX was based on the same power used to enact Title IX. "We will not presume that Congress intended to enact a law under a general Fourteenth Amendment power to remedy an unspecified violation of rights when a specific, substantive Article I power clearly enabled the law." *In re Creative Goldsmiths of Washington, D.C., Inc.*, 119 F.3d 1140, 1146 (4th Cir. 1997).

This Court's prior decisions applying the Eleventh Amendment to federal judicial power clearly hold that Congress cannot invoke Article I Spending Power to abrogate, regulate, condition, require, or force a waiver of sovereign immunity based on a state's receipt of federal funds used by a state university for higher education.

"The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction." *Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44, 45 (1996). In 1996, the Court in *Seminole Tribe* held that Congress cannot invoke legislative power provided by the Indian Commerce Clause of Art. I, § 8 of the U.S. Constitution to abrogate a state's Eleventh Amendment immunity to suit in federal court. *Id.* at 75. Several years

earlier, in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), a plurality of this Court found that the Commerce Clause granted Congress the power to abrogate state sovereign immunity. Finding that "the plurality opinion in *Union Gas* allows no principled distinction in favor of States to be drawn between the Indian Commerce Clause and the Interstate Commerce Clause," this Court overruled *Union Gas* and held that *Union Gas* "deviated sharply from our established federalism jurisprudence" and "never before the decision in *Union Gas* had we suggested that the bounds of Article III could be expanded by Congress pursuant to any constitutional provision other than the Fourteenth Amendment." *Seminole Tribe of Fla.*, 517 U.S. at 65.

The states' retention of sovereign immunity when the Constitution was originally ratified, as reaffirmed by the Eleventh Amendment, does not permit distinctions to be made between any Article I power regarding Congressional power to abrogate Eleventh Amendment immunity in expanding federal judicial power over the states. Overruling *Union Gas* was central to the holding of *Seminole Tribe* because this Court did not find any principled distinction could be made between various Article I powers in light of Article III's limitation on the exercise of federal juridical power. *Id.* at 72–73. By refusing to distinguish Article I powers as a basis for abrogation, the Court's *Seminole Tribe* decision foreclosed Congress's power to abrogate sovereign immunity under *any* Article I power, including the Spending Power used by Congress to enact Title IX and CREA.

B. Article I Spending Power cannot be used to expand federal judicial power through conditions created by Congress to regulate sovereign immunity that procure "constructive waivers" of sovereign immunity from the states.

Aside from Congressional abrogation of sovereign immunity under the Fourteenth Amendment, a state may waive its sovereign immunity by expressly consenting to suit. Because waiver is the "intentional relinquishment or abandonment of a known right or privilege," a state's waiver of sovereign immunity must be both knowing and voluntary. *See Coll. Sav. Bank*, 527 U.S. at 682. "The decision to waive that immunity, however, is altogether voluntary on the part of the sovereignty." *Id* at. 675. Sovereign immunity is no less protected than other constitutionally protected rights, and courts are to "indulge every reasonable presumption against waiver of fundamental constitutional rights." *Id.* at 682. Louisiana has not waived its Eleventh Amendment immunity by state constitutional provision or statute. *See, e.g., Delahoussaye v. City of New Iberia,* 937 F.2d 144, 147 (5th Cir. 1991).

In order to breathe constitutional validity into CREA in light of *Seminole Tribe*, the Fifth Circuit in this case erroneously embraced the legal fiction that CREA is somehow a constitutional exercise of Congressional Spending Power under which a state constructively waives sovereign immunity as a condition precedent in exchange for accepting federal funds. Pet. App. 3a–4a; *Pederson v. La. State Univ.*, 213 F.3d 858 (5th Cir. 2000) ("Congress has successfully codified a statute which clearly, unambiguously, and unequivocally conditions

receipt of federal funds under Title IX on the State's waiver of Eleventh Amendment immunity.") *See also Pace v. Bogalusa City Sch. Bd.*, 403 F.3d 272 (5th Cir. 2005) and *Miller v. Texas Tech University Health Sciences Center*, 421 F.3d 342, 348 (5th Cir. 2005).

The "constructive waiver" of sovereign immunity applied here to LSU by the Fifth Circuit is clearly contrary to the Constitution and this Court's rulings that reject "constructive waiver" as a viable taking of sovereign immunity by Congressional "conditions," even if clearly expressed. The Eleventh Amendment amended the original Constitution, including Article I, expressly to reserve state sovereign immunity in federal court. *See Seminole Tribe of Fla.*, 517 U.S. at 72. A constructive nullification of the Eleventh Amendment occurs if Congress conditions returning federal funds to the states through appropriations only if the states surrender attributes of sovereignty expressly retained by the states in the Constitution.

Careful review of this Court's applicable decisions establishes that the "constructive waiver" theory used by the Fifth Circuit to overrule LSU's Eleventh Amendment immunity from a Title IX private action in federal court is not constitutionally permissible. The legal fiction of a "constructive waiver" of sovereign immunity found limited loose footing in *Parden v. Terminal Railway of Alabama Docks*, 377 U.S. 184 (1964). *Parden* was greatly limited in application by pre-*Seminole Tribe* jurisprudence and lacks any constitutional life after *Seminole Tribe.*

In *Parden*, the State of Alabama operated a for-profit, state-owned railroad for twenty years. By operating the

railroad in interstate commerce, Alabama effectively transcended the usual realm of state authority by voluntarily entering the private market, a market in which all employers were subject to the strictures passed by Congress. The finding of a waiver had little to do with any statute, but rather resulted chiefly from the actions of the state in entering a private market. The limited holding of the Court was that, based on these specific facts, Alabama should be subject to the same requirements as the other private participants in the private market, one of which was that all market actors' consent to suit in federal court. *Id.* at 192.

Subsequent decisions from this Court limit *Parden* "constructive waiver" to its specific facts. First, in *Employees v. Missouri Dept. of Public Health and Welfare*, 411 U.S. 279 (1973), the Court declined to extend *Parden* to circumstances in which a state was operating a non-profit hospital facility as a basis to find "constructive waiver." The next year, in *Edelman v. Jordan*, 415 U.S. 651 (1974), the Court refused to find *Parden*-style consent when Illinois participated in a federal program by agreeing to administer federal and state funds in accordance with federal law. Specifically, the Court found that "constructive consent is not a doctrine commonly associated with the surrender of constitutional rights, and we see no place for it here." *Id.* at 673. As a result, *Edelman* overruled *Parden* insofar as it spoke to the need for express "waiver" language in a state statute before finding any sort of waiver-language, which was clearly lacking in *Parden.*

Ten years later in *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 239–40 (1985) and twelve years

later in *Welch v. Texas Department of Highways and Public Transportation*, 483 U.S. 468, 478 (1987), the Court explained that the only means by which a state may effectuate a waiver of Eleventh Amendment immunity is by:

> a state statute or constitutional provision, or by otherwise waiving its immunity to suit in the context of a particular federal program. In each of these situations, we require an unequivocal indication that the State intends to consent to federal jurisdiction that otherwise would be barred by the Eleventh Amendment.

Atascadero, 473 U.S. at 238 n.1. Hence, by the time *Welch* was decided in 1987, this Court viewed the "forced waiver" or "constructive waiver" rule of *Parden* as the functional equivalent of, or synonymous with, "abrogation" or a unilateral taking by Congress of state sovereign immunity. No Supreme Court case after *Parden* has found *Parden*-type consent or constructive waiver. As a result, this Court, until *Union Gas*, was never faced with the issue of whether such compelled waivers are constitutionally permissible.

In *Union Gas v. Pennsylvania*, 491 U.S. 1, 14 (1989), which was overruled by *Seminole Tribe*, Justice Brennan, writing for the plurality, borrowed from the constitutional notion of waiver (albeit compelled) and misapplied those principles with respect to abrogation, confusing the distinction between "waiver" and "abrogation." The *Union Gas* opinion weakly reasoned that because the *Parden* Court recognized that Alabama could waive or surrender its sovereign immunity, such a finding was tantamount to

holding that Congress could either take or condition the immunity by statute or require its waiver as a condition of regulation under Article I commerce power. *Id.*

The problem with Justice Brennan's flawed reasoning, as identified by Chief Justice Rehnquist in *Seminole Tribe*, was that "constructive waiver" from the state's end was no longer viable in the context of *Parden*-type regulation. *Seminole Tribe of Fla.*, 517 U.S. at 65. Moreover, because the State had surrendered sovereign immunity in *Parden*, there was no opportunity for the Court to test Congress' abrogation power in *Parden* because there was nothing to abrogate under the facts of *Parden*. As demonstrated above, the plurality decision in *Union Gas* and the Fifth Circuit's application of "constructive waiver" of sovereign immunity to Title IX suits in federal court is based wholly on a fiction authorizing Congress to displace state sovereign immunity with "conditions" created by Congress as an exercise of Article I power.

The Fifth Circuit's "constructive waiver" end run around unconstitutional abrogation as applied to Title IX and CREA, attempts to engineer the result of *Union Gas*, which was overruled by *Seminole Tribe*, but with a different and troublesome twist. Acknowledging that Congressional abrogation under Article I is constitutionally impermissible, the label of "waiver" is placed on CREA in an attempt to cleanse the statute of its clear unconstitutionality as an abrogation statute. The balance of constitutional power in this country is not so precarious as to be based on fictions derived from trigger words. Whether the divestiture of sovereign immunity comes from abrogation or Congress' "terms of doing business" with the states, the divestiture has one

source—Congress—and Congress' power to create such a divestiture is measured against the limitations of Article I, Article III, and the Eleventh Amendment. For the waiver to be free of constitutional scrutiny, it must be free of Congressional involvement. Whether viewed through the lens of abrogation or compelled waiver, Congress' power is exerted and exertion of such power is unconstitutional.

The "constructive waiver" found by the Fifth Circuit applicable to LSU in this action is clearly at odds with this Court's decision in *Seminole Tribe*. In *Seminole Trib*e, the government argued that because Congress in the Indian Gaming Act had bestowed a benefit on Florida that it otherwise would not have had—some measure of authority over gaming on Indian lands—Congress was free to condition that benefit on the elimination of state sovereign immunity for violations under the Act. *Seminole Tribe*, 517 U.S. at 58. In other words, the government argued that when Florida decided to exercise regulatory authority over gaming lands in its state, it waived sovereign immunity. Chief Justice Rehnquist rejected this argument and wrote that "[t]he Eleventh Amendment immunity may not be lifted by Congress unilaterally deciding that it will be replaced by grant of some other authority." *Id.* at 58–59.

In *Seminole Tribe*, the Court summarized jurisprudence prior to *Union Gas* as restricting Congressional expansion of Article III power only to defined Fourteenth Amendment power. *Id.* at 65. The language in *Seminole Tribe* cannot be read to permit Congress to manipulate an invalid "abrogation" clause and euchre a backdoor waiver from the states. In his dissent in *Union Gas*, which was cited with approval by the

Seminole Tribe decision, Justice Scalia cogently explained why abrogation and conditional waivers are the same for purposes of constitutional analysis:

> At bottom, then, to acknowledge that the Federal Government can make the waiver of state sovereign immunity a condition to the State's action in a field that Congress has authority to regulate is substantially the same as acknowledging that the Federal Government can eliminate state sovereignty in the exercise of its Article I powers -- that is, to adopt the very principle I have just rejected. There is little more than a verbal distinction between saying that Congress can make the Commonwealth of Pennsylvania liable to private parties for hazardous waste clean-up costs on sites that the Commonwealth owns and operates, and saying the same thing but adding at the end "if the Commonwealth chooses to own and operate them." If state sovereign immunity has any reality, it must mean more than this.

Pennsylvania v. Union Gas Co., 491 U.S. 1, 44 (1989) (Scalia, J., concurring in part and dissenting in part).

This Court in *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board,* 527 U.S. 666 (1999), held that abrogation and "forced waiver" statutes, in the application of a state's Eleventh Amendment immunity, are subject to the same constitutional limitations under Congress's Article I Commerce Clause power because:

> Recognizing a congressional power to extract constructive waivers of sovereign immunity

> through the exercise of Article I powers would also, as a practical matter, permit Congress to circumvent the anti-abrogation holding of *Seminole Tribe. Forced waiver and abrogation are not even different sides of the same coin—they are the same side of the same coin.*

Id. at 683 (emphasis added).

The *College Savings* Court correctly recognized that "State sovereign immunity, no less than the right to trial by jury in criminal cases, is constitutionally protected." *Id.* at 682. This holding means that what cannot be done to coerce individual citizens to waive their rights cannot be done to coerce a state to waive its sovereignty. The *College Savings* decision illustrated the absurdity of a constructive or forced waiver applied to a criminal prosecution:

> For example, imagine if Congress amended the securities laws to provide with unmistakable clarity that anyone committing fraud in connection with the buying or selling of securities in interstate commerce would not be entitled to a jury in any federal criminal prosecution of such fraud. Would persons engaging in securities fraud after the adoption of such an amendment be deemed to have "constructively waived" their constitutionally protected rights to trial by jury in criminal cases? After all, the trading of securities is not so vital an activity that any one person's decision to trade cannot be regarded as a voluntary choice. The answer, of course, is no.

Id. at 681–82.

In the majority opinion, Justice Scalia recognized, **in dicta**, that certain distinctions have been made between Congress's ability to use the Spending Power to regulate states indirectly and Congressional Power under the Commerce Clause. *Id.* at 683. Justice Scalia was careful, however, to note in additional dicta that Congress's ability to indirectly regulate the states using financial conditions under the Spender Power is not unlimited—an issue that was not presented in *College Savings*. *Id.* Here, CREA's authority over LSU's sovereign immunity is not merely an indirect encroachment of implied state Tenth Amendment power—Congress is directly and unconstitutionally regulating Louisiana's express Eleventh Amendment power and immunity.

The conditional waiver theory adopted by the Fifth Circuit and applied to LSU in this case is not constitutionally viable. The governance and regulation of state sovereignty by Congress in CREA is a unilateral decision of Congress—not a collective enactment of legislation by Congress and the states, or any agreement by the states whatsoever. The words enacted by Congress—"No state shall be immune …."—cannot be reasonably construed as anything other than abrogating sovereign immunity. *See Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 72 (1992) ("In the Rehabilitation Act Amendments of 1986, 100 Stat. 1845, 42 U.S.C. § 2000d–7, Congress abrogated the States' Eleventh Amendment immunity under Title IX, Title VI, § 504 of the Rehabilitation Act of 1973, and the Age Discrimination Act of 1975"). Congress "abrogating" a right of sovereignty is by definition "doing away" with a right of sovereignty. Under federal law, "[w]aiver is the voluntary, intentional relinquishment of a known right." *Coll. Sav. Bank*, 527 U.S. at 682. If CREA

unilaterally stripped the states of Eleventh Amendment immunity in the exercise of Spending Power, the states waived nothing by accepting federal funds. A state cannot unambiguously waive a right that does not exist or a right that has been abrogated.

C. Federal funding of higher education should not be viewed as a "gift" in the context of Congress regulating state sovereign immunity as a constitutional condition imposed on a "gift."

Cases that have upheld the exercise of Spending Power to enforce conditions imposed by Congress other than sovereign immunity often point to the notion that funds dispensed by the federal government to the states are "gifts." The Fifth Circuit did so here: "LSU is free to avoid Title IX obligations by declining federal funds without threatening other state agencies' funding." Pet. App. 12a.

If surrendering constitutional sovereignty is a permissible forced condition for receiving a "gift," limited federal funding of public higher education is not properly characterized as a "gift." To be clear, LSU does not contend it is immune from the non-discrimination mandates of Title IX. LSU does not contend that it is immune from Title IX's federal enforcement mechanism and regulations implemented by the Office of Civil Rights, the statutorily appointed federal agency vested with authority to enforce Title IX, which includes terminating federal funds for intentional violations of Title IX. LSU does not contend Respondents have no right to sue LSU in state court. However, the question is not whether LSU is governed by Title IX, but whether, by whom, and where

the statute can be enforced in a court of law consistent with limitations on federal judicial power that were expressly retained by the states.

Federal financial support of public education provided by LSU is not a "gift" to the state of Louisiana or LSU. State governments obtain funding for public education through local/state taxation, student paid tuition and fees, and directly and indirectly through certain appropriations made by the federal government. In the matter of higher education, some federal appropriations go directly to public universities as federal research grants. A federal research appropriation is not a gift to the states. The universities perform valuable research benefiting the national interest in exchange for the grant. Some federal education appropriations go indirectly to state universities in the form of Pell grants provided to eligible students from low income backgrounds and GI benefits provided to eligible military servicemen who are also students. In return, the state universities educate the recipients of these federal funds. Again, not something for nothing.

Beyond the military academies, all public higher education in the United States is provided by the states. The United States does not provide public education to the citizens of Louisiana. Louisiana provides that service. Without state and local public education, there is no public higher education in the United States generally available to the citizens. To treat federal funding mechanisms to state public universities as "gifts" from the federal government ignores the reality that the public service of education and research is provided as consideration for the limited federal funding of public universities such as LSU.

And the nation, as a whole, benefits. As Alexander Hamilton recognized, the taxing power provided to Congress by the states and the subsequent spending of money benefitting the citizens of the states is not just a benefit to the states, "we are sure the resources of the community, in their full extent, will be brought into activity for the benefit of the Union." THE FEDERALIST NO. 30 (Alexander Hamilton). In the original interpretation of Spending Power, money from the national government extended to the states was never viewed as a gift or charity. Alexander Hamilton wrote:

> Money is, with propriety, considered as the vital principle of the body politic; as that which sustains its life and motion, and enables it to perform its most essential functions. A complete power, therefore, to procure a regular and adequate supply of it, as far as the resources of the community will permit, may be regarded as an indispensable ingredient in every constitution. From a deficiency in this particular, one of two evils must ensue; either the people must be subjected to continual plunder, as a substitute for a more eligible mode of supplying the public wants, or the government must sink into a fatal atrophy, and, in a short course of time, perish.

Id.

Under the Eleventh Amendment, the right of a state, as a dual sovereign, to control its own public treasury and payment of alleged debts is retained by the states. The Framers of the Constitution recognized that governmental

authority over its treasury is the lifeblood of government, including state government. *See Franchise Tax Bd. of Cal. v. Hyatt*, 139 S.Ct. 1485, 1493 (2019) ("An integral component" of the States' sovereignty was "their immunity from private suits."); *Fed. Maritime Comm'n v. South Carolina Ports Auth.*, 535 U.S. 743, 751–752 (2002); *Alden v. Maine*, 527 U.S. 706, 713 (1999) ("[A]s the Constitution's structure, its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today ...").

In Article I, the states gave Congress the authority to tax citizens of the states and spend the proceeds of those taxes maintained by the federal treasury. At the same time, the states also retained sovereign immunity to suit in federal court. These principles are neither mutually exclusive nor inconsistent to the sovereignty of either the national government or the states. The states never gave Congress the authority to limit retained sovereign immunity as a condition of receiving funds from the federal government. In Federalist No. 81, Alexander Hamilton wrote that a state's sovereignty should not be the price for federal funding:

> The circumstances which are necessary to produce an alienation of State sovereignty were discussed in considering the article of taxation, and need not be repeated here. A recurrence to the principles there established will satisfy us, that there 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.** The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force.')

THE FEDERALIST No. 81 (Alexander Hamilton) (Emphasis supplied).

The legal fiction of federal funds used to support public higher education as a "gift" for "sovereignty" tradeoff should not drive the outcome here based on the actual realities of administering public higher education and the originalist view that federal funds dispensed to the states are not constraints that can be used to regulate or eliminate state sovereign immunity to suits in federal court brought by private individuals.

II. EVEN IF A REQUIRED WAIVER BY CONGRESS CAN BE PERMISSIBLE UNDER ARTICLE I SPENDING POWER, CONGRESS' REQUIRED WAIVER OF LSU'S ELEVENTH AMENDMENT IMMUNITY TO A TITLE IX PRIVATE ACTION IS NOT "CLEAR NOTICE" AND IS UNCONSTITUTIONALLY COERCIVE.

Even if Congress is not prohibited per se from extracting a "constructive waiver" of LSU's Eleventh Amendment immunity without violating the Eleventh Amendment, the extraction of a constructive waiver from LSU under Title IX is an unconstitutionally coercive exercise of Article I Spending Power. The Constitution empowers Congress to "lay and collect taxes, duties,

imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States." U.S. Const. Art. I, § 8, cl. 1. It is understood that "[i]ncident to this power, Congress may attach conditions on the receipt of federal funds." *South Dakota v. Dole*, 483 U.S. 203, 206 (1987).

However, as made clear in *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012), this power is limited. The Spending Clause doctrine cannot permit Congress to impose any conditions it chooses on its offers of federal funds to the States on the simplistic ground that if a state that not like the conditions, it can always decline the offer. Such a doctrine would strip all meaning from the Constitution's notion of a federal government of limited, enumerated powers. *Sebelius* crafted a "substantially altered doctrine" that should be applied to the Fifth Circuit's erroneous review of CREA for constitutionality. *See* Baker, L., *The Spending Power After NFIB v. Sebelius*, 37 Harv. J.L. & Pub. Pol'y 71, 73 (2014). At least one commentator has similarly argued that the decisions of the Fifth Circuit related to CREA are ripe for reconsideration after *Sebelius*. Pasachoff, E., *Conditional Spending after NFIB v. Sebelius: The example of Federal Education Law*, 62 Am. U. L. Rev. 577, 631 (2013).

In *Dole*, this Court held that Congress' act in conditioning a grant of federal highway funds to South Dakota on the state's adoption of a minimum drinking age of 21 was a valid exercise of Congress' Spending Power, not limited by the Tenth Amendment. 483 U.S. at 212. This Court identified several restrictions on the Congressional Spending Power. First, conditions attached by Congress on the expenditure of federal funds must promote the

general welfare, and not be in the service of narrow and private interests. *Id.* at 207. Second, conditions on the state receipt of federal funds must be unambiguous, and enable "the States to exercise their choice knowingly, cognizant of the consequences of their participation." *Id.* Third, the Court suggested that conditions on federal grants might be illegitimate if they are unrelated to the federal interest in particular national projects or programs." *Id.* Fourth, no condition attached to receipt of federal funds may violate other provisions of the Constitution. *Id.* at 208.

The condition of waiving sovereign immunity in CREA violates the Eleventh Amendment, for reasons discussed above, and is per se unconstitutional under the fourth restriction articulated in *Dole*.

Aside from prohibiting unconstitutional conditions, this Court in *Dole* cautioned that "in some circumstances the financial inducement [to comply with a condition imposed upon the receipt of federal funds] offered by Congress might be so coercive as to pass the point at which pressure turns into compulsion." *Id.* at 208. Thus, while Congress may use its Spending Powers to encourage the states to act, it may not coerce the states into action. If the Congressional action amounts to coercion rather than encouragement, then that action is not a proper exercise of Congress's Spending Power, but is instead a violation of the Tenth Amendment. *Id.* ("Our decisions have recognized that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which pressure turns into compulsion.").

After *Dole*, this Court did not hold that an exercise of Congressional Spending Power was unduly coercive until the 2012 decision in *Sebelius*, 567 U.S. at 576. The

Spending Power question raised in *Sebelius* involved the "Medicaid expansion" provision of the Affordable Care Act ("ACA"), which increased the number and categories of individuals that participating states must cover. The ACA would increase federal funding to cover some, but arguably not all, of the states' cost of expanding Medicaid coverage in the specified ways. *Id.* at 576. If a state did not comply with the ACA's new coverage requirements, it lost not only the federal funding for those new requirements but all of its federal Medicaid funds. The 26 states and others who challenged the ACA contended that this Medicaid expansion provision exceeded Congress's authority under the Spending Clause, and seven Justices of this Court agreed.

The second prong of the *Dole* test, "clear notice," was substantially modified by *Sebelius*. Historically, this prong of the *Dole* test has been read as seeking to ensure that the terms of the conditions on the offer made to the state are clear at the time the offer is made so that the state can make an informed decision whether to accept the offer. In *Sebelius*, Chief Justice Roberts applied *Dole's* "clear notice" restriction in an entirely new way, such that the question became whether the states could have known at the time they agreed to participate in the original Medicaid plan that those funds might later be at risk unless additional conditions—to be disclosed at some unknown point in the future—were met. *Id.* at 584. "Clear notice" cannot be provided based on new conditions attached to the receipt of federal funds decades after the states start relying on such funds followed years later with coercive new strings being attached to the receipt of those funds by Congress. *Id.* And by analogy, a forced waiver of Eleventh Amendment immunity is not voluntary and unequivocal without "clear notice."

It is undisputed that LSU has received federal funding and support as consideration for educating students originating in the 1870's. LSU was established as a land grant university by an act of the Louisiana legislature, approved on April 7, 1874, to carry out the United States Morrill Act of 1862, whereby the federal government granted lands for this purpose. 7 U.S.C. § 301. No condition was placed on Louisiana's sovereignty by the land grant, and Louisiana did not waive sovereign immunity as part of the land grant in 1874. The Morrill Act, an act of Congress, required that military training be part of LSU's offered curriculum. The military training requirement of the Morrill Act is what accounts for LSU's Reserve Officer Training Corp program that has been in existence for almost 150 years. Following the drafting and ratification of Louisiana's Constitution of 1974, the Louisiana legislature immediately enacted La. R.S 13:5106, which does not waive Eleventh Amendment immunity. No condition or regulation was placed on LSU's sovereign immunity under Congress's Spending Power while LSU satisfied the conditions of the Morrill Act for 112 years until CREA was enacted in 1986.

The federal government funds the ROTC program that LSU provides as part of its responsibility under the Morrill Act and the conditions of the land grant. 10 U.S.C. § 2031. Any federal funding of a component of LSU triggers coverage by Title IX. *O'Connor v. Davis*, 126 F.3d 112, 117 (2d Cir. 1997). Military cadets receive scholarships and stipends administered through the LSU Office of Student Aid, which are funded by the federal government. Congress has the constitutional power and obligation to provide for the common defense of the states, raise and support armies, and to provide and maintain a navy. U.S. Const., art. I, §§ 1, 12 and 13. While this type of federal

funding triggers Title IX regulation of LSU, the federal funding is not a "gift" from the federal government to LSU—it is a requirement of funding for national defense.

To say that LSU voluntarily chooses to give up sovereign immunity under these circumstances is simply not accurate. LSU should not have to forego its sovereign immunity when Congress provides funding for a program that Congress is constitutionally required to provide. The conditions that created LSU's need for and entitlement to federal funding of its programs today have their genesis almost 150 years ago. Moreover, prior to the enactment of Title IX in 1972, LSU received federal financial assistance to support education of students through the Servicemen's Readjustment Act of 1944 (the "GI Bill") and Title IV, 20 U.S.C. § 1070, going back to 1964. Louisiana could hardly anticipate that operating an ROTC program with federal money and accepting GI Bill and Title IV funds prior to 1986 would later mean being stripped of dual sovereignty in 1986. That sort of bait-and-switch regulation of sovereign immunity fails the "clear notice" test for the same reason the Medicaid expansion did in *Sebelius*.

A waiver of sovereign immunity was not a condition of LSU's federal land grant in 1874. A waiver of sovereign immunity was not a condition of LSU operating a federally funded ROTC program for a century. A waiver of sovereign immunity was not a condition of LSU receiving GI Bill benefits to educate eligible veterans following World War II. The loss of sovereign immunity was not part of "the bargain" when Title IX was enacted in 1972. The loss of sovereign immunity created by CREA in 1986 was not "bargained for" as suggested by the Fifth Circuit. Requiring LSU to "waive" sovereign immunity in CREA after 100 years of receiving federal financial

assistance is not policy encouragement by Congress—it is Congressional compulsion aimed to eviscerate an integral aspect of constitutional dual sovereignty enjoyed by the states and the federal government. *See Alden*, 527 U.S. at 713 ("[A]s the Constitution's structure, its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today ...").

Furthermore, in Justice Scalia's dissenting opinion in *Sebelius*, joined by Justice Kennedy, Justice Thomas, and Justice Alito, the dissenting group actually agreed with Chief Justice Roberts that the ACA employed unconstitutional coercion by Congress under its Spending Power. *Sebelius*, 567 U.S. 689 (Scalia, J., dissenting) Five justices of this Court agreed that coercion is an unconstitutional use of Spending Power:

> Coercing States to accept conditions risks the destruction of the "unique role of the States in our system." *Davis, supra,* at 685, 57 S.Ct. 883 (KENNEDY, J., dissenting). "[T]he Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions."

Id. at 677.

When Congress enacted CREA in 1986, Congress not only required a state that is a federal fund recipient to abide by Title IX or risk losing its federal funds for

education, Congress **directly regulated the sovereignty of the states or required the states to manage and govern their own sovereignty to suits in federal court based on the instructions set by Congress**, not unilaterally by the states. CREA does not regulate the behavior of the states in administering federally funded education programs. CREA does not change, alter, or modify the anti-discrimination standard of care implemented by Title IX. Under CREA, a state that ends up being exonerated for an alleged Title IX violation brought in federal court loses its sovereignty because the Eleventh Amendment is not just an immunity from liability, it is an immunity from suit. Under *Sebelius*, Congress' regulation of a state's sovereignty using a funding mechanism to obtain a waiver is unconstitutional coercion as direct regulation of state sovereign immunity.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 2020

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED MAY 12, 2020

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-30670

STEPHEN M. GRUVER, INDIVIDUALLY AND ON BEHALF OF MAXWELL R. GRUVER; RAE ANN GRUVER, INDIVIDUALLY AND ON BEHALF OF MAXWELL R. GRUVER,

Plaintiffs-Appellees,

v.

LOUISIANA BOARD OF SUPERVISORS FOR THE LOUISIANA STATE UNIVERSITY AGRICULTURAL AND MECHANICAL COLLEGE,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Louisiana

May 12, 2020, Filed

Before SOUTHWICK, COSTA, and DUNCAN, Circuit Judges.

GREGG COSTA, Circuit Judge:

Appendix A

Two decades ago we held that state recipients of Title IX funding waive their Eleventh Amendment immunity against suits alleging sex discrimination. *Pederson v. La. State Univ.*, 213 F.3d 858, 876 (5th Cir. 2000). Louisiana's flagship university was the defendant in that case, and it is back to again invoke Eleventh Amendment immunity against a Title IX claim. The state has not forgotten its loss on this issue but argues that an intervening Supreme Court decision allows us to reexamine our precedent. We disagree.

I.

This case arises from the tragic death of Maxwell Gruver after a fraternity hazing event at Louisiana State University. His parents sued LSU for violations of Title IX and state law. In support of the federal claim, they allege that LSU discriminated against male students by policing hazing in fraternities more leniently than hazing in sororities.

LSU moved to dismiss the Gruvers' complaint for lack of jurisdiction and for failure to state a claim. It argued that Eleventh Amendment immunity deprived the district court of jurisdiction. The district court denied the motion as to the Title IX claim. Although it dismissed the state-law claims on Eleventh Amendment grounds, it held that LSU had waived immunity to Title IX suits under Fifth Circuit precedent. The court then ruled that the Gruvers had sufficiently alleged a Title IX violation.

LSU cannot bring an interlocutory appeal of the ruling that the Gruvers stated a claim, but it can appeal the denial of Eleventh Amendment immunity before the case goes further, *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144-45, 113 S. Ct. 684, 121 L. Ed. 2d 605 (1993). It has done so.

II.

The Eleventh Amendment bars suits that individuals file against states in federal court. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996). As with just about every rule, there are exceptions. One is that a state may waive its immunity, and Congress can induce a state to do so by making waiver a condition of accepting federal funds. *Pace v. Bogalusa City Sch. Bd.*, 403 F.3d 272, 277-79 (5th Cir. 2005) (en banc).[1]

We held twenty years ago that this type of Spending Clause waiver exists for Title IX. *Pederson*, 213 F.3d at 876. *Pederson* concluded that the following statute—enacted in 1986 as the Civil Rights Remedies Equalization Act—validly conditioned Title IX funding on a recipient's waiver of Eleventh Amendment immunity:

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1. Congress can also unilaterally abrogate a state's Eleventh Amendment immunity by enacting legislation under Section Five of the Fourteenth Amendment. *Pace*, 403 F.3d at 277. The Gruvers contend that abrogation allows their lawsuit too, but we need not reach the question because of our precedent permitting it to proceed on waiver grounds. *Id.* at 287; *Pederson*, 213 F.3d at 875 n.15.

> 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, title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, title VI of the Civil Rights Act of 1964, or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

42 U.S.C. § 2000d-7(a)(1); *see also Pederson*, 213 F.3d at 876. In exchange for receiving federal funds, LSU subjected itself to the *Pederson* suit challenging its failure to field women's soccer and softball teams. 213 F.3d at 876.

We have since reaffirmed that holding in cases dealing with other antidiscrimination statutes mentioned in section 2000d-7. *See Miller v. Tex. Tech Univ. Health Scis. Ctr.*, 421 F.3d 342, 347-52 (5th Cir. 2005) (en banc) (Rehabilitation Act); *Pace*, 403 F.3d at 280-87 (same). We are not alone. Every circuit to consider the question—and all but one regional circuit has—agrees that section 2000d-7 validly conditions federal funds on a recipient's waiver of its Eleventh Amendment immunity.[2]

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2. *See Barbour v. Wash. Metro. Area Transit Auth.*, 374 F.3d 1161, 1170, 362 U.S. App. D.C. 336 (D.C. Cir. 2004); *Nieves-Marquez v. Puerto Rico*, 353 F.3d 108, 129 (1st Cir. 2003); *Koslow v. Pennsylvania*, 302 F.3d 161, 176 (3d Cir. 2002); *Robinson v. Kansas*, 295 F.3d 1183, 1190 (10th Cir. 2002), *abrogated on other grounds by Muscogee (Creek) Nation v. Pruitt*, 669 F.3d 1159 (10th Cir. 2012); *Nihiser v. Ohio E.P.A.*, 269 F.3d 626, 628 (6th Cir.

LSU acknowledges that precedent stands in the way of its immunity claim. Indeed, it sought initial hearing en banc because, under the rule of orderliness, only our full court can "overturn another panel's decision." *See Mercado v. Lynch*, 823 F.3d 276, 279 (5th Cir. 2016) (per curiam) (citation omitted). That request had no takers.

LSU nevertheless presses on. It invokes another way to avoid one of our precedents: an intervening ruling from the Supreme Court. The bar it faces is high. For a Supreme Court decision to constitute a change in the law that enables a panel to take a fresh look at an issue, it must mark an "unequivocal" change, "not a mere 'hint' of how the Court might rule in the future." *Id.* at 279 (citation omitted). The decision LSU cites, *National Federation of Independent Business v. Sebelius*, 567 U.S. 519, 132 S. Ct. 2566, 183 L. Ed. 2d 450 (2012), does not meet that standard when it comes to the analysis that *Pederson* and our other cases used in finding waivers of sovereign immunity from states' acceptance of federal funds.[3]

2001); *Cherry v. Univ. of Wis. Sys. Bd. of Regents*, 265 F.3d 541, 555 (7th Cir. 2001); *Jim C. v. United States*, 235 F.3d 1079, 1082 (8th Cir. 2000) (en banc); *Sandoval v. Hagan*, 197 F.3d 484, 500 (11th Cir. 1999), *rev'd on other grounds*, 532 U.S. 275, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001); *Litman v. George Mason Univ.*, 186 F.3d 544, 555 (4th Cir. 1999); *Clark v. California*, 123 F.3d 1267, 1271 (9th Cir. 1997).

3. We thus need not address the Gruvers' contention that preclusion bars LSU from relitigating the Eleventh Amendment issue it lost in *Pederson*. While Eleventh Amendment immunity is a jurisdictional matter, *Watson v. Texas*, 261 F.3d 436, 440 n.5 (5th Cir. 2001), preclusion is not, *Exxon Mobil Corp. v. Saudi Basic*

Appendix A

Some background on the inquiry for determining when the receipt of funds amounts to an Eleventh Amendment waiver is warranted at this point. Congress can use its Spending Power to entice states to implement its policy objectives, even if it could not impose those policies directly through legislation. *South Dakota v. Dole*, 483 U.S. 203, 206-207, 107 S. Ct. 2793, 97 L. Ed. 2d 171 (1987). It does so by granting funds to the states and conditioning the receipt of those funds on compliance with federal mandates. *Id.* If a state accepts federal funds, it can be held to conditions attached to those funds so long as the grant and conditions comply with the five-part test laid out in *South Dakota v. Dole*, 483 U.S. 203, 107 S. Ct. 2793, 97 L. Ed. 2d 171. That test is: (1) a federal expenditure must benefit the general welfare; (2) any condition on the receipt of federal funds must be unambiguous; (3) any condition must be reasonably related to the purpose of the federal grant; (4) the grant and any conditions attached to it cannot violate an independent constitutional provision; and (5) the grant and its conditions cannot amount to coercion as opposed to encouragement. *Id.* at 207-08, 210.

One condition Congress can attach to funds is a recipient's waiver of its Eleventh Amendment immunity.

Indus. Corp., 544 U.S. 280, 293, 125 S. Ct. 1517, 161 L. Ed. 2d 454 (2005). Indeed, a reason why issue preclusion does not typically apply to pure questions of law is that the more flexible doctrine of stare decisis provides enough stability and protection against unnecessary litigation burdens. *See* 18 Restatement (Second) of Judgments § 29(7) & cmt. i (Am. Law. Inst. 1982); Charles Alan Wright *et al.*, Federal Practice and Procedure § 4425 (3d ed. 2019).

Pace, 403 F.3d at 278-79. As is usually true for waivers, any such waiver must be knowing and voluntary. *Id.* at 277-78 (citing *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682, 119 S. Ct. 2219, 144 L. Ed. 2d 605 (1999)). So when it comes to a condition waiving sovereign immunity, *Dole*'s second and fifth requirements serve dual roles: they ensure not only that Congress's exercise of the Spending Power is valid but also that a state's immunity waiver is knowing and voluntary. *Id.* at 277-79. If a waiver condition is unambiguous, then a state knows the consequence of accepting any associated funds. *Id.* at 279. Likewise, if a waiver condition is not coercive, then the state's acceptance of conditioned funds is voluntary. *Id.*

LSU's appeal centers on *Dole*'s "no coercion" requirement.[4] *Pace* held that section 2000d-7's waiver condition is not coercive, noting that a state agency could retain its Eleventh Amendment immunity by declining federal funding without affecting other state agencies' funding eligibility. *Id.* at 287.

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4. LSU also argues that Congress cannot use its Article I powers to force a state to constructively waive its Eleventh Amendment immunity based on its presence in a regulated field. That argument comes from *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666, 119 S. Ct. 2219, 144 L. Ed. 2d 605. But we rejected the same challenge to section 2000d-7 in *Pace*. We pointed out that *College Savings* "expressly distinguished conditional-spending waivers of Eleventh Amendment immunity" as "'fundamentally different from' illegitimate constructive waivers." 403 F.3d at 285 (quoting *College Savings*, 527 U.S. at 686). LSU does not cite to an intervening change of law on this point, so *Pace* controls.

According to LSU, *NFIB* shows that our caselaw is wrong about the absence of coercion. *NFIB* held that Congress's threat to withhold all Medicaid funding from states that did not agree to dramatically expand Medicaid under the Affordable Care Act was unconstitutionally coercive. 567 U.S. at 575-85.[5] LSU contends that *NFIB* identified two situations, present here, when conditional spending rises to the level of coercion. First, it claims that *NFIB* recognized it is coercive for Congress to attach conditions "that do not . . . govern the use of the funds." *See NFIB*, 567 U.S. at 580.[6] That would pose a problem for section 2000d-7 because its Eleventh Amendment waiver does not "govern the use of funds" but instead allows suit alleging sex discrimination in any programs the recipient administers. Second, LSU asserts *NFIB* held that Congress cannot surprise states with post-acceptance conditions. *See id.* at 584. And yet, LSU says, Congress

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5. Chief Justice Roberts wrote for a plurality on this point. But because the plurality struck down Medicaid expansion on narrower grounds than the joint dissent, the plurality opinion is binding. *Miss. Comm'n on Envtl. Quality v. E.P.A.*, 790 F.3d 138, 176, 416 U.S. App. D.C. 69 & n.22 (D.C. Cir. 2015) (per curiam); *Mayhew v. Burwell*, 772 F.3d 80, 88-89 (1st Cir. 2014); *see also Marks v. United States*, 430 U.S. 188, 193, 97 S. Ct. 990, 51 L. Ed. 2d 260 (1977).

6. LSU suggests that this argument also pertains to *Dole*'s relatedness inquiry. But *NFIB* focused on the coercion inquiry; it "did not address the 'relatedness' element." *Arbogast v. Kan., Dep't of Labor*, 789 F.3d 1174, 1187 n.5 (10th Cir. 2015). Our holding that section 2000d-7's waiver condition is sufficiently related to Title IX's antidiscrimination goals thus stands. *See Miller*, 421 F.3d at 350.

did exactly that when it enacted section 2000d-7 fourteen years after passing Title IX.

LSU's first argument misreads *NFIB*. Its "govern the use of the funds" language merely delineates between two types of spending conditions. Both can be constitutional, but they are subject to different scrutiny. The easier situation is when Congress places a direct restriction on how a state uses federal funds. *Id.* at 580. A restriction of that sort is constitutional because it "ensures that the funds are spent according to [Congress's] view of the 'general Welfare.'" *Id.* But, the Chief Justice explained, Congress can also impose conditions that do not directly "govern the use of the funds" and instead attempt to "pressur[e] the States to accept policy changes." *Id.* Such a condition may, for instance, "threat[en] to terminate other significant independent grants." *Id.* And because those conditions "cannot be justified" on the same basis as the first type of condition, a different test is appropriate to assess their constitutionality: the coercion inquiry. *Id.* This latter type of condition was at issue in *Dole*, where a law withheld five percent of a state's federal highway funds unless the state raised its drinking age to 21. *Id.* The law "was not a restriction on how the highway funds . . . were to be used," so the *Dole* Court had to "ask[] whether the financial inducement offered by Congress was so coercive as to pass the point at which pressure turns into compulsion." *Id.* (internal quotation marks omitted) (quoting *Dole*, 483 U.S. at 211). In other words, determining that a condition does not "govern the use of the funds" triggers the coercion question (as our prior cases recognized in applying the coercion analysis); it does

not answer that question. LSU's first argument thus fails to show that *NFIB* upended our understanding of what constitutes coercion.

The second of LSU's arguments does not establish an unequivocal change in the coercion inquiry either. Section 2000d-7's waiver condition is not new or surprising in the same way Medicaid expansion was for the state plaintiffs in *NFIB*. For starters, *NFIB* did not hold that every new condition imposed on already existing funding streams is invalid. On the contrary, *NFIB* explained that *Dole* permitted exactly that kind of condition, so long as it is not coercive. *See id.* at 580 (noting that "no new money was offered to the States to raise their drinking ages" in *Dole*). Indeed, Congress "make[s] changes to federal spending programs all the time." Samuel R. Bagenstos, *The Anti-Leveraging Principle and the Spending Clause After* NFIB, 101 Geo. L.J. 861, 888 (2013) (citing examples). The problem in *NFIB* was that Congress had conditioned all of a state's Medicaid funding on accepting significant obligations that created a new program entirely different than the original one the state had opted in to. The Chief Justice described the new conditions as "accomplish[ing] a shift in kind, not merely degree" such that although "Congress may have styled the expansion a mere alteration of existing Medicaid," it was actually "enlisting the States in a new health care program." *Id.* at 583-84. Section 2000d-7 does not do that. While it did add a new condition to federal funds fourteen years after Congress and President Nixon enacted Title IX, the condition does not resemble the creation of a brand-new legislative program.

For another thing, section 2000d-7 has been on the books for over thirty years, all the while LSU has continued to accept federal funding. *Cf. Pace*, 403 F.3d at 279 (explaining that, for waiver purposes, "actual acceptance of clearly conditioned funds is generally voluntary"). By contrast, the *NFIB* state plaintiffs challenged the Affordable Care Act the day it became law. 567 U.S. at 540. "The fact that the State has long accepted . . . dollars notwithstanding the challenged conditions may be an additional relevant factor in the contract-like analysis the Court has in mind for assessing the constitutionality of Spending Clause legislation." *Miss. Comm'n on Envtl. Quality v. E.P.A.*, 790 F.3d 138, 179, 416 U.S. App. D.C. 69 (D.C. Cir. 2015) (per curiam). For these reasons, LSU cannot demonstrate that *NFIB*'s principle against "surprising," postenactment spending conditions clearly applies with equal force to section 2000d-7.

We therefore conclude that *NFIB* does not unequivocally alter *Dole*'s conditional-spending analysis. LSU does not cite, nor could we find, any case holding that *NFIB* marks such a transformation of Spending Clause principles. And the longstanding Title IX funding arrangement is not on all fours factually with the Medicaid expansion *NFIB* addressed. The threat of LSU losing what amounts to just under 10% of its funding is more like the "relatively mild encouragement" of a state losing 5% of its highway funding (less than 0.5% of South Dakota's budget) than the "gun to the head" of a state losing all of its Medicaid funding (over 20% of the average state's budget). *See NFIB*, 567 U.S. at 580-82.

As a result, we remain bound by our precedent: LSU has waived Eleventh Amendment immunity by accepting federal funds. *Pederson*, 213 F.3d at 876. Congress did not coerce it to do so. *Pace*, 403 F.3d at 287. LSU is free to avoid Title IX obligations by declining federal funds without threatening other state agencies' funding. *Id.*

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The district court's denial of LSU's motion to dismiss for lack of jurisdiction is AFFIRMED.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF LOUISIANA, FILED JULY 19, 2019

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

CIVIL ACTION 18-772-SDD-EWD

STEPHEN M. GRUVER AND RAE ANN GRUVER, INDIVIDUALLY AND ON BEHALF OF MAXWELL R. GRUVER, DECEASED,

VERSUS

STATE OF LOUISIANA THROUGH THE BOARD OF SUPERVISORS OF LOUISIANA STATE UNIVERSITY AND AGRICULTURAL AND MECHANICAL COLLEGE, *et al.*

July 19, 2019, Decided

RULING

This matter is before the Court on the *Motion to Dismiss*[1] filed by Defendant, State of Louisiana through the Board of Supervisors of Louisiana State University and Agricultural and Mechanical College ("LSU"). Plaintiffs, Stephen M. Gruver and Rae Ann Gruver ("Plaintiffs"), individually and on behalf of their deceased

1. Rec. Doc. No. 70.

son Maxwell R. Gruver ("Gruver"), filed an *Opposition*[2] to this motion, to which LSU filed a *Reply*,[3] and Plaintiffs filed a *Sur-Reply*.[4] For the reasons which follow, LSU's *Motion* will be granted in part and denied in part.

I. FACTUAL BACKGROUND

This suit arises out of the tragic death of Maxwell R. Gruver, a student formerly enrolled at LSU, who died in September of 2017 following a fraternity-related hazing incident. Plaintiffs allege that, over the summer of 2017, LSU sent a 72-page book entitled *Greek Tiger* to their son, an incoming freshman.[5] Plaintiffs allege this book "encourage[s] [new students] to consider participating in fraternity or sorority recruitment,"[6] and served generally to tout LSU's long tradition of promoting the educational opportunities and benefits of Greek Life to its students. Plaintiffs further allege that, although the second paragraph of *Greek Tiger* states that "[h]azing and inappropriate behavior are not tolerated by LSU[,]"[7] in reality, this statement does not apply to male students in fraternities at LSU.

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2. Rec. Doc. No. 93.

3. Rec. Doc. No. 91.

4. Rec. Doc. No. 95.

5. *Complaint*, Rec. Doc. No. 1, ¶ 46.

6. *Id.*

7. *Id.* at ¶ 47.

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Plaintiffs allege that male students involved in the Greek fraternity system at LSU face a "risk of serious injury and death" that is "far worse than the television portrayals LSU references," and that, "[b]efore Max's death, male students pledging LSU-recognized fraternities have died, been hospitalized on an emergency basis for dangerous alcohol consumption, and suffered broken ribs, cigarette burns and other serious physical injuries."[8] Plaintiffs further allege that, "[a]s a result of LSU's policy and practice of responding differently to the hazing of male students than the hazing of female students," the hazing of female Greek students is "virtually nonexistent," while the hazing of male Greek students is "rampant."[9] To demonstrate this claim, Plaintiffs aver as follows:

> 128. In addition to the death of Max, incidents of dangerous hazing, forced consumption of alcohol, deaths and fraternity injuries involving male fraternity pledges and members at LSU include:
>
> a. 2017: Delta Chi Fraternity; hazing activities in the spring of 2017 including requiring pledges to participate in a "capture game" where pledges capture active members, transport them to an undisclosed location, and drop them off, forcing them make their way back to school on foot.

8. *Id.* at ¶ 9.

9. *Id.* at ¶ 13.

b. 2016: Kappa Sigma Fraternity; hazing of pledges including forced consumption of alcohol, sleep deprivation, forced calisthenics, branding, paddling, and personal servitude.

c. 2016: Omega Phi Psi Fraternity; hazing of pledges including an "underground" pledging process that LSU found "resulted in the endangering the safety and well-being of LSU Students."

d. 2015-2016: Lambda Chi Alpha Fraternity; hazing of pledges including sleep deprivation, forced consumption of alcohol, personal servitude, and sit-ups and push-ups on trash and broken glass (2015). After another report of hazing a year later, LSU disallowed recruitment and living in the fraternity house for a year (2016).

e. 2015: Beta Kappa Gamma Fraternity; LSU student Praneet Karki died following an evening of hazing involving extreme exercise required of fraternity pledges.

f. 2015: Sigma Chi Fraternity; after LSU student Sawyer Reed died from a drug overdose, the investigation revealed likely hazing of pledges and "rampant" drug use.

g. 2014: Acacia Fraternity; hazing of pledges including forced alcohol consumption, personal servitude, acts of physical violence and forced physical activities, and being forced to eat dog food and rotten substances.

h. 2014: Lambda Chi Alpha Fraternity; alcohol-related medical transport of pledge in conjunction with chapter's bid-day event.

i. 2014: Sigma Phi Epsilon Fraternity; hazing of pledges including pledges being driven off campus, forced to consume alcohol, and then the intoxicated pledges were taken to the Mississippi River levee, dropped off, and told to make their way back to school on foot in the night. After one fraternity event in August of 2014 where alcohol was provided to underage pledges, a pledge was found unresponsive in an LSU residence hall and transported to the hospital.

j. 2013: Pi Kappa Phi Fraternity; hazing of pledges including quizzes pledges with consequences for incorrect answers, confining pledges in a small room with no light and little air, forcing pledges to kneel on broken silverware, personal servitude, and underage and excessive alcohol consumption.

k. 2011-2012: Sigma Alpha Epsilon Fraternity; an investigation revealed hazing and endangering pledges, including hazing that involved forcing pledges to perform physical activities, military style workouts and calisthenics, such as bows and tows and wall sits, throughout the night.

l. 2012: Sigma Chi Fraternity; hazing of pledges including cigarette burns and forced wrestling of one another resulting in broken ribs.

m. 2012: Acacia Fraternity; violations of LSU's rules and alcohol policies arising from an incident in which three kegs of beer were provided for all active members and pledges of the fraternity.

n. 2011: Pi Kappa Phi Fraternity; in the fall of 2011, fraternity placed on probation by LSU and fraternity's national headquarters for what the fraternity later acknowledged were "serious incidents of hazing."

o. 2011: Sigma Alpha Epsilon; hazing of pledges including forced physical activities and personal servitude.

p. 2006: Phi Gamma Delta Fraternity; pledge burned at fraternity event after falling in bonfire.

q. 1997: Sigma Alpha Epsilon Fraternity; hazing which involved forced, excessive consumption of alcohol resulted in the death of fraternity pledge Benjamin Wynn, whose blood alcohol content was measured at .588%, almost 6 times the legal limit, and the hospitalization of fraternity pledge Donald Hunt.

r. 1979: Theta Chi Fraternity; a car struck and killed a fraternity pledge who was blindfolded and participating in a ritual march along a roadside.[10]

Plaintiffs claim that, "[o]f the 27 fraternities on LSU's campus, which restrict membership to male students, only four were without risk-management violations in the five years preceding Max's death," and, "during those five years, there were at least 24 formal hazing investigations involving fraternities, 20 of which led to findings of policy violations.[11] Plaintiffs contend, "[i]n contrast, in that same period, female students participating in LSU Greek Life never risked or suffered injury or death from dangerous hazing."[12] Plaintiffs maintain that these "stark differences" result from "LSU's policy and practice of responding differently to the hazing of male students than the hazing of female students,"[13] and further allege that,

10. *Id.* at ¶ 128.

11. *Id.* at ¶ 10.

12. Rec. Doc. No. 93 at 2 (citing Rec. Doc. No. 1 at ¶ 13).

13. Rec. Doc. No. 1 at ¶ 13.

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> [Y]ear after year, LSU has remained deliberately indifferent to the serious and substantial risks male students face in seeking the educational opportunities and benefits of LSU Greek Life, and has refused and failed to make any material changes to the manner in which it recognizes, promotes, regulates, manages, and sanctions fraternities on campus, leaving them unsafe and imposing serious and substantial risk to male students seeking the educational benefits and opportunities touted by LSU.[14]

Additionally, Plaintiffs claim that, "[u]nlike LSU fraternities, LSU sororities, which restrict membership to female students, do not have a culture or long-documented history of dangerous hazing and misconduct," and "when LSU has received reports of hazing at its sororities, the sanctions LSU has imposed on the sororities have been significantly greater in length and degree than sanctions LSU generally imposes on fraternities for comparable misconduct."[15] Plaintiffs claim that LSU's deliberate indifference to the great risk of injury and death to male Greek students demonstrates that male Greek students at LSU "have entirely different, and unequal, access to educational opportunities and benefits offered by LSU Greek Life. LSU is deliberately indifferent to those risks, though quickly and decisively acts when young women face lesser risks."[16]

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14. *Id.* at ¶ 138.

15. *Id.* at ¶ 11.

16. Rec. Doc. No. 93 at 3 (citing Rec. Doc. No. 1 at ¶¶ 9, 102, 204).

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Plaintiffs allege that Gruver's death was caused by hazing and forced alcohol consumption while pledging Phi Delta Theta Fraternity ("Phi Delt").[17] Plaintiffs claim that Phi Delt, "unbeknownst to and kept secret from Gruver and his family, had been the subject of numerous credible complaints of hazing."[18] Plaintiffs further claim that complaints about the hazing at Phi Delt were so numerous that "the Director of LSU's Office of Greek Life 'begged for assistance' from Phi Delt's national headquarters in addressing the misconduct."[19] Yet, Plaintiffs claim, neither LSU nor Phi Delt ever addressed this issue.[20] In fact, a mere three weeks before Gruver's death, Plaintiffs allege that a "self-described 'Concerned Parent' emailed the Office of Greek Life at LSU"[21] as follows:

> The Sigma Nu pledge class was made to drink alcohol at the Sigma Nu house until each pledge member vomited. This occurred on boys bid night, August 20th, 2017. I was made aware of this yesterday, when a mother of a pledge (who has dropped out because of this) shared this information with me. As a parent of a pledge of another fraternity, I am very angry that this has occurred and I know that it will likely

17. Rec. Doc. No. 1 at ¶¶ 3-6.

18. Rec. Doc. No. 93 at 3 (citing Rec. Doc. No. 1 at ¶¶ 155-182).

19. Rec. Doc. No. 1 at ¶ 17.

20. *Id.* at ¶¶ 18-19.

21. *Id.* at ¶ 1.

> continue. I do not want to hear that someone's son is dead due to alcohol poisoning, and I expect someone to investigate this incident ASAP and put an end to hazing at LSU.[22]

Plaintiffs further allege that, in response to this email, "LSU's Greek Accountability team 'decided there was not enough information to investigate the case,' and closed its file on the incident."[23] Plaintiffs claim that "LSU's failure to even investigate this parent's ominous warning reflects its long-standing deliberate indifference to the hazing of male students in its fraternities, despite the severe, pervasive risks of serious injuries and death those students face" when they participate in Greek life at LSU.[24]

Plaintiffs have sued LSU for alleged violations of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq.* ("Title IX"). LSU has moved to dismiss Plaintiffs' claims under Rules 12(b)(6) and 12(b)(1) of the Federal Rules of Civil Procedure, arguing that Plaintiffs have failed to state a claim and lack standing under Title IX, and LSU is shielded from suit by Eleventh Amendment sovereign immunity.

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22. *Id.*

23. *Id.* at ¶ 2.

24. *Id.*

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II. RULE 12(B)(1) MOTION TO DISMISS

"When a motion to dismiss for lack of jurisdiction 'is filed in conjunction with other Rule 12 motions, the court should consider the Rule 12(b)(1) jurisdictional attack before addressing any attack on the merits.'"[25] If a complaint could be dismissed for both lack of jurisdiction and for failure to state a claim, "'the court should dismiss only on the jurisdictional ground under [Rule] 12(b)(1), without reaching the question of failure to state a claim under [Rule] 12(b)(6).'"[26] The reason for this rule is to preclude courts from issuing advisory opinions and barring courts without jurisdiction "'from prematurely dismissing a case with prejudice.'"[27]

"Article III standing is a jurisdictional prerequisite."[28] If a plaintiff lacks standing to bring a claim, the Court lacks subject matter jurisdiction over the claim, and

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25. *Crenshaw—Logal v. City of Abilene, Texas*, 436 Fed. Appx. 306, 308 (5th Cir. 2011)(quoting *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001); s*ee also Randall D. Wolcott, MD, PA v. Sebelius*, 635 F.3d 757, 762 (5th Cir. 2011); Fed.R.Civ.P. 12(h)(3)).

26. *Crenshaw—Logal*, 436 Fed.Appx. at 308 (quoting *Hitt v. City of Pasadena*, 561 F.2d 606, 608 (5th Cir.1977)).

27. *Id.* (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998), and *Ramming*, 281 F.3d at 161).

28. *Crenshaw—Logal*, 436 Fed.Appx. at 308 (citing *Steel Co.*, 523 U.S. at 101, 118 S.Ct. 1003, and *Xerox Corp. v. Genmoora Corp.*, 888 F.2d 345, 350 (5th Cir.1989)).

dismissal under Rule 12(b)(1) is appropriate.[29] The party seeking to invoke federal jurisdiction bears the burden of showing that standing existed at the time the lawsuit was filed.[30] In reviewing a motion under 12(b)(1) for lack of subject matter jurisdiction, a court may consider (1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts.[31]

A. Sovereign Immunity

LSU argues dismissal under Rule 12(b)(1) is warranted because, as an arm of the State of Louisiana, it is shielded by Eleventh Amendment sovereign immunity. LSU asserted this defense in a case brought under Title IX in *Pederson v. Louisiana State University*.[32] LSU makes the same arguments in the present lawsuit that were rejected by the Fifth Circuit in *Pederson*, arguing that the United States Supreme Court decision in *National Federation of Independent Business v. Sebelius*[33] effectively calls into

29. *Whitmore v. Arkansas*, 495 U.S. 149, 154-55, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990); *Chair King, Inc. v. Houston Cellular Corp.*, 131 F.3d 507, 509 (5th Cir.1997).

30. *M.D. Anderson Cancer Ctr. v. Novak*, 52 S.W.3d 704, 708 (Tex. 2001); *Howery v. Allstate Ins. Co.*, 243 F.3d 912, 916 (5th Cir. 2001); *Ramming*, 281 F.3d at 161.

31. *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir.1981).

32. 213 F.3d 858 (5th Cir. 2000).

33. 567 U.S. 519, 132 S. Ct. 2566, 183 L. Ed. 2d 450 (2012).

question the Fifth Circuit's holding in *Pederson*, and this Court should reexamine the issue. The *Pederson* court set forth the following analysis in finding that LSU was not shielded by sovereign immunity for Title IX claims:

> 42 U.S.C. § 2000d-7(a)(1) provides that: "[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 ... title IX of the Education Amendments of 1972." In *Litman v. George Mason University*, 186 F.3d 544 (4th Cir.1999), *cert. denied*, 528 U.S. 1181, 120 S. Ct. 1220, 145 L. Ed. 2d 1120 (2000), the Court of Appeals for the Fourth Circuit concluded that, in enacting § 2000d-7 Congress "permissibly conditioned [a state university's] receipt of Title IX funds on an unambiguous waiver of [the university's] Eleventh Amendment immunity, and that, in accepting such funding, [the university] has consented to litigate [private suits] in federal court." *Id.* at 555. The test for finding such waiver "is a stringent one," *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 119 S.Ct. 2219, 2226, 144 L.Ed.2d 605 (1999) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241, 105 S.Ct. 3142, 87 L.Ed.2d 171(1985)), and the Fourth Circuit in *Litman* conducted a careful analysis under the relevant inquiry. We cannot improve on the work done by the court in *Litman*, and we therefore simply adopt its holding for all the reasons supplied in its well-crafted opinion.[34]

34. *Pederson*, 213 F.3d at 875-76.

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In *Pederson*, as in the present case, LSU argued that 42 U.S.C. § 2000d-7(a)(1) did not contain the word "waiver," and the state may have logically disregarded the language of this statute as an attempt to abrogate its sovereign immunity. LSU also argued that the Supreme Court's decision in *Seminole Tribe v. Florida*[35] rejected the idea of a state "constructively waiving" its Eleventh Amendment immunity.[36] The Fifth Circuit rejected both arguments:

> First, we will consider whether 42 U.S.C. § 2000d-7(a)(1), although it does not use the words "waiver" or "condition", unambiguously provides that a State by agreeing to receive federal educational funds under Title IX has waived sovereign immunity. A state may "waive its immunity by voluntarily participating in federal spending programs when Congress expresses 'a clear intent to condition participation in the programs ... on a State's consent to waive its constitutional immunity.'" *Litman*, 186 F.3d at 550 (quoting *Atascadero State Hosp.*, 473 U.S. at 247, 105 S.Ct. 3142). Title IX as a federal spending program "operates much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions." *Id.* at 551; *see also Rosa H. v. San Elizario Independent School District*, 106 F.3d

35. 517 U.S. 44, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996).

36. *Pederson*, 213 F.3d at 876.

648, 654 (5th Cir.1997) (stating that Title IX is Spending Clause legislation, and as a statute enacted under the Spending Clause, Title IX generates liability when the recipient of federal funds agrees to assume liability)[.] The Supreme Court has noted that Congress in enacting Title IX "condition[ed] an offer of federal funding on a promise by the recipient not to discriminate, in what amounts essentially to a contract between the Government and the recipient of funds." *Gebser v. Lago Vista Indep. School Dist.*, 524 U.S. 274, 286, 118 S.Ct. 1989, 1997, 141 L.Ed.2d 277 (1998); *Litman*, 186 F.3d at 551-552. Thus, based on the above reasoning we find that in 42 U.S.C. § 2000d-7(a)(1) Congress has successfully codified a statute which clearly, unambiguously, and unequivocally conditions receipt of federal funds under Title IX on the State's waiver of Eleventh Amendment Immunity. *See Litman*, 186 F.3d at 554.

LSU argues that even if 42 U.S.C. § 2000d-7(a)(1) is intended to cause waiver of sovereign immunity, this type of "conditional waiver" argument is at odds with the Supreme Court's decision in *Seminole Tribe*. We do not find this argument persuasive. As the Fourth Circuit reasoned in *Litman*:

> We do not read *Seminole Tribe* and its progeny, including the Supreme Court's recent Eleventh Amendment

> decisions, to preclude Congress from conditioning federal grants on a state's consent to be sued in federal court to enforce the substantive conditions of the federal spending program. Indeed, to do so would affront the Court's acknowledgment in *Seminole Tribe* of the "unremarkable ... proposition that States may waive their sovereign immunity."
>
> *Id.* at 556 (quoting *Seminole Tribe*, 517 U.S. at 65, 116 S.Ct. 1114). We conclude that in accepting federal funds under Title IX LSU waived its Eleventh Amendment sovereign immunity.[37]

LSU acknowledges the *Pederson* decision but argues that it should be "closely re-examined in light of" *Sebelius*, which LSU contends essentially overrules the *Pederson* holding as to sovereign immunity and based on "the unique relationship that LSU has maintained with the federal government since LSU's commencement as a land grant university in 1874." [38] LSU maintains that,

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37. *Id.*

38. Rec. Doc. No. 70-1 at 16. LSU also argues that, in *College Savings Bank v. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 119 S. Ct. 2219, 144 L. Ed. 2d 605 (1999), the Supreme Court held § 2000d-7's constructive waiver unconstitutional under Congress's Article I Commerce Clause. LSU contends *College Savings* distinguished Congress's ability to extract waivers under the Commerce Clause and the Spending Power Clause, thus

"[c]onsidering LSU's historical relationship with the federal government, Congress unconstitutionally exceeded its Article I Spending Power to the extent Congress coercively conditioned LSU's receipt of federal funds on waiver of its Eleventh Amendment immunity."[39]

LSU contends *Sebelius* provides two scenarios in which a constructive waiver is unconstitutionally coercive: 1) where the conditions do not govern the use of the subject funds, but threaten to terminate other independent grants, and 2) where the conditions apply retroactively. First, LSU argues *Sebelius* allows for the requirement that LSU use Title IX funds in a nondiscriminatory manner, but it does not allow § 2000d-7 to terminate the independent grant of sovereign immunity irrespective of LSU's compliance with Title IX. Second, LSU argues it has received federal funding since 1874 pursuant to the Morrill Act. LSU maintains that it could not have anticipated in 1874 that it would later be required to waive immunity in light of § 2000d-7's enactment in 1986. Further, LSU avers it should not be forced to waive immunity when accepting federal funds because the United States is required to fund the ROTC program, and LSU has no choice but to accept. Thus, under *Sebelius*, LSU renews its argument that § 2000d-7 unconstitutionally forces a waiver of sovereign immunity, and LSU did not knowingly or voluntarily waive immunity.

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narrowing the power to extract waivers under the Spending Clause while not addressing the extent to which the power is narrowed. LSU seems to argue *Sebelius* does this narrowing.

39. *Id.* at 16-17.

As to abrogation, LSU contends Title IX does not abrogate immunity because it was not enacted pursuant to the Fourteenth Amendment.

Plaintiffs oppose LSU's motion and argue that LSU has validly waived Eleventh Amendment sovereign immunity. Plaintiffs contend that the Fifth Circuit held both in *Pederson* and *Pace v. Bogalusa City Sch. Bd.*[40] that, in enacting § 2000d-7, Congress unequivocally conditioned receipt of the statute's listed funds, including Title IX, on the State's waiver of immunity, and these cases remain binding. Further, Plaintiffs claim that the Fifth Circuit has already rejected LSU's argument that the conditional spending programs at issue therein—the IDEA and § 504 of the Rehabilitation Act—were unduly coercive, and those holdings should apply equally to Title IX funds.

Plaintiffs contend LSU is attempting to circumvent the holding of *Pederson* by citing to *College Savings* and *Sebelius*; however, Plaintiffs maintain these cases are factually inapposite and do not support LSU's argument that § 2000d-7 is unduly coercive. Plaintiffs note that four circuit courts have already found that § 2000d-7's conditions are reasonably related to the question of whether federal funds are spent in a nondiscriminatory manner, and no condition of § 2000d-7 applies retroactively. Rather, Plaintiffs aver that LSU has voluntarily and knowingly accepted federal funding since the enactment of § 2000d-7 thirty years ago. Thus, the spending program is not coercive.

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40. 403 F.3d 272 (5th Cir. 2005).

Additionally, Plaintiffs argue that LSU is collaterally estopped from challenging *Pederson*. Plaintiffs claim that LSU asserted and fully and vigorously litigated these same sovereign immunity arguments in *Pederson*. Further, Plaintiffs note that LSU has repeatedly made the argument that the Fifth Circuit should "re-examine" this issue in light of "new" Supreme Court jurisprudence, and the Fifth Circuit has rejected this argument every time.[41]

Plaintiffs contend that, in addition to § 2000d-7's valid conditional waiver of immunity, per *Lesage v. State of Texas*,[42] Congress also abrogated states' immunity to Title IX lawsuits. The *Lesage* court found that § 2000d-7 abrogated immunity under Title VI. Plaintiff argues Title IX was modeled on Title VI, and the language parallels exactly. Title VI prevents race discrimination, Title IX prevents gender discrimination, and both invoke the Equal Protection Clause of the Fourteenth Amendment as needed to abrogate immunity. Thus, Plaintiffs maintain that LSU is still not immune from suit even if unconstitutionally coerced.

As to the state law claims, Plaintiff admits this Court lacks jurisdiction but argues their claims should be dismissed *without prejudice*.

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41. LSU relied on *Seminole Tribe v. Florida*, 517 U.S. 44, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996), in *Pederson; Garcia v. S.U.N.Y. Health Sciences Center*, 280 F.3d 98 (2d Cir. 2001), in *Pace*; and *Jackson v. Birmingham Board of Education*, 544 U.S. 167, 125 S. Ct. 1497, 161 L. Ed. 2d 361 (2005), in *Miller v. Tex. Tech Univ. Health Scis. Ctr.*, 421 F.3d 342 (5th Cir. 2005).

42. 158 F.3d 213, 215-219 (5th Cir. 1998), *overruled on other grounds*, 528 U.S. 18, 120 S. Ct. 467, 145 L. Ed. 2d 347 (1999).

Appendix B

Based on a wealth of binding jurisprudence, the Court finds that LSU is not entitled to sovereign immunity from suits brought under Title IX. The Eleventh Amendment bars private suits against a State in federal court, but there are two exceptions to this general rule. Immunity may be abrogated when Congress acts under § 5, the Enforcement Clause of the Fourteenth Amendment,[43] or a state may consent to suit, and such consent must be both *knowing* and *voluntary*.[44]

In *South Dakota v. Dole*, the Supreme Court set forth the test that is employed in determining the validity of a conditional waiver such as § 2000d-7.[45] Under *Dole*, congressional spending programs that benefit the general welfare, contain unambiguous conditions, and contain conditions reasonably related to the purpose of the expenditure, are valid unless they are either independently prohibited or coercive.[46] *Dole*'s requirements ensure compliance with the "knowing and voluntary" requirements set forth in *College Savings*.[47] A state knowingly waives immunity in exchange for federal funds when it has knowledge that a Spending Clause

43. U.S. CONST. amend. XIV, § 5.

44. *Pace v. Bogalusa City Sch. Bd.*, 403 F.3d 272, 277 (5th Cir. 2005).

45. *Id.* at 278 (citing *South Dakota v. Dole*, 483 U.S. 203, 107 S. Ct. 2793, 97 L. Ed. 2d 171 (1987)).

46. *Id.* at 279

47. *Id.*

condition requires waiver of immunity.[48] Thus, Congress must make conditions on federally granted money clear and unambiguous. If Congress does so, a state's actual acceptance of funds is generally voluntary, unless the spending program is deemed coercive.[49]

Specifically, 42 U.S.C. § 2000d-7(a)(1) conditions receipt of Title IX funds on a state's waiver of immunity. It provides that "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 ...title IX of the Education Amendments of 1972." The *Pace* court held that there is no independent bar to conditional-spending programs under the Spending Clause or unconstitutional-conditions doctrine.[50] The *Pace* court also found that, because a state can avoid suits under the IDEA by rejecting IDEA funds (and to do so, a state would not have to reject all federal assistance), the conditional-spending scheme is not unduly coercive.[51] Additionally, although this statute does not contain the words "waiver" or "condition," in the statute, Congress clearly, unambiguously, and unequivocally conditions receipt of federal funds under Title IX on the State's

48. "That [a state] might not 'know' subjectively whether it had any immunity to waive by agreeing to conditions is wholly irrelevant." *Id.* at 284.

49. *Id.* at 279.

50. *Id.* at 285-286.

51. *Id.* at 287 (citing 29 U.S.C. § 794(b)(1); *See e.g. Jim C. v. United States*, 235 F. 3d 1079 (8th Cir. 2000)).

waiver of Eleventh Amendment immunity.[52] Therefore, the "knowing" requirement is satisfied. In both *Pace* and *Pederson*, the Fifth Circuit found that, in accepting federal funds under Title IX, the State waived its Eleventh Amendment sovereign immunity.[53]

In *Sebelius*, several states challenged Congress's ability to require states to comply with Medicaid expansion or potentially lose all federal Medicaid funding. The Court affirmed that Congress customarily attaches conditions to funds granted to states,[54] but the power to attach these conditions has limits.[55] The *Sebelius* Court explained that conditions must be "unambiguous so that a state at least knows what it is getting into,"[56] must be related to the federal interest in national projects or programs,[57] and must not induce the states to engage in activities that would themselves be unconstitutional.[58] And while Congress may induce the states to accept

52. *Id.* at 280; *Pederson*, 213 F.3d at 876.

53. *Id.* at 280-81.

54. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 675, 132 S. Ct. 2566, 183 L. Ed. 2d 450 (2012)(citing *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17, 101 S. Ct. 1531, 67 L. Ed. 2d 694 (1981); *South Dakota v. Dole*, 483 U.S. 203, 206, 107 S. Ct. 2793, 97 L. Ed. 2d 171 (1987)).

55. *Id.* (citing *Dole, supra*, at 207, 208).

56. *Id.* (citing *Pennhurst, supra*, at 17).

57. *Id.* (quoting *Massachusetts v. United States*, 435 U.S. 444, 461, 98 S. Ct. 1153, 55 L. Ed. 2d 403 (1978)).

58. *Id.* (citing *Dole, supra*, at 210).

conditional grants, Congress may not cross the "point at which pressure turns into compulsion, and ceases to be inducement."[59] Where states have a real choice in accepting or declining federal aid, the federal-state relationship is much like a contract, and the legitimacy of Congress's spending power rests on whether the state *knowingly* and *voluntarily* accepts the terms of the contract.[60] If a state truly has no choice but to accept federal funding, the offer is coercive.[61]

The *Sebelius* Court compared the Medicaid expansion conditions to the conditions imposed on South Dakota in *Dole*. In *Dole*, Congress conditioned 5% of South Dakota's federal highway funds on the State's adoption of a drinking age of 21. This small percentage was deemed relatively mild encouragement rather than coercion, whereas the threat of losing all Medicaid funding was deemed coercive.[62] Therefore, in this Court's view, *Sebelius* did not announce a new rule on conditional spending programs but simply applied *Dole* and other established precedent. In keeping with Fifth Circuit precedent, the Court finds that LSU is not shielded from suit under Title IX by Eleventh Amendment sovereign immunity.[63]

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59. *Id.* at 675 (quoting *Steward Machine Co. v. Davis*, 301 U.S. 548, 590, 57 S. Ct. 883, 81 L. Ed. 1279, 1937-1 C.B. 444 (1937)).

60. *Id.* at 676 (citing *Barnes v. Goldman*, 536 U.S. 181, 186, 122 S. Ct. 2097, 153 L. Ed. 2d 230 (2002); *Pennhurst, supra*, at 17.

61. *Id.* at 679.

62. *Id.*

63. Considering the Court's ruling, Plaintiffs' claim that LSU is collaterally estopped from raising this defense is moot. Further,

B. Standing

LSU also claims that Plaintiffs lack standing to bring this suit under Title IX. LSU argues that the mere risk of injury is insufficient to satisfy the Article III standing requirement, let alone to sustain a Title IX claim. LSU contends "Plaintiffs must allege a 'concrete and particular injury in fact' that is 'fairly traceable' to the alleged actions of [LSU]."[64] LSU further argues that a risk of future harm only satisfies Article III standing when the harm is "certainly impending."[65] LSU contends that Plaintiffs have not alleged that Gruver was at a unique risk to be hazed, nor that all male fraternity members are hazed, so there can be no "certainly impending" risk.

Plaintiffs argue in opposition that LSU is barred from raising its Article III standing argument in a reply memorandum. However, should the Court entertain the argument, Plaintiffs assert that an "invasion of a legally protected interest" is sufficient for Article III standing. Plaintiffs argue Gruver had a legally protected interest in not being excluded from participation in, or denied benefits of, an education program on the basis of sex, and the discriminatory policy denied him those benefits and

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because the Court has determined that LSU waived its sovereign immunity, the Court need not address abrogation. *See Pederson*, 213 F.3d at 875, n. 15.

64. Rec. Doc. 91 at 4 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)).

65. *Id.* (citing *Clapper v. Amnesty International USA*, 568 U.S. 398, 133 S. Ct. 1138, 185 L. Ed. 2d 264 (2013)).

caused his hazing and death. Therefore, Plaintiffs argue they have demonstrated standing under Title IX.

The Court finds that LSU is not barred from raising a challenge to standing in its *Reply*. The law is clear that "a defect in Article III standing deprives [a] federal court of subject matter jurisdiction."[66] Further, "[b]ecause standing is a necessary component of federal subject matter jurisdiction, it may be raised at any time by a party or the court."[67]

Nevertheless, the Court is unpersuaded by LSU's argument. To demonstrate Article III standing, a plaintiff must show: (1) "an injury in fact—a harm suffered by the plaintiff that is concrete and actual or imminent, not conjectural or hypothetical[,]" (2) "causation—a fairly traceable connection between the plaintiff's injury and the [defendant's] complained-of conduct[,]" and (3) "redressability—a likelihood that the requested relief will redress the alleged injury."[68] The invasion of a "legally protected interest" is an injury in fact.[69]

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66. *Brooks v. Georgia Pacific, L.L.C.*, No. 16-0676, 2017 U.S. Dist. LEXIS 64097, 2017 WL 1534219 at *2 (citing *Cadle Co. v. Neubauer*, 562 F.3d 369, 374 (5th Cir. 2009) (citation omitted)).

67. 2017 U.S. Dist. LEXIS 64097, [WL] at *3 (citing *Sample v. Morrison*, 406 F.3d 310, 312 (5th Cir. 2005)).

68. *Pederson*, 213 F.3d at 869 (quoting *Sierra Club v. Peterson*, 185 F.3d 349, 360 (5thCir. 1999)).

69. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992).

The *Pederson* court found Equal Protection jurisprudence to be instructive on the issue of when a legally protected interest is violated. In those cases, when the government erects a barrier making it more difficult for members of one group to obtain a benefit than it is for members of another group, the injury in fact is the inability to seek benefits on equal footing.[70] Therefore, to establish standing in these circumstances, a plaintiff only needs to demonstrate that he is ready and able to compete, but the discriminatory policy prevents him from doing so on an equal basis.[71] The Court finds that Plaintiffs have sufficiently pled such an injury, as well as causation (that the injury was fairly traceable to LSU's alleged policy), and redressability, as will be demonstrated in greater detail below.

III. MOTION TO DISMISS UNDER RULE 12(b)(6)

When deciding a Rule 12(b)(6) motion to dismiss, "[t]he 'court accepts all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff.'"[72]

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70. *Pederson*, 213 F.3d at 871 (citing *Northeastern Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666, 113 S. Ct. 2297, 124 L. Ed. 2d 586 (1993)); (*see also Wilson v. Glenwood Intermountain Properties, Inc.*, 98 F.3d 590, (10th Cir. 1996) (applying principles of Equal Protection standing to Fair Housing Act claim)).

71. *Id.*

72. *In re Katrina Canal Breaches Litigation*, 495 F.3d 191, 205 (5th Cir. 2007)(quoting *Martin K. Eby Constr. Co. v. Dallas Area Rapid Transit*, 369 F.3d 464, 467 (5th Cir. 2004)).

Appendix B

The Court may consider "the complaint, its proper attachments, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice."[73] "To survive a Rule 12(b)(6) motion to dismiss, the plaintiff must plead 'enough facts to state a claim to relief that is plausible on its face.'"[74] In *Twombly*, the United States Supreme Court set forth the basic criteria necessary for a complaint to survive a Rule 12(b)(6) motion to dismiss. "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do."[75] A complaint is also insufficient if it merely "tenders 'naked assertion[s]' devoid of 'further factual enhancement.'"[76] However, "[a] claim has facial plausibility when the plaintiff pleads the factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[77] In order to satisfy the plausibility

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73. *Randall D. Wolcott, M.D., P.A. v. Sebelius*, 635 F.3d 757, 763 (5th Cir. 2011).

74. *In re Katrina Canal Breaches Litigation*, 495 F.3d at 205 (quoting *Martin K. Eby Constr. Co. v. Dallas Area Rapid Transit*, 369 F.3d at 467).

75. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)(internal citations and brackets omitted)(hereinafter *Twombly*).

76. *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009)(internal citations omitted)(hereinafter "*Iqbal*").

77. *Twombly*, 550 U.S. at 570.

standard, the plaintiff must show "more than a sheer possibility that the defendant has acted unlawfully."[78] "Furthermore, while the court must accept well-pleaded facts as true, it will not 'strain to find inferences favorable to the plaintiff.'"[79] On a motion to dismiss, courts "are not bound to accept as true a legal conclusion couched as a factual allegation."[80]

Title IX prohibits discrimination on the basis of sex in federally-funded educational programs.[81] It is enforceable through an individual's private right of action and allows for the recovery of damages.[82] There are two avenues to pursue a claim under Title IX: one based on an institution's official policy of intentional discrimination on the basis of sex and one that seeks to hold an institution liable for teacher-on-student or student-on-student sexual harassment.[83] According to the Supreme Court in *Davis v. Monroe County Board of Education*,[84] to prevail on a

78. *Iqbal*, 556 U.S. at 678.

79. *Taha v. William Marsh Rice University*, 2012 U.S. Dist. LEXIS 62185, 2012 WL 1576099 at *2 (quoting *Southland Sec. Corp. v. Inspire Ins. Solutions, Inc.*, 365 F.3d 353, 361 (5th Cir. 2004)).

80. *Twombly*, 550 U.S. at 556 (quoting *Papasan v. Allain*, 478 U.S. 265, 286, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986)).

81. 20 U.S.C. § 1681(a).

82. *Franklin v. Gwinnett Cty. Public Schs.*, 503 U.S. 60, 112 S. Ct. 1028, 117 L. Ed. 2d 208 (1992).

83. *See Pederson*, 213 F.3d at 882; *see also Doe 1 v. Baylor University*, 240 F.Supp.3d 646, 657 (W.D. Texas 2017).

84. 526 U.S. 629, 119 S. Ct. 1661, 143 L. Ed. 2d 839 (1999).

student-to-student harassment claim, the plaintiff must prove: (1) the school acted with deliberate indifference to sexual harassment of which it had (2) actual knowledge, and (3) the harassment must be so severe, pervasive, and objectively offensive that it can be said to deprive the victim of access to the educational opportunities or benefits provided by the school.[85] Because the deliberate indifference must *cause* the harassment, liability is further limited to circumstances where the recipient exercises substantial control over both the harasser and the context in which the known harassment controls.[86]

LSU erroneously argues that Plaintiffs' claim must be dismissed because the implied private right of action under Title IX does not impose liability against LSU where Plaintiffs do not allege peer-on-peer sexual harassment. Plaintiffs' Title IX claim in this case is unquestionably based on LSU's alleged policy of intentional discrimination on the basis of sex, an allowable cause of action under Title IX. Therefore, the Court will not address LSU's arguments regarding peer-on-peer sexual harassment as they are irrelevant.

LSU claims Plaintiffs' allegations are largely conclusory and only based "upon information and belief." LSU further argues that Plaintiffs' *Complaint* compares one instance of sorority hazing where females received the harshest available sanction to twenty-four instances of fraternity hazing where twenty policy violations were

85. *Davis*, 526 U.S. at 650.

86. *Id.* at 645 (emphasis added).

found. LSU contends these purported facts are insufficient to demonstrate a policy of discrimination.

LSU further argues that Plaintiffs are attempting to circumvent *Davis* by alleging LSU engaged in a practice of discrimination by policing sorority hazing more strictly than fraternity hazing. LSU contends this type of claim fails as well because Plaintiffs must assert that: (1) Gruver was a member of a protected class, (2) this class suffered adverse action, and (3) this class was treated less favorably than similarly situated students.[87] LSU argues that Plaintiffs have pled no facts supporting a claim that those outside of Gruver's protected class were treated more favorably than he. Rather, LSU maintains that Plaintiffs' *Complaint* demonstrates the opposite—that those outside of Gruver's class were in fact treated worse—because females were treated more harshly when their hazing complaints were met with greater sanctions. Further, LSU contends Plaintiffs failed to claim that LSU took any adverse action against Gruver himself, or that he ever reported hazing in the first place. LSU argues that if Plaintiffs allege the hazing was the adverse action, then the claim must be analyzed under *Davis*, where it would fail.

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87. Rec. Doc. 70-1 at 11 (citing *Kirk v. Monroe City Sch. Bd.*, 2018 U.S. Dist. LEXIS 154376, 2018 WL 4292355, at *6 (W.D. La. Aug. 24, 2018), *report and recommendation adopted*, 2018 U.S. Dist. LEXIS 153235, 2018 WL 4291750 (W.D. La. Sept. 7, 2018); *Arceneaux on Behalf of Rebekka A. v. Assumption Par. Sch. Bd.*, 242 F. Supp. 3d 486, 494 (E.D. La. 2017)).

LSU also contends that a classic intentional discrimination claim fails because the alleged intentional discrimination must cause the injury.[88] LSU claims Plaintiffs only allege that LSU failed to prevent an injury. Further, LSU contends a sex discrimination claim predicated on student-on-student conduct must show the school had an affirmative policy or practice that directed or encouraged misconduct on the basis of sex, not that the institution simply failed to prevent the conduct. LSU argues that Plaintiffs claim the adverse action caused by LSU was the mere risk Gruver faced, thus the policy was not an affirmative cause of hazing.

Plaintiffs assert that *Davis* is inapplicable to their claim because it is not based on peer-on-peer harassment. Rather, Plaintiffs have alleged a claim based on LSU's actions in intentionally discriminating against male students seeking the benefits of Greek life as compared to female Greek students. Plaintiffs maintain that "discrimination under Title IX should be construed broadly."[89]

Plaintiffs argue that *Pederson* is controlling as to the elements of their claim, and it provides that "the proper test for determining whether an intentional violation

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88. Rec. Doc. 91, pg. 2 (citing *Weckhorst v. Kansas State University*, 2017 U.S. Dist. LEXIS 135556, 2017 WL 3674963 (D. Kan. 2017)).

89. Rec. Doc. 93 at 6 (citing *Jackson v. Birmingham Bd. Of Educ.*, 544 U.S. 167, 174-175, 125 S. Ct. 1497, 161 L. Ed. 2d 361 (2005) (internal quotation marks omitted)).

has occurred under Title IX is whether an institution 'intended to treat [students] differently on the basis of their sex.'"[90] Plaintiffs allege LSU has a policy of treating sorority hazing complaints more harshly than fraternity complaints. Plaintiffs further argue that, because this practice is grounded in outdated stereotypes of men, it is intentional discrimination that forces males to seek benefits of Greek Life with greater risk of injury.

Plaintiffs also decry LSU's claim that their allegations are conclusory and direct the Court to numerous paragraphs in the *Complaint* detailing the manner in which LSU treated fraternity hazing claims.[91] Specifically, Plaintiffs allege LSU misconstrues their allegations "to arrive at the erroneous conclusion that because at least three fraternities were punished more severely than the single sorority discussed, Plaintiffs' allegations fail to give rise to a reasonable inference that LSU treated males and females differently."[92] Rather, Plaintiffs contend that one sorority was in fact punished more harshly than all fraternities during the same time period, and this fact supports the position that LSU treated sorority hazing complaints more severely.

To LSU's assertion that those outside of Gruver's class were not treated more favorably because they were met with greater sanctions, Plaintiffs counter that

90. *Id.* (quoting *Pederson*, 213 F.3d at 882).

91. *Id.* at 8 (citing *Complaint* at ¶¶ 101-103, 112-116, 125-141, 155-182).

92. *Id.* at 9 (internal quotation marks omitted).

this argument is "completely backwards."[93] Instead, Plaintiffs maintain that those outside of Gruver's class (female Greek students) were treated better specifically because their hazing complaints were met aggressively and appropriately by LSU with greater sanctions, thereby providing greater protection by LSU to female Greek students and reducing their risk of injury. Plaintiffs argue that the adverse action taken against Gruver was the operation of its discriminatory policy regarding male Greek hazing which proximately caused Gruver's injury specifically and creates a heightened risk of injury to all male Greek students generally.

The Court has considered the allegations in the *Complaint* and the applicable jurisprudence, and the Court finds that LSU is not entitled to dismissal under Rule 12(b)(6).

In *Pederson*, the plaintiffs brought suit against LSU under Title IX, alleging LSU intentionally discriminated on the basis of sex by not sponsoring a women's fast-pitch softball team. In that case, the district court concluded that a Title IX claimant must prove intentional discrimination in addition to a threshold finding of a Title IX violation.[94] The Fifth Circuit found that the actual notice and deliberate indifference requirements of sexual harassment cases have "little relevance" in determining whether intentional discrimination occurred.[95] Rather, the

93. Rec. Doc. No. 93 at 8.

94. *Pederson*, 213 F.3d at 879-880.

95. *Id.* at 882.

proper test is "whether [LSU] intended to treat women differently on the basis of sex by providing them unequal athletic opportunity."[96] "[LSU] need not have intended to violate Title IX, but need only have intended to treat women differently."[97] Application of archaic attitudes about women constitute intentional discrimination.[98] Thus, the *Pederson* plaintiffs were required only to prove a violation of Title IX and intentional discrimination.[99]

In most Title IX cases, the threshold finding of a Title IX violation is found by a violation of the clear terms of the statute. The *Pederson* court made the threshold finding of a Title IX violation by utilizing the Policy Interpretations of Title IX, 44 Fed. Reg. at 71,413 (1979), the application of which is limited to athletics programs.[100] Further, the Supreme Court's holding in *Gebser v. Lago Vista Independent School Dist.*,[101] the leading teacher-on-student harassment case, seems to support this approach. *Gebser* also dispenses with the actual notice and deliberate indifference requirements where the Title IX claim alleges an official policy of discrimination.[102] This

96. *Id.*

97. *Id.* at 881 (internal citations omitted).

98. *Id.*

99. *See also Horner v. Kentucky High School Athletic Association*, 206 F.3d 685 (6th Cir. 2000) (alleging the same claim and proofs needed for the claim).

100. *Id.*

101. 524 U.S. 274, 118 S. Ct. 1989, 141 L. Ed. 2d 277 (1998).

102. *Id.* at 290.

logically leaves the claimant to prove only the policy of intentional discrimination. *Davis* also seems to support this approach where it says an institution can be sued for damages "where the funding recipient engages in intentional conduct that violates the clear terms of the statute."[103]

The most factually analogous case located by the Court is *J.H. v School Town of Munster*,[104] a case decided by United States District Court for the Northern District of Indiana. Although this ruling addressed a summary judgment motion, it is nonetheless instructive to the present case. In *J.H.*, a high school male brought a Title IX claim against his school alleging that it purposefully ignored complaints of hazing in the boys' swimming program due to their gender.[105] The Court noted that "J.H.'s argument is essentially that the Defendants were willfully turning a blind eye to all of the awful things going on in the male swimming program because 'boys will be boys.'"[106] The court explained that, "[i]n essence, it's not necessary to show that Munster had a policy of forcing the boys to do or not do something that didn't apply to the girls. Instead, indifference to the boys' welfare is enough."[107] The court continued:

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103. *Davis*, 526 U.S. at 642.

104. 160 F.Supp.3d 1079 (N.D. Ind. 2016).

105. *Id.*

106. *Id.* at 1086.

107. *Id.* (citation omitted).

> In pursuing this theory, J.H. must show a connection between Munster's alleged custom or practice and his injury. *Rice ex rel. Rice v. Corr. Med. Servs.*, 675 F.3d 650, 670 (2012). So what all this boils down to is that J.H. must show that Munster engaged in a widespread practice of ignoring complaints of hazing from the boys' swimming program, either intentionally or with deliberate indifference to the boys' rights, simply because the complaints were coming from boys and not girls. *See e.g. Hayden*, 743 F.3d at 583 (intentional discrimination can be shown by either deliberate indifference or a discriminatory school policy). J.H. can show this based on evidence of his own treatment, in addition to the treatment of others on his team. *Bohen*, 799 F.2d at 1187 (Maj. opinion).[108]

The court relied on the same elements laid out in *Davis* and found that the school's policy alone demonstrated its intent to discriminate, suggesting that the first *Davis* prong requiring discrimination is met even if it does not demonstrate harassment.[109] Nevertheless, the court concluded that J.H. could proceed with his claim under either framework.[110] The court reasoned that the same evidence showing a practice of intentionally ignoring the

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108. *Id.*

109. *Id.* at 1091. The *J.H.* court did note, however, that the Seventh Circuit had not addressed whether a plaintiff needs to satisfy the three remaining prongs of *Davis* for this type of claim.

110. *Id.*

boys' hazing complaints satisfies the deliberate indifference element in that the practice is *necessarily* deliberately indifferent, and the basis of the claim is the school's own policy which establishes the school's actual knowledge.[111] Finally, the court found that the plaintiff had submitted sufficient evidence that the alleged discrimination was sufficiently severe, pervasive, and objectively offensive such that it undermined his educational opportunities.[112] The court held that there was sufficient evidence to allow a jury to determine whether the school's failure to remedy the hazing—which was extensively reported to the school administration—caused J.H. to leave the school, experience a decline in grades, and suffer psychological effects.[113] The court also noted that a plaintiff need not prove that the girls' team experienced no hazing, but only that the discriminatory policy applied only to the boys.[114]

Ultimately, the court denied the motion for summary judgment for this portion of J.H.'s claim, but it did not resolve the factors necessary to prove a Title IX claim because it found the claim satisfied the test for student-on-student harassment claims. While this analytical framework is not binding on this Court, the Court nevertheless finds the *J.H.* decision instructive, and it demonstrates that federal courts have allowed claims like Plaintiffs herein to proceed to trial under the same type of pleadings.

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111. *Id.* (emphasis added).

112. *Id.*

113. *Id.*

114. *Id.* at 1088.

Appendix B

The present case alleges both an intentional policy of discrimination and student misconduct. A similar case was presented in *Doe 1 v. Baylor University*, wherein female students asserted a claim seeking to hold the university liable for its discriminatory custom or policy that created a heightened risk of sexual harassment for female students.[115] Specifically, the ten female plaintiffs in *Baylor* sued the university under Title IX and alleged that, while they were students at Baylor University,

> they were sexually assaulted by another student, but that when they sought assistance and protection from Baylor, the school did nothing (or almost nothing) in response to their reports. Plaintiffs allege Baylor discouraged them from reporting their assaults, failed to adequately investigate each of the assaults, and failed to ensure Plaintiffs would not be subjected to continuing assault and harassment. Plaintiffs assert that Baylor's practices in handling their reports reflect the school's widespread practice of mishandling reports of peer sexual assault. They allege these practices chilled other students from reporting sexual harassment, permitted the creation of a campus condition "rife with sexual assault," "substantially increased Plaintiffs' chances of being sexually assaulted," (Third Am. Compl., Dkt. 56, at 1-2, ¶ 29), and ultimately created

115. 240 F.Supp.3d 646, 657-658 (W.D. Tex. 2017) (hereinafter *Baylor*).

> a harassing educational environment that deprived Plaintiffs of a normal college education and other educational opportunities.[116]

Notably, the *Baylor* court rejected the university's argument, on a Rule 12(b)(6) motion to dismiss, that "evidence of a general problem of sexual violence is not sufficient."[117] The court explained:

> At this stage of litigation, the Court considers only whether Plaintiffs' Complaint contains sufficient factual matter, if accepted as true, to state a claim to relief that is plausible on its face. Baylor attempts to disclaim liability by dismissing Plaintiffs' allegations as "an amalgam of incidents that involved completely different contexts, offenders, and victims," (Def.'s Mot. Dismiss Doe 7, Dkt. 62, at 21), and arguing that "evidence of a general problem of sexual violence is not sufficient," (*id.* at 22). This Court disagrees. Plaintiffs have not alleged that Baylor had knowledge of accusations against their specific assailants prior to their initial assaults, **but what they have alleged—a widespread pattern of discriminatory responses to female students' reports of sexual assault—is arguably more egregious**. Indeed, even those Supreme Court justices who expressed skepticism

116. *Id.* at 652.

117. *Id.* at 653.

> regarding holding institutions liable for sexual assaults on individual students under Title IX have suggested that "a clear pattern of discriminatory enforcement of school rules could raise an inference that the school itself is discriminating." *Davis v. Monroe Cty. Bd. Educ.*, 526 U.S. 629, 683, 119 S.Ct. 1661, 143 L.Ed.2d 839 (1999) (Kennedy, J., dissenting). In particular they noted that a "school's failure to enforce its rules when the boys target the girls on a widespread level, day after day, may support an inference that the school's decision not to respond is itself based on gender" and thereby be actionable under Title IX. *Id.*[118]

Summarizing the plaintiffs' claims, the court stated:

> Taken together, Plaintiffs allege, these facts demonstrate Baylor created a condition that substantially increased Plaintiffs' chances of being sexually assaulted, (*id.* at 1); chilled student reporting of sexual harassment, (*id.* ¶ 41); led to a sexually hostile environment at the university, (*id.* ¶ 43); caused Plaintiffs psychological damage and distress, (*id.* ¶ 48); and deprived Plaintiffs of a normal college education, (*id.* ¶ 50).[119]

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118. *Id.* (emphasis added).

119. *Id.*

Applying relevant jurisprudence, the *Baylor* court noted that the deliberate indifference and actual notice elements of *Davis* do not apply to this type of claim.[120] Rather, the court found, in evaluating a heightened risk claim, it must consider whether the alleged custom or policy inflicted the injury of which plaintiffs complain.[121] In support of their heightened risk claim, the plaintiffs alleged that "Baylor's handling of reports of sexual assaults created a heightened risk of sexual assault throughout the university's student body."[122] Specifically, the plaintiffs alleged that Baylor

> knew of and permitted a "campus condition rife with sexual assault," (Third Am. Compl., Dkt. 56, ¶ 29); that sexual assault was "rampant" on Baylor's campus, (*id.* ¶ 27); that Baylor mishandled and discouraged reports of sexual assault, (*id.* at 1, ¶ 36); and that Baylor's response to these circumstances "substantially increased" the risk that Plaintiffs and others would be sexually assaulted, (*id.* at 1).[123]

Evaluating this claim, the court noted and held as follows:

> The Supreme Court has repeatedly explained that where the Title IX violation in question is caused by an institution's discriminatory policy

120. *Id.* at 661.

121. *Id.*

122. *Id.*

123. *Id.*

> or custom, courts need not apply the actual notice and deliberate indifference framework typically used in cases involving institutional liability for sexual harassment or assault. *See Gebser*, 524 U.S. at 290, 118 S.Ct. 1989 (stating that the actual notice and deliberate indifference requirements are restricted to those cases "that do not involve [an] official policy of the [funding recipient]"); *Davis*, 526 U.S. at 642, 119 S.Ct. 1661 (acknowledging that an institution cannot be liable unless it has notice that its conduct could subject it to a damages claim but providing that "this limitation ... is not a bar to liability where a funding recipient intentionally violates the statute"). Plaintiff's heightened-risk claims fit squarely within the official-policy rubric previously identified by the Court, and the Court is satisfied that Plaintiffs have met their burden under Rule 12(b)(6).[124]

The *Baylor* court found that the plaintiffs sufficiently alleged that Baylor repeatedly misinformed them of their rights under Title IX, failed to investigate sexual assaults, discouraged them from naming assailants or coming forward, and failed to report any on-campus assaults to the Department of Education.[125] Thus, the court determined that these facts, if proven, would allow a jury to infer that Baylor's policy created the heightened risk of sexual assault, thereby inflicting the plaintiffs' injuries.[126]

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124. *Id.*

125. *Id.* at 662.

126. *Id.*

Similarly, in the instant case, Plaintiffs allege that LSU's purposeful disregard of Greek male hazing complaints created a greater risk of danger for males in fraternities as compared to females in sororities. While *Baylor* is not binding, the Court finds the *Baylor* court's reasoning and analysis particularly persuasive and applicable herein because, substituting sexual assault/harassment allegations for "Greek male hazing," the allegations pled against the universities in both cases are extremely similar. Here, Plaintiffs have clearly alleged that LSU misinformed potential male students about the risk of hazing in fraternities, had actual notice of numerous hazing violations, and failed to address or correct the hazing issue for Greek males while aggressively and appropriately addressing and correcting hazing issues in sororities, thereby providing protection to female Greek students that was not equally provided to Greek male students. Plaintiffs' *Complaint* is replete with allegations that LSU had knowledge of the hazing problem within Greek fraternities and was deliberately indifferent to the risk this posed to male Greek students by a policy of general inaction to fraternity violations as opposed to strong corrective action taken in response to sorority violations. The Court finds that, as in *Baylor*, if these facts are proven, a jury may infer that LSU's policy created the heightened risk to Greek male students of serious injury or death by hazing, thereby inflicting the injury alleged herein. Accordingly, LSU's *Motion to Dismiss* shall be denied as to the Title IX claims asserted.

IV. CONCLUSION

For the reasons set forth above, the Court finds that LSU's *Motion to Dismiss*[127] is hereby GRANTED in part and DENIED in part. LSU's *Motion* is GRANTED as to state law claims asserted considering Plaintiffs' concession that LSU is immune from suit in federal court as to those claims. Plaintiffs' state law claims are hereby DISMISSED without prejudice. LSU's *Motion* is DENIED as to Plaintiffs' Title IX claims.

IT IS SO ORDERED.

Baton Rouge, Louisiana, this 19th day of July, 2019.

/s/ Shelly D. Dick
CHIEF JUDGE SHELLY D. DICK
UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

127. Rec. Doc. No. 70.

APPENDIX C — CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

The Spending Clause provides:

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.

U.S. Const. Art. I, § 8, cl. 1.

The Eleventh Amendment provides:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI.

Title IX of the Educational Amendments of 1972 provides, in pertinent part:

No 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 discrimination under any education program or activity receiving Federal financial assistance***.

20 U.S.C.A. § 1681(a).

The Rehabilitation Act Amendments of 1986, Section 1003 provides:

(a) General provision

(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, title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, title VI of the Civil Rights Act of 1964, 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.

(b) Effective date

The provisions of subsection (a) shall take effect with respect to violations that occur in whole or in part after October 21, 1986.

42 U.S.C.A. § 2000d-7.