

No. 11-357

IN THE
Supreme Court of the United States

EQUITY IN ATHLETICS, INC.,

Petitioner,

v.

DEPARTMENT OF EDUCATION, ET AL.,

Respondents.

*On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit*

**BRIEF OF AMICUS CURIAE EAGLE FORUM
EDUCATION & LEGAL DEFENSE FUND
IN SUPPORT OF PETITIONER**

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QUESTION PRESENTED

Whether the gender quota known as the “Proportionality Test,” which is being required by the U.S. Department of Education of colleges nationwide, is lawful under Title IX.

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INTEREST OF *AMICUS CURIAE*¹

The Eagle Forum Education & Legal Defense Fund (“EFELDF”) is a nonprofit organization founded in 1981. For about three decades, it has participated in educational efforts on women’s issues, including Title IX. EFELDF has consistently advocated enhancing opportunities for men and women without

¹ This brief is filed with the written consent of all parties, with timely notice provided in compliance with Sup. Ct. Rule 37.2(a). Pursuant to its Rule 37.6, counsel for *amicus curiae* authored this brief in whole, and no counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus*, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

ignoring important differences between the sexes. EFELDF has filed *amicus curiae* briefs with this Court on prior matters concerning Title IX. *See, e.g., Jackson v. Birmingham Bd. of Educ.*, 2002 U.S. Briefs 1672 (Oct. 7, 2004).

Amicus has a direct and vital interest in the issues presented to this Court based on its participation in women's issues since 1981.

BACKGROUND

A gender quota has become the *de facto* requirement for intercollegiate sports under the Three-Part Test adopted by the Carter Administration and expanded by the Clinton Administration. This test requires matching the percentage of men and women on a college's sports team to the overall enrollment by sex at the same college.

Specifically, under this requirement of the Department of Education, a college must satisfy one of the following elements of the Three-Part Test:

1. have the same proportion of women in intercollegiate sports as there are women enrolled in the school (the "Proportionality Test"),
2. expand the opportunities for women in intercollegiate sports, or
3. satisfy the entire interest of women to participate in intercollegiate sports.

44 Fed. Reg. 71,418 (the 1979 Policy Interpretation, as reaffirmed in 1996 and 2003).

This test appears to offer non-quota options to colleges, but in fact parts (2) and (3) are impossible to satisfy when a college's expenditures on sports are

not increasing. Opportunities for women in sports cannot be expanded as budgets are cut, and it is not possible to satisfy the entire interest of women (or men) in sports in the presence of budgetary constraints, which always exist. Accordingly, in the vast majority of circumstances, the Proportionality Test of part (1) above becomes the only way to remain in compliance with the policy of the Department of Education.

Meanwhile, and contrary to the situation when the Carter Administration embarked on this quota approach in 1979, enrollment by women in colleges has far surpassed the enrollment by men. “Since 1991, the proportion of young women enrolled in college has exceeded the enrollment rate for young men, and the gap has widened over time.” Mark Mather and Dia Adams, “The Crossover in Female-Male Enrollment Rates,” *Population Reference Bureau* (Feb. 2007).² Yet there is no evidence that this trend is due to an interest by women in playing intercollegiate sports. Quite the contrary, the evidence is that this trend has to do with “gender differences in academic achievement (girls do better in high school than boys), changes in societal values, and a shift in women’s expectations for future employment.” *Id.*

James Madison University – a state-funded college in Virginia – announced in 2006 its decision to eliminate seven men’s sports teams in order to satisfy the gender quota of the Proportionality Test. Many schools have been coy about their reasons for cutting

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<http://www.prb.org/Articles/2007/CrossoverinFemaleMaleCollegeEnrollmentRates.aspx> (viewed 10/20/11).

men's sports teams, but JMU was candid. Their study body has become 61% female and only 39% male, a typical imbalance in enrollment that is prevalent at many colleges today but which has no relevance to relative interests in intercollegiate sports. The Carter-Clinton interpretation of Title IX demands that 61% of the players on JMU's intercollegiate sports teams be women in order to match their general enrollment figures. In 2006 a majority of the varsity intercollegiate athletes at JMU were already women (50.7%), but that was not good enough to satisfy the gender quota embodied in the Proportionality Test.

For the sole purpose of satisfying a senseless gender quota of 61% women, JMU drastically eliminated many men's teams. "JMU stated that '[a]lternatives were proposed, considered, and analyzed to deal with the need to come into compliance with Title IX,' but ultimately, *'the university was left with the need to comply with the proportionality prong [of the Three-Part Test].'*" *Equity in Ath., Inc. v. Dep't of Educ.*, 639 F.3d 91, 97 (4th Cir. 2011) (quoting J.A. 344, emphasis added).

The second and third prongs of the Three-Part Test were, as in the case of most colleges, of no use to JMU. *Id.* at 97-98. JMU had 28 sports teams and was not in a position to expand that large number, and thus the second option in the test was unavailable. Most colleges cannot continuously increase the number of sports teams in its athletic programs. JMU had added a women's sports team in the past, and did have more women competing on varsity intercollegiate sports than men, but concluded that neither of those compelling facts would satisfy the se-

cond or third parts of the Three-Part Test. The harsh numerical quota of the Proportionality Test became JMU's safe harbor, and it applied that test with a draconian effect.

As detailed by the Petition itself, JMU announced shortly after the school year began in 2006 that it would eliminate seven men's athletic teams: gymnastics, archery, cross-country, indoor and outdoor track and field, swimming, and wrestling, as well as a few women's teams. Pet at 3-4. This left many student-athletes stranded solely because of application of a government gender quota. *Id.*

The harsh application of this government gender quota to the intercollegiate sports programs at JMU is typical of injustices happening nationwide. As the imbalance of female/male college enrollment increases across the nation, the unjustified and severe consequences of this gender quota are rippling across most colleges. Men – and women – continue to be hurt by the distortions, disruptions and outright elimination of programs in order to fit the overall numbers of participants on intercollegiate sports into an irrational quota requirement.

SUMMARY OF ARGUMENT

Quotas hurt competitiveness and are contrary to the merit-based system that lies at the heart of the American Dream. It is difficult to find anyone who endorses quotas, and yet a government-mandated gender quota is being imposed with severe effects on college campuses. They are unlawful under Title IX, and yet are implemented supposedly in furtherance of that law.

Title IX requires that no one “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” *on account of sex*. 20 U.S.C. § 1681(b). Yet the Proportionality Test does encourage and even require discrimination based on sex. In fact, the Proportionality Test compels the elimination of entire college sports teams for one and only one reason: the sex of their participants. This is contrary to Title IX itself.

A grant of the Petition for *Certiorari* is necessary to correct this. Could government mandate that the percentage of men and women on a college’s sports teams be in the same percentages as the men and women who volunteer to work in the kitchen, or join the orchestra? It was error for the decision below to affirm conduct by JMU that was admittedly based on the Proportionality Test. *Equity in Ath.*, 639 F.3d at 103.

There is heightened national importance to this issue for at least two reasons. First, this gender quota – which affects nearly every college³ and tens of thousands of students at those colleges – hurts national competitiveness and undermines the merit-based system central to the American economic and academic systems. Second, it adds perhaps a billion dollars in health care costs as rigorous athletic competition is no longer based on merit, but on sex, causing unexpected physical injuries to many.

³ EFELDF is aware of only two private colleges in the United States that may be outside of application of the Proportionality Test: Grove City College in Pennsylvania and Hillsdale College in Michigan.

ARGUMENT

Gender quotas for college sports are inimical to the merit-based system that publicly funded universities traditionally fostered. The federal government cannot lawfully require gender quotas at colleges, or create a safe harbor for schools that impose them.

I. *CERTIORARI* SHOULD BE GRANTED TO CLARIFY THAT THIS FEDERAL QUOTA REQUIREMENT IS UNLAWFUL.

In the context of affirmative action, this Court has long held that quota systems are unconstitutional. For example, in *Ricci v. DeStefano*, this Court strongly criticized an approach “[t]hat would amount to a de facto quota system, in which a ‘focus on statistics ... could put undue pressure on employers to adopt inappropriate prophylactic measures.’” 129 S. Ct. 2658, 2675 (2009). *See also Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 757-758 (2007) (Thomas, J., concurring) (deploring “laws that favor or disfavor one race, segregate by race, or create quotas for or against a racial group”); *Freeman v. Pitts*, 503 U.S. 467, 494 (1992) (“Racial balance is not to be achieved for its own sake”).

While Title IX requires equal opportunity, the Department of Education has turned that purpose on its head in order to mandate equal participation as an end in itself. The Proportionality Test essentially requires what this Court has called “nonsensical”: to measure alleged discrimination by comparing participation levels from highly specialized pursuits to a nearly general population. *Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 651 (1989); *cf. Watson v.*

Fort Worth Bank and Trust, 487 U.S. 977, 997 (1988) (“statistics based on an applicant pool containing individuals lacking minimal qualifications for the job would be of little probative value”).

Despite these teachings by this Court, the Proportionality Test enshrines the overall enrollment at a school as the yardstick for athletic participation, contrary to the obvious truth that students entering college have divergent levels of interest in intercollegiate athletic competition. The Proportionality Test fails to use a qualified applicant pool (those who actually want to play intercollegiate sports), and instead uses the equivalent of a general population (all enrolled at a college). *See, e.g., Mayor of Philadelphia v. Educational Equity League*, 415 U.S. 605, 620 (1974); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 501 (1989); *Hammon v. Barry*, 826 F.2d 73, 75 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1036 (1988).

To almost no one’s genuine surprise, surveys show that high school senior boys are far more physically active than high school senior girls. For example, the Department’s National Center for Educational Statistics (“NCES”) has polled high school seniors who “actively participate in sports, athletics or exercising [e]very day or almost every day” over a 15-year period from 1980 to 1994. By roughly a 20% margin, males were more active than females in athletic activity.⁴ Likewise, males exercise vigorously (e.g., jogging, swimming, calisthenics, or other active sports) in much higher percentages than females do. For example, in 1992 and 1993 more than twice as many high school males exercised vigorously as females.

⁴ <http://nces.ed.gov/pubs98/yi/y9647a.asp> (viewed 10/20/11).

Men's interest in watching sports is also much higher than women's, even for most sports geared to women. "The audience for this year's championship game in women's college basketball was 57 percent male, according to Nielsen Media Research. Annika Sorenstam's appearance in the Colonial golf tournament last month may have been a giant leap for women, but 65 percent of the witnesses were men." John Tierney, "Why Don't Women Watch Women's Sports?," *Week in Review*, *N.Y. Times* (June 15, 2003).

Surely one would not expect the fans at a typical professional sporting event to be split evenly between men and women, and they are not. Accordingly, Title IX does not require equal numbers of participation in intercollegiate competitions by sex, nor can the Department of Education lawfully impose such a quota on schools like JMU in this case.

Ralph Waldo Emerson famously observed:

A foolish consistency is the hobgoblin of little minds, adored by little statesmen and philosophers and divines. With consistency a great soul has simply nothing to do. He may as well concern himself with his shadow on the wall.⁵

Today the same should be said about quotas, including the gender quotas required by the Department of Education for college sports. There is no reason to expect "consistency" in the interests of men and women in intercollegiate sports, and it is "foolish" for government to demand equal results through a quota system. The Petition for *Certiorari* should be

⁵ <http://www.emersoncentral.com/selfreliance.htm> (viewed 10/20/11).

granted to review and strike down the gender quota of the Proportionality Test.

II. THE BURDEN OF THIS FEDERALLY MANDATED GENDER QUOTA IS AN ISSUE OF HEIGHTENED NATIONAL IMPORTANCE.

The gender quota of the Proportionality Test affects nearly every college and is hampering our Olympic competitiveness in sports for both men and women. It undermines the merit-based approach that is fundamental to our economic and academic systems. The gender quota has also added burdensome health care costs, possibly to the tune of a billion dollars. Just as this Court has recognized the national importance of invalidating quotas in other contexts, *see, e.g., Gratz v. Bollinger*, 539 U.S. at 259 (2003) (invalidating a school's admission criteria described by the trial court as "the functional equivalent of a [racial] quota"), there is national importance in the issue presented here too.

National competitiveness in Olympic sports is a casualty of the gender quota. Already there has been a net loss from 1998-1999 to 2007-2008 of 151 men's teams, mostly in Olympic sports, from colleges in Division I – the most competitive division. Nancy Hogshead-Makar, "Hurricane Warning Flag for Olympic Sports: Compliance Practices in *Biediger v. Quinnipiac University* Signal a Risk to Women's and Men's Olympic Sports," 52 B.C.L. Rev. 465, 475 (March 2011). As lawsuits proliferate in enforcement of the Proportionality Test, and the imbalance in college enrollment grows, the squeeze on track and field and other Olympic sports is going to choke off the

supply of Olympic athletes. “It is only a matter of time before men’s Olympic sports will be next to suffer the same fate” of elimination due to the Proportionality Test. *Id.* at 491.

Wrestling and gymnastics, two longtime Olympic sports, have already been bit hard by the gender quota. “There were 363 NCAA wrestling teams in 1981 and 225 by the end of 2001. Men’s gymnastics was never widely sponsored at the university level, but only 24 NCAA programs remained by 2001. BYU dropped both sports at the end of the 2000 school year.” Michael Yount, “Football: The 800-Pound Gorilla in College Athletics,” *The Salt Lake Tribune*, A1 (June 15, 2003).

American competitiveness in wrestling due to the gender quota has markedly declined: in 2008, the United States won only three Olympic medals in all the different styles and weight classes for wrestling. Gary Mihoces, “Ex-wrestling Olympic medalists hope to guide 2012 path to gold,” *USA Today* (Apr. 23, 2010) (noting how “disappointed” USA Wrestling was by its performance at the 2008 Olympics).⁶ Before the Proportionality Test, the United States won twice as many medals in free-style wrestling in 1976, and that was when the Soviet Union and eastern European nations were producing heavily subsidized athletes to compete against American amateur athletes.

Student-athletes at Howard University experienced the effects of the gender quota the hard way. As its male enrollment dropped to less than 40% of its student body, elimination of men’s teams became

⁶ http://www.usatoday.com/sports/olympics/2010-04-23-us-wrestling-preview_N.htm (viewed 10/20/11).

necessary to comply with the Proportionality Test. In 2002, Howard University simultaneously dropped both its varsity wrestling and baseball teams. Its wrestling coach, Wade Hughes, observed that “Howard University would like to look at this as a non-Title IX issue, but from my perspective, it is a Title IX issue in gender equality.” Mark Asher, “Howard Drops Baseball, Wrestling,” *Washington Post* D1 (May 23, 2002). Many other colleges have been likewise cutting men’s teams:

Enrollment at [the University of Honolulu]-Manoa is 42 percent male and 58 percent female; thus, UH-Manoa has no men’s soccer team or water polo team, but UH provides soccer and water polo teams for women; thus, many local boys who would have relied on those positions to attend college join thousands of minority men nationwide who are not able to go to college because of Title IX.

Gerald Nakata, “Title IX is a Disservice to Males,” *The Honolulu Advertiser* 7A (Mar. 8, 2005). *See also New York Times Upfront* (Apr. 18, 2003) (“Has Title IX’s quest for equality gone too far? Title IX was designed to ensure equal opportunities for girls in school sports, but some say it has unintentionally hurt boys’ teams.”).

Olympic women’s teams have also been hurt by the gender quota, which causes colleges to shift women’s sports from small squad teams (like the Olympic sport of gymnastics) to large-squad teams like rowing. The University of Massachusetts women’s rowing coach, Jim Dietz, bluntly admitted, “The reason we’re here – everybody knows it – is for gender equi-

ty.” Jessica Gavora, *Tilting the Playing Field* 66 (2002).

As a result, in the 2000 Olympics the United States failed to win a single medal in an individual woman’s gymnastics event, and in 2004 the only American gymnastics medals were won by private club, non-Title IX athletes. Phyllis Schlafly, “How Title IX is holding us back in Athens,” *Copley News Service* (Aug.18, 2004). Most women now seeking to compete in the Olympics in non-team sports are compelled to develop their skills in expensive private clubs rather than Title IX intercollegiate programs.

The gender quota even imposes substantial economic burdens. Women athletes suffer higher injury rates, often causing life-long hardships. “Female athletes, particularly basketball players, are far more likely than their male counterparts to suffer ACL injuries.” Stephen Hargis, “Girls have more torn ACLs,” *Chattanooga Times Free Press* (Tennessee) D1 (Feb. 4, 2005). According to the American Academy of Orthopaedic Surgeons, the risk of women tearing their ACL is 1 in 100, which is five times the rate for men. Nikki Usher, “Knee injury takes toll on girls playing soccer five times more likely than males to suffer a torn ACL,” *Philadelphia Inquirer* A01 (Nov. 29, 2004). “Compared with guys, female athletes run an eight-times-greater risk of tearing the ACL, a fibrous band that connects the shinbone (tibia) to the thighbone (femur). Basketball, soccer and other sports that require cutting moves or jump shots can put athletes at risk.” Kathleen Fackelmann, “Girls face higher knee injury risk,” *USA Today* 15B (Aug. 24, 2004).

There is immense national importance in ending the federally mandated gender quota for intercollegiate sports.

CONCLUSION

This Court should grant the Petition for Writ of *Certiorari*.

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