No. 03-5169

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL WRESTLING COACHES ASSOCIATION, *et al.*,
Plaintiffs-Appellants,

v.

DEPARTMENT OF EDUCATION,
Defendant-Appellee.

On Appeal from the United States District Court
for the District of Columbia

BRIEF OF *AMICI CURIAE* EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND AND INDEPENDENT WOMEN'S FORUM IN SUPPORT OF REVERSAL

Andrew L. Schlafly
521 Fifth Ave. – 17th Floor
New York, NY 10175
Telephone: (212) 292-4510
Facsimile: (212) 214-0354

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and *Amici*

Amici curiae Eagle Forum Education and Legal Defense Fund ("EFELDF") and Independent Women's Forum ("IWF") adopt the statement of parties and *amici* in Appellants' Brief. In addition, *Amici* EFELDF and IWF furnish the following statement pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure: EFELDF and IWF are nonprofit corporations without parent companies, subsidiaries, or affiliates with outstanding securities in the hands of the public.

B. Rulings Under Review

Amici EFELDF and IWF adopt the statement of rulings under review in Appellants' Brief.

C. Related Cases

Amici EFELDF and IWF adopt the statement of related cases in Appellants' Brief.

STATEMENT OF STATUTES AND REGULATIONS

All applicable statutes and regulations are contained in Appellants' Brief.

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GLOSSARY

EFELDF	Eagle Forum Education and Legal Defense Fund
GAO	General Accounting Office
IWF	Independent Women's Forum
JAMA	*Journal of the American Medical Association*
NWLC	National Women's Law Center
NCES	National Center for Education Statistics

IDENTITY AND INTEREST OF THE *AMICI CURIAE* AND THE SOURCE OF THEIR AUTHORITY TO FILE

The Eagle Forum Education and Legal Defense Fund ("EFELDF") is an Illinois nonprofit organization founded in 1981. Its general mission includes study and research of problems pertaining to the status of women and their civil, legal, economic and social rights. EFELDF has for years provided education and training to advance the status of women while respecting the important differences between the genders. It has education programs for students of all ages. EFELDF regularly files *amicus curiae* briefs in numerous cases before the United States Supreme Court and federal Courts of Appeals. EFELDF has a particular interest in the interpretation of Title IX by the Department of Education. Title IX prohibits the exclusion of participation in intercollegiate sports based on numerical balancing between the genders. The Department has violated the statute and encouraged discrimination, against EFELDF's interests.

The Independent Women's Forum ("IWF") is a nonprofit organization dedicated to affirming women's participation in and contributions to a free, self-governing society. The IWF advocates for individual liberty and responsibility, for self-governance, the superiority of the market economy, and the imperative of equal opportunity for all. The IWF's Board of Directors, National Advisory Board, and staff include students, educators, and administrators, in addition to women and men from outside academia. The IWF provides a woman's voice on important policies and issues of the day, with the goal of reinstating women as a positive force for freedom, opportunity and self-government.

In compliance with Circuit Rule 29(b), EFELDF and IWF obtained the consent of all parties to this brief and filed a timely notice to that effect on August 29, 2003.

SUMMARY OF ARGUMENT

The Department of Education lacked power or justification in promulgating the "proportionality test," which encourages colleges to reduce the proportion of men on their sports teams to the overall proportion of men enrolled as students. 44 Fed. Reg. 71,418 (the first prong of the 1979 Policy

Interpretation directs that "intercollegiate level participation opportunities for male and female athletes [be] provided in numbers substantially proportionate to their respective enrollments"). Congress never granted the Department the authority to set numerical targets for intercollegiate sports programs. The Department has authorized and encouraged colleges to meet an arbitrary numerical target, and to create and eliminate teams towards that end. This is as senseless as encouraging schools to equate overall testosterone levels of students, and to expel male students until balance is achieved. Wrestling teams, which feature many athletes at little expense, are vanishing under this pressure. But the harm applies to all men's sports: for example, Howard University recently eliminated both its wrestling and baseball teams. Mark Asher, "Howard Drops Baseball, Wrestling," *Washington Post*, D1 (May 23, 2002). Appellants are organizations with members injured by agency-promoted discrimination, and have standing to object.

Title IX of the Education Amendments Act of 1972, 20 U.S.C. §§ 1681-1688, prohibits this misguided social engineering. It mandates 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(a). It violates Title IX, and is discriminatory, to exclude athletes from sports in order to depress the male-female ratio. "Nothing contained in . . . this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federal program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area." 20 U.S.C. § 1681(b). Numerical comparisons are only allowed as evidence in proceedings or hearings, not as official targets. *Id.* In Title IX, Congress precluded a gender-norming system that unthinkingly matches percentage participation in sports (or any other educational activity) with the larger population. The Department of Education is in violation of this statute, and its policy is arbitrary and capricious.

Two examples of the arbitrariness of the disputed policy – and its manifest injustice – concern the pernicious practices of eliminating and "capping" teams. These practices do not benefit women, but do injure many men. The bean-counting encourages colleges to expel athletes from squads for the sole purpose of finagling the numbers, and even to eliminate teams entirely. Such termination or "capping" of teams, in order to limit the overall number of male athletes, deprives many of them the benefits and enjoyment of participating. This has no redeeming benefit. Women do not benefit from these policies, and are even harmed by the distortions wrought by this numerical approach.

Only the public – not government planners – can establish *bona fide* demand for an activity such as competitive sports. "Supply and demand" can only be properly determine by private decisions rather than government mandate. Yet the Department of Education has replaced legitimate demand with a mathematical formula contrary to the spirit and letter of the enabling statute. The casualties are men and women alike. Popular men's teams are eliminated in favor of sparsely attended women's teams, many of which flounder or disband due to lack of participation. Women's crew teams, with the potential for large squad sizes, are being promoted by colleges at the expense of smaller but more popular women's sports. It does not help women to offer a sport which does not even exist at the vast majority of high schools. Men's wrestling teams, in contrast, are often eliminated because of their large squad sizes, notwithstanding that they have relatively small costs. Indeed, even *self-funded* teams cannot play in this numbers game.

At issue here is government control at its worst, wholly unsupported by statutory authority. A school perhaps would consider replacing its small, but popular, women's gymnastics team with a larger crew team, made up of women with no crew experience or interest. If it did so, the gymnasts, active in their sport since early childhood, could try to reason with their school. Absent the challenged Title IX policies, the school could meet their needs and assert its First Amendment right to education autonomy. *See Grutter v. Bollinger*, 123 S. Ct. 2325, 2339 (2003). But the Department of Education has severely limited that dialog with women student athletes, and has virtually precluded any meaningful dialog with male student athletes. Given that it acted outside the Administrative Procedure Act rulemaking

requirements and brushed aside questions of its legal authority, it is no wonder that the Department acted *ultra vires.* The only wonder is that its unjustified policy has survived this long.

ARGUMENT

I. THE PROPORTIONALITY TEST AUTHORIZES AND ENCOURAGES DISCRIMINATION IN VIOLATION OF TITLE IX, TO THE DETRIMENT OF APPELLANTS, WHO THEREBY HAVE STANDING

Official authorization and encouragement of discrimination is fully reviewable, and groups representing injured parties have standing to challenge it. *See Telephone & Data Systems, Inc. v. FCC,* 19 F.3d 42, 47 (D.C. Cir. 1994) ("injurious private conduct is fairly traceable to the administrative action . . . if that action authorized the conduct or established its legality"). Such standing exists for racial and gender issues alike. *See Lutheran Church-Missouri Synod v. FCC*, 141 F.3d 344, 350 (D.C. Cir. 1998) ("A person suffers [an] injury in fact if the government requires ***or encourages as a condition of granting him a benefit*** that he discriminate against others based on their race or sex.") (emphasis added). The Department of Education cannot authorize and encourage institutions to discriminate, as the proportionality test does, and then evade legal challenge to its actions. Title IX prohibits reducing or eliminating opportunities based "on account of an imbalance which may exist with respect to the total number or percentage of persons" participating. 20 U.S.C. § 1681(b). As shown below, numerous colleges feel compelled to eliminate longstanding men's sports teams in light of the proportionality rule, and government is fully accountable for what its interpretation causes. *See Block v. Meese,* 793 F.2d 1303, 1309 (D.C. Cir.), *cert. denied*, 478 U.S. 1021 (1986) (legal tort-law causation argument is "irrelevant to the question of core, constitutional injury-in-fact, which requires no more than *de facto* causality").

The United States General Accounting Office (GAO) studied the conduct of college athletic departments between 1992-93 and 1999-2000. GAO found that colleges discontinued 171 intercollegiate

men's sports teams during that period.[1] (JA 372) College athletic directors candidly admitted to the GAO that "Gender Equity Goals/Requirements" were one of the most significant factors causing the elimination of men's teams. (JA 378) Title IX, quoted above, expressly prohibits this and its plain meaning should be enforced. *See United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240-41 (1989) ("[A]s long as the statutory scheme is coherent and consistent, there generally is no need for a court to inquire beyond the plain language of the statute"); *United States v. Fordice*, 505 U.S. 717, 732 n.7 (1992) (declining to look to affirmative-action regulations because the "reach of Title VI's protection extends no further than the Fourteenth Amendment"). In sharp contrast, the main reason for eliminating women's teams during that period was lack of interest. (JA 378.)

The Supreme Court has clearly established standing by groups, like Appellants, that represent members harmed by the Department's interpretation. *See Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Brock*, 477 U.S. 274, 281 (1986) ("It has long been settled that even in the absence of injury to itself, an association may have standing solely as the representative of its members") (quotations omitted). *See also United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 688-89 (1973) (finding that the environmental group had standing to challenge an agency decision that adversely affected the group's members); *National Lime Ass'n v. EPA*, 233 F.3d 625, 636-37 (D.C. Cir. 2000) (holding that a trade association had standing to challenge a rule, even if some of its members support the rule).

The court below recognized that "injury-in-fact to 'any one' of the plaintiffs' members is sufficient to meet the requirements of the associational standing test." *National Wrestling Coaches Ass'n v. United States Dep't of Ed.*, 263 F. Supp.2d 82, 107 (D.D.C. 2003). Moreover, the court found "beyond dispute that plaintiffs have sufficiently alleged that at least some of their members, at a minimum student-athletes and coaches, are currently sustaining injuries that are concrete, particularized, direct, and

[1] Because it did not even address capping, the GAO report understates the amount of men's athletic opportunities lost because of proportionality.

immediate, and not conjectural or hypothetical." *Id.* The court erred, however, in immunizing an official policy from review that encourages colleges to injure rather than directly inflicts the harm itself. Rules likely to result in injury are fully challengeable. *See Pennell v. San Jose,* 485 U.S. 1, 8 (1988) (granting standing to landlords for their facial challenge to a rule that was likely to reduce their collected rent); *Dynalantic Corp. v. Department of Defense,* 115 F.3d 1012 (D.C. Cir. 1997).[2]

The GAO survey demonstrates that colleges eliminated many teams to satisfy "requirements" of gender equity. (JA 378) Such injury alone suffices for standing. "The injury need not be substantial. A trifle is enough for standing." *Joseph v. United States Civil Serv. Comm'n,* 554 F.2d 1140, 1145 (D.C. Cir. 1977). Had the Department of Education authorized colleges to discriminate by race in an analogous manner, there would be no doubt that standing would exist. Congress did not remove jurisdiction from the federal courts over this issue, and courts should not abdicate it on their own. An official encouragement or authorization to engage in numerical balancing is reviewable, particularly when the statute itself so clearly prohibits the policy at issue. 20 U.S.C. § 1681. Plaintiffs cannot be denied their day in court because a district court feigns to perceive complexities in the chain of causation.

The court below also erred in finding a lack of redressability. "Here, there is no direct action DoE could take in new Rulemaking which would force education institutions to redress plaintiffs' alleged injuries." 263 F.Supp.2d at 115. That is plainly false. The court could prohibit adherence to the Department's encouragement of numerical balancing by enforcing Title IX itself, and colleges would surely drop their reliance on the proportionality test. It is simply absurd to argue that schools voluntarily would forgo federal funding to follow proportionality when they instead could receive federal funds and

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[2] In *Dynalantic,* this Court reversed an earlier opinion by the same district court judge on the same type of agency-caused, unequal-footing injury that Appellants seek to redress. *See* 115 F.3d at 1016. In *Dynalantic,* the government program favored contractors on both race-conscious and non-race-conscious (economic) grounds, which prompted Judge Edwards to argue in dissent that striking the race-conscious element would not redress the injury because the plaintiff-appellant was ineligible under the non-race-conscious economic provision, which the parties agreed was constitutional. 115 F.3d 1018-20. Unlike *Dynalantic,* however, the Department's regulations operate exclusively on the basis of gender.

allocate athletic opportunities under the more-flexible regulatory standard of equal opportunity, based on interest. *See* 34 C.F.R. § 106.41(c)(1). Legitimate student interest in competitive sports would then be met rather than frustrated.

The court below held, in effect, that if colleges might discriminate in the absence of the Department's interpretation, then plaintiffs lack a redressable claim. If so, then many forms of official encouragement to discriminate would be immune from legal challenge. But this is not the law, as such encouragement reduces opportunity, and lost opportunity is redressable. *See Competitive Enter. Inst. v. NHTSA*, 901 F.2d 107, 113 (D.C. Cir. 1990) ("We determined that a lost opportunity to purchase vehicles of choice is sufficiently personal and concrete to satisfy Article III requirements"); *Center for Auto Safety (CAS) v. NHTSA*, 793 F.2d 1322, 1332-33 (D.C. Cir. 1986) (holding that a decrease in opportunity to purchase certain types of vehicles constituted injury in fact and established standing). This is particularly true where government action robs groups like Appellants of the opportunity even to compete by placing them on an unequal footing versus a government-favored class. *Gratz v. Bollinger*, 123 S. Ct. 2411, 2423 (2003); *Dynalantic Corp.*, 115 F.3d at 1016.

The proportionality test authorizes and encourages numerical balancing by colleges, and plaintiffs have standing to challenge that authorization and encouragement.

II. THE PROPORTIONALITY TEST IS ARBITRARY AND CAPRICIOUS IN ENCOURAGING THE ELIMINATION AND "CAPPING" OF TEAMS, WITHOUT BENEFIT TO WOMEN

The proportionality test is arbitrary, capricious, and manifestly unjust. This is illustrated by its invitation to eliminate and "cap" teams. "Capping" is an artificially low limit on squad size, or the number of athletes on a team, in order to minimize an overall numerical total by gender. Athletes who would ordinarily be allowed on the team as substitutes or extras are cut, thereby depriving them of the benefits and camaraderie of being there. Capping does not save money and lacks any redeeming benefit for women. Yet it is promoted by the proportionality test and authorized by the 1996 Cantu letter quoted below.

A. The Proportionality Test Violates Title IX by Authorizing Elimination and Capping of Teams

The 1996 Clarification to the proportionality rule included the following statement in its letter of transmittal: "The rules here are straightforward. ***An institution can choose to eliminate or cap teams as a way of complying with part one of the three-part test.*** However, nothing in the Clarification requires that an institution cap or eliminate participation opportunities for men." Letter from Norma V. Cantu, Assistant Sec'y, Office for Civil Rights, Dep't of Educ. (Jan. 16, 1996) at 4 (JA 146) (emphasis added).[3] While this does not require capping the number of participants on teams, it does authorize it. Colleges are not forced to cap teams and cut athletes to meet numerical targets, but are officially encouraged to do so. The encouragement is what is arbitrary and in violation of Title IX.

Howard University has a predominantly female enrollment; men comprise less than 40% of its student body. The proportionality test encourages it to eliminate men's teams until fewer than 40% of its intercollegiate athletes are male. Last year, it moved in that direction, simultaneously eliminating both its varsity wrestling and baseball teams, leaving in the lurch its numerous athletes in those sports. 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). Athletic Director Sondra Norrell-Thomas said it was due to a lack of facilities, but the wrestling coach pointed out that all the sport needs is a simple wrestling room, which they obviously had. *Id.* The athletic director could not deny it. *Id.* The *Washington Post* applauded the move for bringing the school closer to "about 50-50 in gender rates." *Id.*

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[3] Although the district court assumed otherwise (JA 484), none of the pre-1996 circuit courts even discussed (much less authorized) capping. Indeed, as far as we are unaware, only one post-1996 case addresses the issue. *See Neal v. Board of Trustees of The California State Universities,* 198 F.3d 763 (9th Cir. 1999). Given the serious equal protection issues presented by capping, the pre-1996 cases cannot be read to authorize capping to meet the proportionality test that those decisions upheld. *See Texas v. Cobb,* 121 S. Ct. 1335, 1341 (2001) ("Constitutional rights are not defined by inferences from opinions which did not address the question at issue").

Women are not helped one iota when male athletes are cut from their teams by virtue of capping or eliminating teams. The Department's encouragement to do so is senseless. There is no rational defense of it, and neither the court below nor *Amici* National Women's Law Center ("NWLC") *et al.* offered any. Instead, the court below found that there is not a "unanimous decision on the part of educational institutions to comply with the challenged Title IX enforcement scheme by cutting or capping men's teams." 263 F.Supp.2d at 116. But unanimity is not required to be actionable. The GAO survey, discussed in Part I *supra*, proves that athletic directors are eliminating teams based primarily on "Gender Equity Goals/Requirements."

The practice of capping teams is particularly harmful to "walk-ons" – athletes neither recruited nor funded by scholarship. These are students who, simply out of their own enthusiasm, want to try out for a competitive team. They "walk on" the practice field and attempt to make the team, as acclaimed in the popular movie "Rudy." RUDY (Tristar 1993). Because they play for love of the sport and nothing else, consuming no scholarship or recruitment dollars, there is no justification for including them in a numerical balancing. Yet the proportionality test does arbitrarily include them, thereby giving colleges reason to impede the walk-ons. "[T]here to four times more men than women arrive unsolicited for the first week of practices," and the proportionality test requires cutting many walk-ons previously allowed. Bill Pennington, "Want to Try Out for College Sports? Forget It," *N.Y. Times* (Sept. 22, 2002). Marilyn McNeil, athletic director of Monmouth University, is unapologetic: "I hated the movie 'Rudy'. If you're not going to get your uniform dirty during games, you shouldn't be on the team." *Id.* The reality, however, is that "most administrators say it is generally harder to keep female walk-ons on a team once they realize they will play little or not at all in the games." *Id.* Debbie Yow, the athletic director for the University of Maryland, admitted that "[t]he men's [lacrosse] coach has been turning players away while the women's coach has been literally begging women to fill out the roster." John Tierney, "Why Don't Women Watch Women's Sports?", Week in Review, *N.Y. Times* (June 15, 2003). "[I]n order to keep the number of male and female players balanced to comply with Title IX, the men's lacrosse team has had to reduce its roster." *Id.*

B. The Proportionality Test Does Not Confer Any Benefit on Women

Implicit in the decision below, and the *Amici* NWLC brief on which the court so heavily relied, is that there is somehow an enormous social benefit that "women and girls reap from participating in athletics," insisting that athletics "promote responsible social behavior, greater academic success, and increased personal skills." (JA 347) *Amici* NWLC then cited numerous studies supposedly supporting its claims. (JA 347-49) They insisted that minority women uniquely benefit from participation in sports. (JA 348-49) But these arguments all apply equally to men and boys. While Title IX requires equal opportunity, the Department of Education mandates equal participation as an end it itself, contrary to our Constitution. *See Freeman v. Pitts*, 503 U.S. 467, 494 (1992) ("Racial balance is not to be achieved for its own sake").

By casting varsity sports as a prize benefit, *Amici* NWLC argue for their share. To promote equal results, the *Amici* NWLC cited studies in the court below extolling the virtues of exercise and participation in sports. But those studies simply confirm that students benefit from exercise. Intercollegiate competition, in contrast, brings to exercise enjoyment but also risk of injury, pressure to take harmful steroids and distractions from schoolwork. The harm is so palpable that the NCAA affirmatively prohibits students from competing if their schoolwork falls below certain levels, and it is considering testing for drug use.

No one should be surprised, and it is no evidence of discrimination, when many talented students say "no thanks" to intercollegiate competition. In 1992, the Title IX litigation against Brown University revealed that there were 93 unfilled positions for women on varsity teams. (JA 270) It is typical for colleges to have difficulty finding women to meet its numerical athletic targets. The California State University/Cal-NOW Consent Decree Final Report on Title IX compliance found that "not enough qualified student-athletes accepted the offer" to participate in a summer school offered to female athletes designed to increase its overall numerical participation. (JA 269) The *Journal of the American Medical Association* published data showing a higher rate for traumatic brain injuries to girls than boys in comparable sports. John Powell and Kim Barber-Foss, "Traumatic Brain Injury in High School

Athletes," 282 *JAMA* 958-63 (1999).[4] In girls softball, the rate of brain injury was double that for boys baseball. *Id.* Knee injuries to girls and women, especially the torn anterior cruciate ligament (ACL) occur at a much higher rate for women in competitive sports than for men, and they are also more difficult to repair. Steroid use, spurred by competitive forces, may be particularly injurious to women. Many college women rationally choose not to compete, and their decisions should be properly factored into the analysis.

III. THE PROPORTIONALITY TEST IS GOVERNMENTAL SOCIAL PLANNING, HARMING STUDENTS BY FRUSTRATING THEIR DEMAND FOR PARTICIPATION IN SPORTS

The optimal level of activity for sports, like similar activities, is when supply is allocated to meet unbiased demand. It is folly and harmful for government to attempt to constrain demand to what it wants rather than what the participants want. Such government planning is as futile and unlawful as it is inefficient. Congress did not authorize – much less mandate – a mathematical formula or bureaucratic directive to guide college sports.

An appropriate discrimination analysis requires comparison with the qualified applicant pool, not the general population. *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). Indeed, the Supreme Court has called it "nonsensical" to measure alleged discrimination by comparing participation levels from highly specialized pursuits with the 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"). Nonetheless, the Department of Education enshrines the general population as the yardstick for athletic opportunity, disregarding any of the massive evidence that students entering college

[4] *See* http://jama.ama-assn.org/cgi/content/abstract/282/10/958

may have formed divergent levels of interest in intercollegiate athletic competition. (*See, e.g.*, JA 262-70, 364)

There is a legitimate demand for college wrestling teams, and has been for a long time. (JA 365, high school wrestling participation from 1970 to 2000). No one disputes this. Yet the proportionality test is plainly causing elimination of those wrestling teams to reduce the numbers of male competitors. In 1981-82, 52.7% of NCAA Division I colleges had a wrestling team. By 2000-01, only 27.1% of colleges did. (JA 363) Despite a substantial increase in the number of colleges in the NCAA Division I during that period, the number of athletes competing in wrestling declined from 3,659 to 2,662. (*Id.*) Similar declines occurred in NCAA Divisions II and III. Overall, the number of colleges in the NCAA increased from 787 to 1,049 from 1981-21 to 2000-01, yet the number of wrestlers declined from 7,914 to 5,966. (*Id.*) This decline is due not to high costs of wrestling (it is inexpensive) nor to any decline in demand. Rather, the enthusiasm for college wrestling is being frustrated by this government intervention.

If the proportionality test remains intact, this bleak situation will only worsen. There is still a higher percentage of women enrolled in college than that which competes in college sports. Women make up the majority of college students, many of them beyond an athletic competitive age, while men are still hold a majority on varsity sports. 263 F.Supp.2d at 94; JA 463-65. The test will only wreak further havoc.

A. Overall Proportional Enrollment by Gender is Arbitrary and Capricious, and Harms Women and Men Alike

The bean-counting approach favors sports with large squad sizes for women, and small squad sizes or complete elimination for men. This is the only way to counter the larger demand by men to compete in sports. The resulting distortion is hurtful to both women and men.

The March 2001 General Accounting Office (GAO) report bears this out. In the 1980s and 1990s, women's sports with large squad sizes have ballooned. (JA 371) Rowing (crew) is an example. It features the largest average squad size for women, an enormous 46.3 members per team. (JA 368-71) The number of these teams increased by 184% during this time period, despite little to no interest at the

high school level. (JA 271) The University of Massachusetts women's rowing coach, Jim Dietz, bluntly admitted, "The reason we're here – everybody knows it – is for gender equity." (*Id.*) Women's water polo, another large-squad-size sport, increased for women by 3,600%. (JA 371) Women's equestrian, boasting an average squad size of 26.2, exploded with a 486% increase as athletic directors seek numerical balancing. (JA 368-71) These increases result not from a boom in high-school demand for these opportunities, but from college's attempt to boost their participation numbers.

Meanwhile, an historically popular sport for women suffered the consequences of planning-by-the-numbers. Gymnastics fell by 53% during this time period. (*Id.*) During a time when Title IX required massive expenditures on women's sports to increase opportunities, women's gymnastics was cut from 190 teams to only 90. This reflects the small squad size of a gymnastics team, making it unattractive in the numbers game. The small squads of fencing and archery, other women favorites, also fell sharply. (*Id.*)

In sports for which women share the practice facility with men, the elimination of the men's team has an adverse secondary effect on the women's team. Fencing is such a sport. The elimination of 42 men's fencing teams between 1981-82 and 1998-99 caused a similar elimination of nearly as many teams (31) for women. (*Id.*) Archery, too: the number of men's teams declined during the period to a total of only six in 1998-99, and the number of women's archery teams declined to the same small number. (*Id.*)

On the men's side, the proportionality test has caused declines in most of the large squad sports. Wrestling teams have declined by 40%, reflecting a drop of the sport by an astounding 171 schools; 37 schools dropped football; 27 dropped outdoor track; 25 dropped swimming; and 10 ended ice hockey. (*Id.*)

The one unqualified success is the increase in women's soccer, which grew by 1,058% in college (JA 371), which parallels its 912% growth in high school over the comparable period.[5] As such, soccer

[5] According to the National Federation of State High School Associations data included with the NCAA survey in *Amici* NWLC's brief below, the number of girls' interscholastic soccer teams increased

(Footnote cont'd on next page)

serves as the best proof that intercollegiate teams increase in proportion to demand coming from colleges' pool of interscholastic demand. Without Title IX, opportunities still increase with interest.

In the court below, *Amici* NLWC insisted that "[s]chools have numerous ways to increase opportunities for women without cutting men's opportunities, and many schools have done just that." (JA 354). But the problem is that there are also many schools that have accepted the Department of Education's invitation to reduce and eliminate men's teams. This numerical approach is, after all, the safest way to avoid enforcement actions and private litigation. It is this invitation to eliminate men's teams for proportionality reasons that is contrary to Title IX and must be invalidated.

B. There Is Nothing "Stereotypical" in Allowing Student Demand Rather than Government Mandates to Determine which Sports to Offer

Neither experience nor logic supports the view that male and female demand for competitive sports must be identical. Women do not have as great an interest in spectator team sports as men do, and the converse is true for many extracurricular activities. (JA 262-63) It is scientific, not "stereotypical", to survey students and observe their differences in interests and needs by gender. To 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") polled high school seniors who "actively participate in sports, athletics or exercising [e]very day or almost every day" over a fifteen year period from 1980 to 1994. By a wide twenty percent margin, males were more active than females in athletic activity. (JA 263) Similarly, males exercise vigorously (e.g., jogging, swimming, calisthenics, or other active sports) in much higher percentages than females do. (*Id.*) In 1992 and 1993,

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from 599 to 5,463 from 1977 to 1994, the high school years corresponding to the GAO's 1981-1998 survey of intercollegiate sports. *See* NCAA, 1982-2001 NCAA Sports Sponsorship and Participation Report, 187 (2002) (http://www.ncaa.org/library/research/participation_rates/1982-2001/175-192.pdf).

over twice as many high school males exercised vigorously as females. (*Id.*) This is a genuine difference in athletic interest, encompassing exercise beyond available competition.

This obvious disparity is reinforced simply by attending a sports stadium or visiting a weight room, or observing the advertisements on televised sporting events. *See* John Tierney, "Why Don't Women Watch Women's Sports?," Week in Review, *N.Y. Times* (June 15, 2003) ("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.").

The court below pretended that obvious differences by gender in enthusiasm for competitive sports do not exist. Men and women are no more likely to have identical interests in competitive sports in college than they were in high school, where their interests diverged by a wide margin. (JA 263) Surely one would not expect the fans at a typical professional sporting event to be split evenly between men and women. Yet the lower court opinion deplored that "although women represent 53% of undergraduates at Division I schools, they are afforded only 41% of available athletic participation opportunities." 263 F.Supp.2d at 94. Putting aside the biased term "participation opportunities" – which fails to incorporate the difficulties colleges have in filling women's varsity positions – there is nothing alarming about these figures, which show less divergence than the enthusiasm for exercise in the NCES survey. Title IX does not require equal intercollegiate competition, nor can the Department of Education encourage such a goal.

CONCLUSION

The decision below should be reversed and full relief should be granted to Appellants.

November 10, 2003

Respectfully submitted,

Andrew L. Schlafly

521 Fifth Ave. – 17th Floor
New York, NY 10175
Telephone: (212) 292-4510
Facsimile: (212) 214-0354

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in proportionally spaced typeface using Microsoft Word 2002 in 11-point Times New Roman.

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Andrew L. Schlafly
November 10, 2003

CERTIFICATE OF SERVICE

I certify that I served two copies of the foregoing *Amici Curiae* Brief of the Eagle Forum Education and Legal Defense Fund and the Independent Women's Forum on the below-listed parties on the 10th day of November 2003 by overnight mail to each party at his or her regular mailing address:

Mark B. Stern
Thomas M. Bondy
Appellate Staff
Civil Division
Department of Justice
601 D Street, N.W.
Washington, DC 20530

Marcia D. Greenberger
Jocelyn F. Samuels
Dina R. Lassow
Neena K. Chaudhry
National Women's Law Center
11 Dupont Circle NW, Suite 800
Washington, DC 20036

Lawrence J. Joseph
LAWRENCE J. JOSEPH, LLC
7918 Jones Branch Drive, Suite 600
McLean, VA 22102

_____
Agnes Miller