UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 97-3346 & 97-3347

R.M. SMITH,

Appellant,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,

Appellee.

On Remand from the Supreme Court of the United States

BRIEF OF *AMICI CURIAE* NATIONAL WOMEN'S LAW CENTER *ET AL.* IN SUPPORT OF APPELLANT URGING REVERSAL AND REMAND FOR FURTHER PROCEEDINGS

(additional *amici* listed on the inside cover)

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that . . . in no circumstances may a controlling authority argument be viable." 198 F.3d at 118.

This *amicus* brief, in Part I, argues that the NCAA is covered by Title IX because: (1) member schools have delegated authority over their intercollegiate athletic programs to the NCAA, rendering the NCAA an "assignee" under the Title IX regulations; (2) the NCAA is a program or activity receiving federal financial assistance under subsections (2), (3), and (4) of the Civil Rights Restoration Act of 1987, Pub. L. 100-259, 102 Stat. 28 (1988); and (3) the NCAA receives a federal grant from the Department of Health and Human Services ("HHS") through the National Youth Sports Program Fund. *Amici*'s first two arguments have not been addressed by this Court, and they are mentioned but not explored fully in Appellant Smith's brief. *Amici*'s third argument is addressed more fully in Appellant Smith's brief; the main point here is that in the context of important post-*Cureton* regulatory changes, this Court should squarely address the NYSP Fund theory, which demonstrates coverage of the NCAA. Finally, this brief, in Part II, contends that covering the NCAA under Title IX is fully consistent with one of the statute's purposes, the elimination of discrimination in athletics, which is clearly articulated in Title IX's legislative history. The NCAA's dominant role in intercollegiate athletics necessitates its coverage under Title IX.

Appellant Smith's brief focuses primarily on why this case should be allowed to proceed under the NYSP Fund and ceding controlling authority

theories - namely, why this case is distinguishable from *Cureton* on the facts and why it should be remanded to the district court for further proceedings.[2]

ARGUMENT

I. TITLE IX COVERS THE NCAA, AS EVIDENCED BY THE STATUTE'S PLAIN LANGUAGE, ITS IMPLEMENTING REGULATIONS, AND AMENDMENTS PURSUANT TO THE CIVIL RIGHTS RESTORATION ACT OF 1987

A. Title IX and Its Implementing Regulations Are Broad

Congress enacted Title IX to prohibit sex discrimination in federally funded programs and activities. The language of the statute is expansive, stating simply: "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 program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). Congress has consistently demonstrated its intention that the determination of what is a program or activity receiving federal funds be made to effect the broad mandate of the statute.

Title IX's implementing regulations define a "recipient" of federal funds as:

> any public or private agency, institution, or organization, or other entity, or any person, to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives or benefits from such assistance, including any subunit, successor, assignee, or transferee thereof.[3]

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[2] One way in which this case differs from *Cureton* is that it involves a disparate treatment claim.

[3] As discussed *infra* in Section B.3, the Department of Education has issued for (continued...)

34 C.F.R. § 106.2(h). That this definition includes entities receiving federal funds, as well as subunits, successors, assignees, and transferees of such recipients, demonstrates that Title IX's reach is intended to be expansive to effect the goal of ending sex discrimination in education.

The regulation defining recipient has been approved by Congress and given deference by the Supreme Court since its adoption in 1975. *See Grove City College v. Bell*, 465 U.S. 555, 567-68 (1984) (according Title IX regulations particular deference as an interpretation of the statute). At the time that Title IX's regulations were promulgated, the General Education Provisions Act[4] was in place, which gave Congress the unique opportunity to disapprove any of the Department of Health, Education and Welfare's ("HEW") regulations[5] that it

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[3](...continued)
notice and comment proposed regulations amending Title IX to conform with statutory amendments made by the CRRA. *See* Conforming Amendments to the Regulations Governing Nondiscrimination on the Basis of Race, Color, National Origin, Disability, Sex, and Age Under the Civil Rights Restoration Act of 1987, 65 Fed. Reg. 26,464 (2000) (to be codified at 34 C.F.R. Parts 100, 104, 106, and 110) (proposed May 5, 2000) [hereinafter Conforming Amendments]. One such change involves eliminating the "or benefits from" language in the recipient definition. The Department explains this change by stating that before the CRRA, this language was "necessary to clarify that *all* of the operations of a university or other educational institution that receives Federal funds . . . are covered by [Title IX]." 65 Fed. Reg. at 26,466.

[4] Pub. L. No. 93-380, § 509(a)(2), 88 Stat. 567, 20 U.S.C. § 1232(d)(1) (1970 & Supp. IV 1974).

[5] The former HEW promulgated the regulations initially in 1975. HEW's functions under Title IX were transferred in 1979 to the Department of Education ("DOE"), which subsequently adopted the regulations without substantive changes. *See North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 515-17 & nn.4&5 (1982).

thought were inconsistent with Title IX. Congress reviewed the regulations, neither House passed a disapproval resolution, and the regulations went into effect. *See North Haven*, 456 U.S. at 533 n.24; 121 Cong. Rec. 23,846 (1975). Congress' failure to disapprove the regulations "strongly implies that the regulations accurately reflect congressional intent." *Grove City*, 465 U.S. at 568. Moreover, because "Title IX was patterned after Title VI," Congress was aware of how Title VI's regulations were being interpreted and could have changed Title IX if it had so desired. *See Cannon v. University of Chicago*, 441 U.S. 677, 694 (1979). Its failure to do so provides further evidence of its approval of Title IX's definition of recipient. *See id.* at 696 ("The drafters of Title IX explicitly assumed that it would be interpreted and applied as Title VI had been during the preceding eight years.").

Relying in part on the legislative history and the broad wording of Title IX, the Supreme Court explicitly held that the indirect receipt of federal funds triggers Title IX coverage. *See Grove City*, 465 U.S. 555 (holding that federal financial aid to students to be used at college triggers Title IX coverage of college). In response to Grove City College's argument that none of its programs directly received any federal assistance, the Court noted that Title IX does not indicate that Congress perceived any difference between direct and indirect federal assistance:

> Nothing in § 901(a) suggests that Congress elevated form over substance by making the application of the nondiscrimination principle dependent on the manner in which a program or activity receives federal assistance. There is no basis in the statute for the view that only institutions that themselves apply for federal aid or receive checks directly from the federal government are subject to

regulation.

Id. at 564. Citing its own precedent that Title IX should be "accord[ed] a sweep as broad as its language," *North Haven*, 456 U.S. at 521, the *Grove City* Court refused to read into Title IX "a limitation not apparent on its face." *Grove City*, 465 U.S. at 564. *But see Grove City*, 465 U.S. at 573-74 (limiting the reach of Title IX to only the specific program or activity receiving federal funds).

Congress later expressly endorsed the longstanding definition of "recipient" when it passed the CRRA to overrule *Grove City*'s program-specific interpretation of Title IX . Congress stated clearly that the CRRA does not "change in any way who is a recipient of federal financial assistance," and that the "purpose of the Civil Rights Restoration Act of 1987 is to reaffirm the pre-*Grove City College* judicial and executive branch interpretations and enforcement practices which provided for broad coverage of the antidiscrimination provisions of [the] civil rights statutes."[6] S. Rep. No. 100-64, at 2 (1987), *reprinted in* 1988 U.S.C.C.A.N. 3. The CRRA made clear that once an entity is a direct or indirect recipient, as a general matter, all of its parts are covered.

In addition, the meaning of the terms "subunit, successor, assignee, or

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[6] On September 29, 2000, numerous federal agencies enacted Title IX regulations, which incorporate clearly the language of the CRRA. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 65 Fed. Reg. 52,858 (2000) [hereinafter Agencies' Title IX Regulations]. Moreover, in response to this Court's decision in *Cureton*, the Department of Education's proposed regulations amending Title IX specifically incorporate the CRRA's definition of "program or activity" while making clear that the Department has always interpreted Title IX to have broad institution-wide coverage. 65 Fed. Reg. at 26,464-26,465.

transferee thereof" was debated in discussions of early versions of the CRRA. These terms were explained as "standard contract language applied to situations in which the successor, assignee, or transferee stands in the shoes of the recipient of the federal financial assistance, with like obligations and functions of the recipient." *E.g.*, H.R. Rep. No. 98-829, pt. 2, at 32 (1984) [hereinafter House Comm. Rep.]. Thus, Congress again demonstrated that it was aware and approved of Title IX's definition of recipient.

B. The NCAA Is Covered by Title IX Because It Is an Education Program or Activity Receiving Federal Financial Assistance

The NCAA is subject to Title IX for three reasons. First, recipient schools have delegated authority over their intercollegiate athletics programs to the NCAA, making it a subunit, successor, assignee or transferee under Title IX's definition of recipient. Second, the NCAA is a "program or activity receiving federal financial assistance" under the CRRA. Third, the NCAA is a recipient of federal funds from HHS through its relationship with the NYSP Fund.

1. The NCAA Is a Recipient Because It Serves as a Subunit, Successor, Assignee or Transferee of Its Member Schools

The NCAA serves as a subunit, successor, assignee or transferee of its member schools and hence is a recipient within the meaning of Title IX. Member schools, which are recipients themselves, delegate their functions with respect to intercollegiate athletics to the NCAA. This part of the regulation does not require

any transfer of federal funds.[7] *See Kemether v. Pennsylvania Interscholastic Athletic Ass'n*, No. Civ. A. 96-6986, 1999 WL 1012948, at *24 (E.D. Penn. Nov. 8, 1999) (holding that because member schools have given complete control over interscholastic athletics to the athletic association, the latter is subject to Title IX as an assignee).

The NCAA promotes itself as "the organization through which the nation's colleges and universities speak and act on athletics matters at the national level." *The NCAA: General Information* (visited Nov. 1, 2000) <http://www.ncaa.org/about/>. The member colleges and universities, now numbering about 1200, have formally assigned or transferred functions with respect to athletics to the NCAA and have agreed to be bound by the rules and regulations of the NCAA.[8] Sanctions for violating the rules range from prohibition from competition to termination of an institution's membership in the association.[9] In addition, member schools have assigned or transferred many

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[7] When reviewing this part of the regulation defining recipient, the House Report used the particularly instructive example of a parking garage in a university-owned building financed with federal funds, which was leased by the university to a private operator. In that example, the university presumably did not give funds to the garage operator. In fact, the lease would have yielded funds from the operator to the university. Nonetheless, even without any transfer of federal funds, the garage operator was covered by Title IX as it was operating a part of the federally funded building for the recipient just as the NCAA is operating a part of its members' federally funded educational programs. *See* House Comm. Rep. at 32.

[8] *1998-99 NCAA Division I Manual* at 1, Const., Art. 1, § 1.2(d)&(h), § 1.3.2 [hereinafter *NCAA Manual*].

[9] *Id.* at 54, Bylaw, Art. 10, § 10.4 (ineligibility of a student athlete for

(continued...)

rights to the NCAA, such as their rights to money from championship events, including money from ticket sales; program sales and advertising; radio, television and movie rights, and more. *See* at 419-20, Art. 31, § 31.4.2. The individual schools are entitled to only a small allowance of the net receipts from these events. *See id.* at 420, § 31.4.4.1. All of this money would be retained by the NCAA's member schools if they did not delegate control over the governance of their athletic programs to the NCAA. The vast authority assigned to the NCAA by its member schools is evidenced by NCAA bylaws that affect virtually every aspect of a member institution's athletic program. From student eligibility requirements, to the maximum number of scholarships that may be awarded by sport and gender, to playing and practice seasons, member schools have transferred to the NCAA an enormous amount of control over their athletics programs.[10] It is beyond dispute that the NCAA is a dominant player in the operation of the educational program or activity of intercollegiate athletics in our nation's colleges and universities.[11]

(...continued)
intercollegiate competition); *id.* at 330, Bylaw, Art. 19, § 19.6.2.2(j) (prohibition of a team from competition); *id.* at 332, Bylaw, Art. 19, § 19.6.3 (termination or suspension of an institution's membership). The mere threat of sanctions is often enough to change an institution's ways. *See, e.g., NCAA v. Tarkanian*, 488 U.S. 179, 187 (1988) (noting that when faced with possibility of sanctions, university chose to "[r]ecognize [its] delegation to the NCAA of the power to act as ultimate arbiter of [the issue]"); *NCAA v. Regents of the Univ. of Oklahoma*, 468 U.S. 85, 94-95 (1984) (describing how College Football Association ("CFA") never consummated television agreement negotiated independently of NCAA because of threatened broad-based sanctions by NCAA against CFA members).

[10] *NCAA Manual* at 131-78, Bylaw, Art. 14 (eligibility); *id.* at 192-99, Bylaw, Art. 15 (scholarships); *id.* at 227-316, Bylaw, Art. 17 (playing and practice seasons).

[11] The NCAA's predominance in college athletics is widely acknowledged. *See*
(continued...)

As one court stated, in a case in which the NCAA itself claimed that it was an educational institution based on its relationship with its member schools, and was thus entitled to a sales tax exemption:

> The activities of the NCAA are of the type the member universities and colleges could accomplish by committee except for the number of schools involved and the complexity of the world of major intercollegiate sports. The work of the NCAA staff is that which the members have decreed it shall do for the mutual benefit of, and assistance to, the member institutions' educational programs. We must conclude that the NCAA is but an extension of the member universities and colleges . . . .

NCAA v. Kansas Dep't of Revenue, 781 P.2d 726, 730 (Kan. 1989).

The assignment and transfer of obligations to the NCAA from member schools receiving federal assistance are clearly for the purpose of providing a federally funded educational program or activity.[12] Therefore, the NCAA, as a

(...continued)
Michael P. Acain, Note & Comment, *Revenue Sharing: A Simple Cure for the Exploitation of College Athletes*, 18 Loy. L.A. Ent. L.J. 307, 328 (1998) ("[T]he NCAA [has] unmitigated control over the market for college players."); Christopher L. Chin, Comment, *Illegal Procedures: The NCAA's Unlawful Restraint of the Student-Athlete*, 26 Loy. L.A. L. Rev. 1213, 1222 (1993) ("In terms of regulatory power, the NCAA is clearly the dominant organization in intercollegiate athletics."). While other athletic organizations exist, the NCAA is "the only entity with substantial power over intercollegiate athletics in the United States." *Id.* at 1222. The NCAA's prestige and the commercial opportunities it offers are powerful incentives for schools to obtain (and avoid losing) NCAA membership. *See* Darryl C. Wilson, *Title IX's Collegiate Sports Application Raises Serious Questions Regarding the Role of the NCAA*, 31 J. Marshall L. Rev. 1303, 1319 n.102 (1998) ("[T]he question [is] whether anyone can afford to not be a member of the NCAA.").

[12] In fact, an enormous loophole would be created were an entity such as the NCAA not considered covered, with troubling implications contrary to the fundamental purposes of Title IX. For example, if several universities jointly
(continued...)

subunit, successor, assignee, or transferee providing the educational intercollegiate athletics program, is covered by Title IX.

2. The Civil Rights Restoration Act Amendments Underscore Coverage of the NCAA

The language, structure and intent of Congress in passing the CRRA was to ensure that a broad range of entities with responsibility for federally funded programs were covered in their entirety.[13] The CRRA broadly defines a "program

(...continued)
managed an archaeological dig and appointed a joint governing body to administer the research, control the number of students from each school allowed access to the site, and determine the maximum amount of student aid each researcher could receive, that joint governing body could no more discriminate based on sex than could any of the universities involved in the research. This result would be the same regardless of whether the governing body received funds from the universities, charged the students directly, or received other sources of funds.

[13] The CRRA provides in relevant part:

> For the purposes of this chapter, the term "program or activity" and "program" mean all of the operations of–
> . . . .
> (2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or
> (B) a local educational agency (as defined in section 8801 of this title), system of vocational education, or other school system;
> (3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship–
> (i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or
> (ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or
>
> (B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship or
> (4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3);

(continued...)

or activity" that receives federal funds to mean all of the operations of: colleges and universities; private organizations principally engaged in education; and any entity established by two or more of the listed entities--what Congress termed the "catch-all" provision.[14] The NCAA is subject to Title IX under all three of these provisions.

a. The NCAA is Covered as an Operation of Its Federally Funded Member Schools

Subsection (2) of the CRRA extends Title IX coverage to all operations of covered colleges and universities. The NCAA would be hard pressed to argue that it is not an operation of the schools themselves, as its own testimony seems to recognize.[15]

The fact that the NCAA's members choose to conduct some part of the operations of their covered educational programs by arrangement with the NCAA rather than by themselves does not make the NCAA's role and responsibilities any less an operation of the schools. The NCAA's central role in the management of

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(...continued)

any part of which is extended Federal financial assistance . . . .

20 U.S.C. §1687.

[14] *See* S. Rep. No. 100-64 at 19.

[15] See *Hearings Before the House Education and Labor Comm. and the Subcomm. on Civil and Constitutional Rights*, House Judiciary Comm., 98th Cong., 2d Sess. at 225 (May 21, 1984) [hereinafter *1984 Joint Hearings*], where it described voluntary athletics associations as operations of colleges and universities. *See also NCAA v. Kansas Dep't of Revenue*, 781 P.2d at 730 ("We must conclude that the NCAA is but an extension of the member universities and colleges.").

each member schools' athletic programs makes the NCAA a part of the operation of each member school within the meaning of the CRRA. At least one court has held an analogous entity to be covered as operations of covered schools themselves, even when those entities were separate from the schools. *See, e.g.*, *Graham v. Tennessee Secondary Sch. Athletic Ass'n*, No. 1:95-CV-044, 1995 WL 115890 (E.D. Tenn. Feb 20, 1995), *appeal dismissed*, 107 F.3d 870 (6th Cir. 1997) (upholding Title VI claim against the athletic association because it is an operation of the state's schools).

It is the member schools whose athletics operations the NCAA relies on to generate revenues and to provide facilities and participants for events. NCAA events are intercollegiate athletic competitions between federally funded student athletes at federally funded schools. But for the federally funded schools that build, maintain, and operate the facilities in which these contests occur and pay for the salaries of the coaches, assistants, and trainers who manage these teams, there would be no NCAA championships. But for the federally assisted student athletes who are extended federal financial assistance, there would be no teams to compete and no NCAA championship games to be broadcast. Thus, the NCAA is covered by Title IX as an operation of its federally funded member schools.

b. The NCAA is Covered Because It is a Private Educational Organization Whose Parts Receive Federal Financial Assistance

Under subsection (3)(A)(ii) of the CRRA, organizations principally engaged in the business of providing education are subject to Title IX if any part of the

organization receives federal financial assistance. The NCAA falls squarely within this provision: it is a private educational organization whose member schools (parts) receive federal funds. Thus, the NCAA as a whole is covered.

The NCAA itself has claimed it is an "educational institution" to gain tax-exempt status in a number of circumstances, and courts have agreed. *See, e.g.*, *National Collegiate Realty Corp. v. Board of County Comm'rs*, 690 P.2d 1366 (Kan. 1984) (NCAA stated before the Kansas Board of Tax Appeals that it is a § 501(c)(3) organization). Under the CRRA, when an organization like the NCAA "is principally engaged in the business of providing education," all of its operations are covered if any part of it receives federal aid. This is precisely the NCAA's status. The NCAA acknowledged as much when it testified before the Joint Hearings of the House Committee on Education and Labor and the House Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary in May 1984, when Congress first began considering the CRRA. In a prepared statement submitted for the record, the NCAA stated its belief that if Congress adopted a scheme whereby federal financial assistance to one university's program extended Title IX coverage to the university's other programs, by analogy, voluntary athletic associations such as the Big Eight Athletic Conference would be covered. *See 1984 Joint Hearings* at 225. Thus, the NCAA is subject to the anti-discrimination requirements of Title IX because it is a private organization, principally engaged in the business of education, whose member parts receive federal financial assistance. *See* 20 U.S.C. §§ 1681, 1687.

c. The NCAA is Covered Because It Is an Organization Established by Two or More Colleges or Universities That Receive Federal Funds

The "catch-all" provision, subsection (4) of the CRRA, provides that an entity created by two or more otherwise covered entities is itself subject to Title IX. The NCAA is such an entity, as it was established by colleges and universities that are explicitly listed in the CRRA as covered themselves. *See* 20 U.S.C. § 1687(2)(A).

Pursuant to this catch-all provision, lower courts have held the NCAA liable under Title VI and Section 504. The district court in *Cureton* held the NCAA to be subject to Title VI under subsection 4. *Cureton v. NCAA*, No. Civ. A. 97-131, 1997 WL 634376, at *2 (E.D. Pa Oct. 9, 1997).[16] Furthermore, in *Bowers v. NCAA*, the court held that the NCAA is a program or activity subject to Section 504 because it "squarely fits within the statutory language of [subsection (4)]" as an entity established by two or more colleges and universities. 9 F. Supp. 2d 460, 491 (D.N.J. 1998). Finding that the NCAA is covered under subsection (4) is consistent with Congress' goal of "meaningful coverage and effective enforcement" of these civil rights laws, *see* S. Rep. No. 100-64, at 6, and its explicit purpose that subsection (4) serve as a catch-all provision and apply to entities not reached by the other enumerated subsections.

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[16] On appeal, this Court in *Cureton* did not address the issue of NCAA coverage under the CRRA.

3. The NCAA Receives Federal Funds to Operate the National Youth Sports Program

This Court in *Cureton* never decided whether the NCAA was covered by Title VI by virtue of its relationship with the NYSP Fund because it held that the Title VI disparate impact regulations were program specific and the Fund's programs were not at issue. As support for its holding, the Court pointed to the fact that the Departments of Health and Human Services and Education did not modify their Title VI regulations following enactment of the CRRA, even though it acknowledged that the CRRA was passed to correct the Supreme Court's program-specific interpretation of Title IX in *Grove City.*

It is important to note that the Department of Education and other agencies have always interpreted civil rights regulations to mean that acceptance of federal funds by a school results in broad institutional coverage, and the CRRA simply restored that interpretation. *See, e.g.*, Conforming Amendments, 65 Fed. Reg. at 26,464-26,465. Nevertheless, the Department is in the process of issuing conforming amendments to these civil rights regulations that specifically incorporate the statutory language of the CRRA. *Id.*[17] Given its role as primary enforcer of these laws, the Department's longstanding interpretation of these regulations deserves deference. *See Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984). Therefore, this Court should squarely address

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[17] As discussed *supra*, a number of other agencies recently enacted new Title IX regulations that incorporate the specific language of the CRRA. *See* Agencies' Title IX Regulations, 65 Fed. Reg. 52,858.

the NYSP theory of coverage, which demonstrates that the NCAA is subject to Title IX because it operates the NYSP, an education program receiving federal financial assistance within the meaning of Title IX.[18] This argument is discussed more fully in Appellant's brief.

II. COVERING THE NCAA UNDER TITLE IX FURTHERS CONGRESS' INTENT TO ELIMINATE SEX DISCRIMINATION IN INTERCOLLEGIATE ATHLETICS

A. Congress Recognized that Gender Equity in Intercollegiate Athletics Is Critical to Fulfilling Title IX's Mandate

The legislative history of Title IX demonstrates that Congress repeatedly rejected attempts to weaken its application to intercollegiate athletics, recognizing the importance of ensuring that the statute's proscription against sex discrimination applied to intercollegiate athletic programs. In 1974, for example, Congress not only rejected a proposal to exempt revenue-producing intercollegiate athletic programs, but also directed HEW to prepare regulations implementing Title IX which included "with respect to intercollegiate athletics reasonable provisions considering the nature of particular sports."[19] Pub. L. No. 93-380, § 844, 88 Stat. 612 (1974); *see also Sex Discrimination Regulations: Hearings*

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[18] In fact, the district court record developed by the plaintiffs in *Cureton* was sufficient to withstand summary judgment on this issue. *See Cureton v. NCAA*, 37 F. Supp. 2d 687, 694 (E.D. Penn. 1999).

[19] Subsequent efforts to restrict Title IX's coverage of intercollegiate athletics also failed. *See* H.R. 8394, 94th Cong., 121 Cong. Rec. 21,685 (1974) (bill amending Title IX to protect revenue produced by an athletic team from use by any other team unless the first team did not need the funds for itself); S. 2106, 94th Cong., 121 Cong. Rec. 22,778 (1975) (bill amending Title IX to exempt revenue-producing sports).

Before the Subcommittee on Postsecondary Education of the Committee on Education and Labor, 94th Cong., 1st Sess., at 21 (1975) [hereinafter *Sex Discrimination Regulations*] (describing the relevant history).

Acting on this explicit delegation of rulemaking authority, HEW issued proposed regulations in June of 1974, including specific provisions addressing intercollegiate athletics. The proposed regulations were subjected to a public comment period that produced nearly 10,000 comments. *See Sex Discrimination Regulations* at 438 (testimony of Caspar Weinberger). The large number of comments addressing intercollegiate athletics prompted then-Secretary of HEW Caspar Weinberger to remark that "the most important issue in the United States today is intercollegiate athletics, because we have an enormous volume of comments about them." *Id.*

HEW issued its final regulations in 1975, and Congress held extensive hearings on the regulations, focusing particular attention on the need to address the pervasive sex discrimination in intercollegiate athletics programs. The hearings produced a voluminous record documenting such discrimination.[20] *See*

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[20] Many members of Congress spoke to this issue. *See Sex Discrimination Regulations* at 175 (remarks of Sen. Bayh) ("I have heard of no one making the argument that athletics should not be covered by Title IX who does so on the premise that there is not discrimination."); *see also id.* at 58 (remarks of Mr. Simon) ("I think we have to recognize that we have had some failures here in the past in not encouraging female sports."); 121 Cong. Rec. 24,635 (1975) (remarks of Sen. Clark) ("A look at present spending figures reveals an unbelievable inequity -- of the $300 million spent annually on collegiate athletic programs, only 2% is spent on women's athletics."); 121 Cong. Rec. 20,714 (1975) (remarks of Sen. Javits) ("Sex discrimination in education takes many forms . . . . [A]thletic programs are restricted and financial aid distributed in a biased manner."); 120

(continued...)

Sex Discrimination Regulations, supra.

Resolutions were introduced in both Houses disapproving the regulations insofar as they applied to athletics, *see* S. Cong. Res. 52, 121 Cong. Rec. 22,940 (1975); H. Cong. Res. 311, 121 Cong. Rec. 19,209 (1975), and in their entirety, *see* H. Cong. Res. 310, 121 Cong. Rec. 19,209 (1975); S. Cong. Res. 46, 121 Cong. Rec. 17,300 (1975). None of the resolutions passed, and the regulations went into effect on July 21, 1975. *See Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics*, 44 Fed. Reg. 71,413 (1979) (summarizing relevant history)

Title IX's application to intercollegiate athletics has made a difference. Title IX has led to the availability of athletic scholarships, which in turn have sharply increased the ability of young women to pursue a college education and to choose from a wider range of schools. Before Title IX, athletic scholarships for women were almost nonexistent and many colleges had no women's sports programs at all. *See* U.S. Comm'n on Civil Rights, Pub. No. 63, *More Hurdles to Clear: Women and Girls in Competitive Athletics* (1980). Prior to the passage of Title IX, only 32,000 women per year played college sports. *See* 44 Fed. Reg. 71,413, 71,419 (1979). Currently over 110,540 women participate in college athletics. NCAA, *Participation Study* (1995).

Despite these increased opportunities, however, the full potential of Title IX

(...continued)
Cong. Rec. 20,668 (1974) (remarks of Hon. Robert P. Hanrahan) ("Mr. Speaker, there has always been sex discrimination involved in athletics.").

in the area of intercollegiate athletics has not yet been realized. Recognizing the need for continued enforcement of Title IX, Congress continues to legislate in this area. For example, in 1998, Congress passed the "Fair Play Act," requiring the public availability of data regarding compliance with Title IX's mandate. Higher Education Amendments of 1998, Pub. L. 105-244 (1998). Congress found that despite the important advances made under Title IX, women have not yet achieved equity in intercollegiate athletics. The data has shown that many problems remain, and in the area of scholarship inequities, for example, schools have pointed to NCAA scholarship rules as creating barriers to the removal of the inequities, *See, e.g.*, Jim Naughton, *Focus of Title IX Debate Shifts from Teams to Scholarships*, Chron. of Higher Educ., May 29, 1998, at A45.

In order to implement Congress' intent in enacting Title IX, coverage of the NCAA is particularly important, as the instant case makes crystalline. The challenged conduct is a rule or decision by the NCAA itself -- its manner of granting eligibility waivers -- not the action of any individual school. Therefore, coverage under Title IX is essential to hold the NCAA accountable for its actions.

Moreover, the argument that coverage of the NCAA is unnecessary because effective relief can be obtained from an individual federally funded school, which must comply with Title IX notwithstanding the NCAA's rules, ignores the reality that schools face. Schools are subject to sanctions for violating the NCAA's rules, including prohibition from competition or termination of membership. Thus, even if a plaintiff obtained a judgment ordering a particular school not to implement a

discriminatory NCAA rule, the school then could be subject to sanctions by the NCAA and excluded from NCAA-sponsored competition. In the end, therefore, the plaintiff and other athletes at the institution might lose valuable opportunities for participation and competition and not secure effective relief.[21]

Thus, subjecting the NCAA itself to Title IX is essential to achieving the statute's purposes. Any decision to the contrary would frustrate Congress' intent to eliminate sex discrimination in athletics.

B. The NCAA Should Be Covered to Advance the Far-Reaching Benefits That Sports Provide for Women and Girls

Sports offer much to female athletes who participate in them in a variety of ways. In 1997, the President's Council on Physical Fitness and Sport released a report on girls' involvement in physical activity and sports. The report affirmed the basic premise that sports and physical activities are highly beneficial for girls, offering a panoply of physiological, psychological, sociological and mental health benefits. *See The President's Council on Physical Fitness and Sports Report: Physical Activity & Sports in the Lives of Girls* xii (Spring 1997) [hereinafter

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[21] In fact, in a pending case against the Michigan High School Athletic Association, plaintiffs have alleged that several school districts have protested unsuccessfully to the association to change a rule which schedules tournament play for certain women's teams off season. These school districts are faced with the choice of withdrawing from the tournaments or acquiescing in a discriminatory practice -- both choices hurt their female students' opportunities for scholarships and other benefits that in-season tournaments would provide. *See Communities for Equity v. Michigan High Sch. Athletic Ass'n,* No. 1:98CV479, 1998 WL 804829 (W.D. Mich. Nov. 16, 1998) (order denying defendant athletic association's motion for summary judgment, *inter alia,* in which it argued that it is not covered by Title IX).

President's Council Report).

Athletic participation expands academic opportunities and promotes academic achievement. The availability of athletic scholarships sharply increases young women's ability to pursue a college education and to choose from a wider range of schools, thus opening more doors for women. Indeed, for many low-income women, intercollegiate athletics provide a gateway to an education that they otherwise could not obtain. *See, e.g., Cohen v. Brown Univ.*, 991 F.2d 888, 891 (1st Cir. 1993). On average, female athletes fare better academically than their nonathletic counterparts. *See President's Council Report* at xxiii. Young women who participate in sports are more likely to graduate from high school. *See* The Women's Sports Foundation, *Minorities in Sports: The Effect of Varsity Sports Participation on the Social, Educational and Career Mobility of Minority Students* 27 (Aug. 15, 1989). They also have higher grades and higher scores on standardized tests than non-athletes. Thus, athletic participation enhances the overall educational experiences of many young women.[22]

Second, women develop a range of skills through participation in athletics, all of which are crucial to success in employment and adult life, generally. Those skills include the ability to work with a team, to perform under pressure, to set

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[22] Athletic participation has been proven to yield similar benefits for Black and Hispanic students. Minority athletes receive higher grades, are less likely to drop out, and aspire to hold leadership positions in their communities in greater percentages than their non-participating counterparts. *See* Carol Herwig, *Report Stresses Role of Academics; High School Athletes: Winners On, Off Field*, USA Today, Aug. 16, 1989 (citing Women's Sports Foundation Report: *Minorities in Sports* (1989)).

goals, and to take constructive criticism. Importantly, participation in sports can teach problem-solving skills. *See President's Council Report* at 64. Participation in intercollegiate athletics offers young women "an opportunity to exacuate [sic] leadership skills, learn teamwork, build self-confidence, and perfect self-discipline." *Cohen*, 991 F.2d at 891.

Third, regular and rigorous physical exercise from sports provide enormous health benefits to women. Sports participation decreases a young woman's chance of developing heart disease, osteoporosis, and other health related problems. *See* Donna A. Lopiano, *Testimony Before the U.S. Subcomm. on Consumer Affairs, Foreign Commerce and Tourism*, Oct. 18, 1995. A 1998 study found that former college athletes had a 35% less chance of developing breast cancer and a 61% less chance of developing reproductive cancer compared to non-athletes. *See* Carol Krucoff, *Exercise and Breast Cancer,* Saturday Evening Post, Nov. 1995, at 22. Increased fitness levels can contribute to better posture, the reduction of back pain, and the development of physical strength and flexibility. *See President's Council Report*, at 14. In terms of emotional and mental health, women who participate in sports have a higher level of self-esteem, a lower incidence of depression, and a more positive body image. *See* Colton & Gore, Ms. Foundation, *Risk, Resiliency, and Resistance: Current Research on Adolescent Girls* (1991); The Women's Sports Foundation, *Miller Lite Report* 3 (Dec. 1985). Through participation in sports, women establish constructive relationships with peers, are influenced by healthy role models, experience success, and learn how to deal with physiological

and psychological changes. *See President's Council Report* at 64. Thus, it is clear that sports participation also promises young women important health benefits.[23]

Although women continue to have a disproportionately low share of athletic opportunities, women have made a tremendous contribution to the world of sports. From the Women's World Cup to the Women's National Basketball Association to the amazing triumphs of female athletes in Atlanta, Nagano, and Sydney, women and girls are beginning to reap the benefits and successes associated with sports participation. And while Title IX has played a vital role in opening up competitive athletics to women and girls, its goal of full equality of opportunity in sports has yet to be realized. Thus, the commitment to providing young women equal opportunities in athletics must be sustained, and the NCAA must not be permitted to ignore its Title IX responsibilities.

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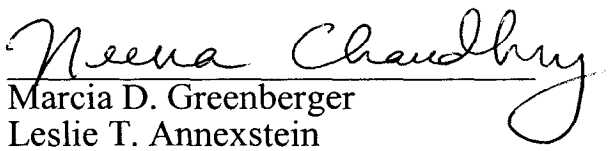
[23] A recent book provides a comprehensive look at the impact of sports in the lives of girls and further provides a guide for parents who would like to see their daughters succeed. The authors talked with girls who play sports, professional athletes, parents, educators, coaches, academics, etc. The authors propose that "in raising our athletic daughters, we are raising girls to be strong, self-determined women." J. Zimmerman and G. Reavill, *Raising Our Athletic Daughters* xii (1998).

CONCLUSION

For the foregoing reasons, *amici* urge this Court to remand this case to the district court for further proceedings.

Respectfully Submitted,



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Dated: November 3, 2000

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CERTIFICATION OF MEMBERSHIP OF THE BAR OF THIS COURT

Pursuant to Local Appellate Rule 46.1(e), I, Neena K. Chaudhry, hereby certify that I am a member of the bar of the United States Court of Appeals for the Third Circuit.

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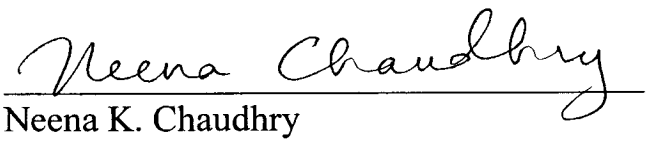
CERTIFICATE OF COMPLIANCE

This brief complies with the Federal Rules of Appellate Procedure 29 (d) and 32(a)(7)(C). It contains 6,980 words.



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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of November, 2000, I caused two copies of the foregoing Brief of *Amici Curiae* National Women's Law Center *et al.* In Support of Appellant Urging Reversal and Remand for Further Proceedings to be served on the following parties by federal express:

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APPENDIX
INTEREST OF THE AMICI

The *National Women's Law Center ("Center")* is a nonprofit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. Since 1972, the Center has worked to secure equal opportunity in education for girls and women through full enforcement of Title IX. In particular, the Center has consistently sought active enforcement of Title IX with respect to intercollegiate athletics and was counsel in the first Title IX challenge to discrimination in intercollegiate athletics, *Haffer v. Temple University*. The benefits and opportunities uniquely available to competitive athletes have been and continue to be disproportionately reserved for men. The Center has a deep and abiding interest in ensuring equal athletic opportunity under Title IX, including the opportunity to participate in intercollegiate athletics.

For well over a century, *American Association of University Women (AAUW)*, the organization of 150,000 members, has been a catalyst for the advancement of women and their transformations of American society. In more than 1,500 communities across the country, AAUW members work to promote education and equity for all women and girls. AAUW plays a major role in activating advocates nationwide on AAUW's priority issues. Current priorities include gender equity in education, reproductive choice, and workplace and civil rights issues. AAUW believes that Title IX is essential for continuing the advancement of women and girls in education.

The *American Civil Liberties Union (ACLU)* is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to preserving the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The ACLU's Women's Rights Project was established in 1971. For nearly three decades, it has battled on behalf of women's equality in schools and other settings. Among other things, the ACLU has appeared before this Court in virtually every major women's rights case, either as direct counsel or as *amicus curiae*. The issue presented in this case, which involves the proper scope and application of Title IX, is therefore a matter of great concern to the ACLU and its members.

The *California Women's Law Center (CWLC)* is a private, nonprofit public interest law center specializing in the civil rights of women and girls. The California Women's Law Center was established in 1989 to address the comprehensive civil rights of women and girls in the following priority areas: Sex Discrimination, including sex discrimination in education, Women's Health and Reproductive Rights, Family Law, Violence Against Women and Child Care.

Since its inception, the CWLC has placed a strong emphasis on advancing the rights of women and girls in education, particularly the issues of discrimination, and access to equal opportunities in athletic programs and activities. The issues raised in this case will have an enormous impact on the rights of women and girls to participate fully in educational and athletic programs free of the terrible consequences of discrimination. Thus, this case raises questions within the expertise and concern of the California Women's Law Center.

Center for Women Policy Studies is a national nonprofit, multiethnic and multicultural feminist policy research and advocacy institution. The Center believes Title IX is a critical tool for ensuring educational equity for women and girls in diverse settings; the law's strength and scope of application must not be diluted.

Clearinghouse on Women's Issues was established some 25 years ago to provide a channel for dissemination of information on a variety of issues of special concern to women. Advancement of educational opportunities for women and girls and elimination of discrimination in all areas of society are major issues to which we have given sustained attention. The full implementation and enforcement of Title IX has long been of great concern to our members.

The *Connecticut Women's Education and Legal Fund, Inc. (CWEALF)* is a statewide non-profit organization dedicated to empowering women, girls and their families to achieve equal opportunities in their personal and professional lives. CWEALF was incorporated in 1973 and has over 1,400 members. Having worked on the issue of Title IX since we first opened our doors, we understand how critical this law has been in terms of improving educational equity for girls and women, particularly in the area of athletics. We also understand that it is vital for the authoritative voice of intercollegiate athletics -- the NCAA -- to abide by Title IX if women's sports are to be truly equitable.

Equal Rights Advocates ("ERA") is a San Francisco-based public interest law center dedicated to the empowerment of women and girls through the establishment of their economic, social, and political equality. Since its inception in 1974, ERA has specialized in litigating cases and pursuing public policy initiatives designed to assure women equal access to all of society's benefits including employment, education, and public accommodations. ERA has litigated cases involving Title IX, including *Doe v. Petaluma City Sch. Dist.,* 830 F. Supp. 1560 (N.D. Cal 1993), *reconsid, granted,* 949 F.Supp. 1415 (N.D. Cal. 1996), as well as participating as *amicus curiae* in Title IX cases, such as *Gebser v. Lago Vista Indep. Sch. Dist.* 118 S. Ct. 1989 (1998).

Since 1899, the *National Association for Girls & Women in Sport (NAGWS)* has championed equal funding, quality and respect for women's sports programs.

NAGWS is an organization of over 5,000 professional educators whose mission is to promote and advocate for increased opportunities in participation and leadership for girls and women in sport.

The *National Association of Social Workers (NASW)* is a professional membership organization comprised of more than 155,000 social workers with chapters in every state, the District of Columbia, New York City, Puerto Rico and the Virgin Islands, and an international chapter in Europe. Created in 1955 by the merger of seven predecessor social work organizations, the NASW has as its purpose to develop and disseminate high standards of practice while strengthening and unifying the social work profession as a whole. In furtherance of its purposes, the NASW promulgates professional standards and criteria including *Standards for the Practice of Clinical Social Work and Guidelines for Clinical Social Work Supervision*, conducts research, publishes studies of interest to the profession, provides continuing education and enforces the *NASW Code of Ethics*. The NASW also sponsors a voluntary credentialing program to enhance the professional standing of social workers, including the NASW Diplomate in Clinical Social Work and the Qualified Clinical Social Worker credentials.

National Council of Jewish Women, Inc. (NCJW) is a volunteer organization, inspired by Jewish values, that works through a program of research, education, advocacy and community service to improve the quality of life for women, children and families and strives to ensure individual rights and freedoms for all. Founded in 1893, the National Council of Jewish Women has 90,000 members in over 500 communities nationwide. Given NCJW's early and active involvement in passage of the Title IX program and NCJW's *National Resolutions,* which support "the enactment and enforcement of laws and regulations which protect civil rights and individual liberties for all," we join this brief.

National Education Association (NEA) is a nationwide labor organization with approximately 2.2 million members, the vast majority of whom are employed by public school districts, colleges and universities. NEA is strongly committed to ending gender discrimination by educational institutions and, to this end, firmly supports the vigorous enforcement of Title IX.

National Partnership for Women & Families, founded in 1971, formerly the Women's Legal Defense Fund, is a national advocacy organization that develops and promotes public policies to help women achieve equal opportunity, quality health care, and economic security for themselves and their families. The National Partnership has a longstanding commitment to equal opportunity for women and to monitoring the enforcement of antidiscrimination laws. The National Partnership has devoted significant resources to combating sex and race discrimination in education and has filed numerous briefs *amicus curiae* in the United States Supreme

Court to advance women's opportunities in education.

NOW Legal Defense and Education Fund (NOW LDEF) is a leading national nonprofit civil rights organization that performs a broad range of legal and educational services in support of women's efforts to eliminate sex-based discrimination and secure equal rights. NOW LDEF was founded in 1970 by leaders of the National Organization for Women. A major goal of NOW LDEF is the elimination of barriers that deny women and girls equal opportunity, including sex discrimination in intercollegiate athletic programs. For years, NOW LDEF has fought for educational equity for girls and the full enforcement of Title IX. NOW LDEF has appeared as *amicus* in numerous cases concerning girls' rights to be free from sex discrimination in education programs under Title IX, and joins this case because of its importance to securing equal opportunity in education.

Women Employed is a national association of working women based in Chicago, with a membership of 2000. Since 1973, the organization has assisted thousands of working women with problems of sex discrimination and harassment, monitored the performance of equal opportunity enforcement agencies, and developed specific, detailed proposals for improving enforcement efforts. Women Employed strongly believes that one of the most fundamental guarantees that women and girls are entitled to under Title IX is equal opportunity, which includes the enjoyment of equal rights and treatment as male athletes. Women Employed believes that women are entitled to the same rights and opportunities as men, whether their interests lie in sports, arts, or business.

Women's Law Project (WLP) is a non-profit public interest legal center located in Philadelphia, PA. Founded in 1974, the WLP works to abolish discrimination and injustice and to advance the legal and economic status of women and their families through litigation, public policy development, public education and individual counseling. The WLP has a strong interest in the eradication of discrimination against women and girls in athletics and the availability of strong and effective remedies under Title IX of the Education Amendments of 1972. The WLP has worked throughout its twenty-four year history to eliminate sex discrimination in athletics and education, representing student athletes, coaches, and other players in the athletic arena in their efforts to achieve equal treatment and equal opportunity. The application of Title IX to the NCAA and to other athletic associations which operate and control the athletic programs of federally funded school programs is essential to the ultimate elimination of gender discriminatory practices in these programs.

The *Women's Sports Foundation* is a non-profit educational organization dedicated to expanding opportunities for girls and women to participate in sports and fitness and to creating an educated public that supports gender equity in sports. The

Foundation distributes over $1 million per year in grants and scholarships to female athletes and girls' sports programs, answers over 100,000 inquiries a year concerning Title IX and other women's sports related questions, and administers award programs to increase public awareness about the achievements of women in sports. The Foundation is interested in this case because of its important implications for gender equity in sports.