

**U.S. COURT OF APPEALS  
FOR THE FOURTH CIRCUIT**

\_\_\_\_\_  
No. 07-1914  
\_\_\_\_\_

**EQUITY IN ATHLETICS, INC.,**  
*Plaintiff-Appellant,*

v.

**DEPARTMENT OF EDUCATION, et al.,**  
*Defendants-Appellees.*

On Appeal from the  
U.S. District Court for the Western District of Virginia  
Civil Action No. 07-0028-GEC

**APPELLANT'S OPENING BRIEF**

Lawrence J. Joseph  
1250 Connecticut Ave, NW,  
Suite 200  
Washington, DC 20036  
Tel: (202) 669-5135  
Fax: (202) 318-2254

Douglas G. Schneebeck  
Modrall Sperling  
500 Fourth Street, NW Suite 700  
Albuquerque, NM 87102  
Tel: (505) 848-1869  
Fax: (505) 848-1882

**DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER  
ENTITIES WITH A DIRECT FINANCIAL INTEREST IN LITIGATION**

Only one form need be completed for a party even if the party is represented by more than one attorney. Disclosures must be filed on behalf of individual parties as well as corporate parties. Disclosures are required from amicus curiae only if amicus is a corporation. Counsel has a continuing duty to update this information. Please file an original and three copies of this form.

No. 07-1914 Caption: Equity in Athletics, Inc. v. Department of Education et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Equity in Athletics, Inc. who is Appellant,  
(name of party/amicus) (appellant/appellee/amicus)

makes the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity?  
 YES  NO
2. Does party/amicus have any parent corporations?  
 YES  NO  
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:
3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity?  
 YES  NO  
If yes, identify all such owners:
4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))?  
 YES  NO  
If yes, identify entity and nature of interest:
5. Is party a trade association?  
 YES  NO  
If yes, identify all members of the association, their parent corporations, and any publicly held companies that own 10% or more of a member's stock:
6. If case arises out of a bankruptcy proceeding, identify any trustee and the members of any creditors' committee:

\_\_\_\_\_  
(signature)

November 13, 2007  
\_\_\_\_\_  
(date)

**TABLE OF CONTENTS**

Corporate Disclosure Statement .....i  
 Table of Contents.....ii  
 Table of Authorities .....iv  
 Jurisdiction..... 1  
 Statutes and Regulations..... 1  
 Standard of Review..... 1  
 Statement of Issues..... 2  
 Statement of the Case..... 2  
 Statutory Background..... 3  
     Title IX..... 3  
     Education Amendments of 1974 ..... 6  
     Department of Education Organization Act ..... 7  
 Regulatory Background ..... 8  
     1975 Regulations ..... 8  
     1979 Policy Interpretation ..... 9  
     1980 Regulations ..... 10  
     The Clarifications ..... 11  
 Statement of Facts..... 12  
 Summary of Argument ..... 14  
 Argument ..... 15  
 I. Procedural Issues ..... 15  
     A. Jurisdiction for Relief ..... 15  
         1. Subject-Matter Jurisdiction..... 15  
         2. Standing ..... 15  
         3. Sovereign Immunity..... 17  
         4. Administrative Exhaustion ..... 18  
     B. Enforcing State-Law Standards via §1983..... 18  
     C. Associational Injuries ..... 19  
     D. Decisions without Jurisdiction Non-Precedential..... 20  
 II. Merits Issues ..... 21  
     A. Procedural Invalidity..... 22  
         1. Notice-and-Comment Rulemaking..... 23  
         2. Presidential Approval under §902 ..... 27

        3. GEPA’s Laying-Before Process ..... 31  
 B. No Deference Warranted ..... 31  
     1. Multi-Agency Delegations ..... 32  
     2. Title IX’s Mere “Effectuation”..... 33  
     3. HEW’s Deference Non-Transferable ..... 34  
     4. “Javits Amendment” ..... 35  
     5. Policy Statements ..... 38  
 C. Actionable Procedural Violations..... 40  
 D. No Title IX Authority ..... 41  
 E. Unconstitutional Quota ..... 49  
     1. Intermediate Scrutiny ..... 54  
     2. Strict Scrutiny ..... 55  
     3. Rational-Basis Test ..... 57  
 F. Reliance on Federal Officers ..... 59  
 G. Extra-Circuit Decisions Non-Controlling ..... 60  
 III. *Blackwelder* Factors ..... 61  
     A. Balance of Harms ..... 62  
         1. Irreparable Injury ..... 63  
         2. Defendants’ Harm ..... 64  
         3. Timing Consistent with Irreparable Injury..... 67  
     B. Likelihood of Success..... 71  
     C. Public Interest..... 71  
     D. Injunction Bond..... 73  
 Conclusion ..... 74

## TABLE OF AUTHORITIES

### CASES

|   |               |
|---|---------------|
| Adarand Constructors, Inc. v. Pena,<br>515 U.S. 200 (1995).....   | 49, 51        |
| Alexander v. Sandoval, 532 U.S. 275 (2001) .....  | 3, 33, 41, 45 |
| Amrep Corp. v. FTC, 768 F.2d 1171 (10th Cir. 1985).....   | 39            |
| Angstadt v. Midd-West Sch. Dist., 377 F.3d 338 (3rd Cir. 2004).....   | 40            |
| Antrican v. Odom, 290 F.3d 178 (4th Cir. 2002).....   | 19            |
| Baker v. General Motors Corp., 522 U.S. 222 (1998).....   | 21            |
| Bd. of Pub. Instruction of Taylor County v. Finch,<br>414 F.2d 1068 (5th Cir. 1969).....                                  | 5, 30         |
| Belk v. Charlotte-Mecklenburg Bd. of Educ.,<br>269 F.3d 305 (4th Cir. 2001).....  | 54            |
| Betsey v. Tuttle Creek Assoc., 736 F.2d 983 (4th Cir. 1984).....  | 43            |
| Blackwelder Furniture Co. v. Seilig Mfg. Co.,<br>550 F.2d 189 (4th Cir. 1977).....  | 60-62, 70, 71 |
| Bowen v. Am. Hospital Ass'n, 476 U.S. 610 (1986).....   | 32            |
| Bowen v. Georgetown Univ. Hosp., 488 U.S. 204 (1988).....   | 35            |
| Bragdon v. Abbott, 524 U.S. 624 (1998) .....  | 32            |
| Bragg v. West Virginia Coal Ass'n,<br>248 F.3d 275 (4th Cir 2001).....  | 19            |
| Broadrick v. Oklahoma, 413 U.S. 601 (1973).....   | 56            |
| Brogan v. U.S., 522 U.S. 398 (1998) .....   | 42            |
| Brown v. Gardner, 513 U.S. 115 (1994).....  | 46            |
| Burroughs Wellcome Co. v. Schweiker,<br>649 F.2d 221 (4th Cir. 1981).....   | 38            |
| Candle Factory, Inc. v. Trade Assocs. Group, Ltd., 23 Fed.Appx.<br>134, 2001 Copr. L. Dec. P 28,348 (4th Cir. 2001) ..... | 66, 72        |
| Cannon v. Univ. of Chicago, 441 U.S. 694 (1979) .....   | 18            |
| Carey v. Phipus, 435 U.S. 247 (1978) .....  | 58            |
| Chevron, U.S.A., Inc. v. N.R.D.C., 467 U.S. 837 (1984).....   | 32-33, 35-36  |
| Chocolate Mfrs. Ass'n v. Block,<br>755 F.2d 1098 (4th Cir. 1985).....   | 23, 26        |
| City of Alexandria v. Helms, 728 F.2d 643 (4th Cir. 1984) .....   | 25            |
| City of Boerne v. Flores, 521 U.S. 507 (1997) .....   | 48            |
| City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985) .....   | 49            |
| Civil Rights Cases, 109 U.S. 3 (1883) .....   | 47            |
| Clinton v. New York, 524 U.S. 417 (1998).....   | 16            |
| Cohen v. Brown Univ.,<br>101 F.3d 155, 170 (1st Cir. 1996) .....  | 21, 42        |
| Cohen v. Brown Univ., 991 F.2d 888 (1st Cir. 1993) .....  | 42            |
| Communities for Equity v. Michigan High School Athletic<br>Ass'n, 459 F.3d 676 (6th Cir. 2006).....                       | 50            |
| Connecticut v. Teal, 457 U.S. 440 (1982) .....  | 43            |
| Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990) .....  | 1             |
| Craig v. Boren, 429 U.S. 190 (1976) .....   | 52            |
| Crawford v. Davis, 109 F.3d 1281 (8th Cir. 1997) .....  | 50            |
| D.O.L. v. Wolf Run Mining Co., Inc.,<br>452 F.3d 275 (4th Cir. 2006).....   | 61, 64        |
| Dart v. U.S., 848 F.2d 217 (D.C. Cir. 1988).....  | 22            |
| Davis v. Monroe County Bd. of Educ., 526 U.S. 629 (1999) .....  | 43            |
| Direx Israel, Ltd. v. Breakthrough Med. Group,<br>952 F.2d 802 (4th Cir. 1991).....                                       | 62            |
| E.E.O.C. v. Commercial Office Products Co.,<br>486 U.S. 107 (1988).....   | 29            |
| Eisenberg ex rel. Eisenberg v. Montgomery County Public Sch.,<br>197 F.3d 123 (4th Cir. 1999).....                        | 64            |
| Equity in Athletics, Inc. v. Department of Education,<br>504 F.Supp.2d 88 (W.D. Va. 2007) .....                           | <i>passim</i> |
| Ex parte Young, 209 U.S. 123 (1908) .....   | 17-18         |

|  |        |
|--|--------|
| F.C.I.C. v. Merrill, 332 U.S. 380 (1947).....  | 59     |
| Faulkner v. Jones, 10 F.3d 226 (4th Cir. 1993).....  | 55     |
| Fed'l Mar. Bd. v. Isbrandtsen Co., 356 U.S. 481 (1958) .....                               | 39     |
| Freeman v. Pitts, 503 U.S. 467 (1992).....   | 52     |
| Frost v. R.R. Comm., 271 U.S. 583 (1926).....  | 52     |
| FTC v. Standard Oil Co. of Cal., 449 U.S. 232 (1980).....                                  | 30-31  |
| Goss v. Lopez, 419 U.S. 565 (1975).....  | 40     |
| Gratz v. Bollinger, 539 U.S. 244 (2003).....   | 16     |
| Grutter v. Bollinger, 288 F.3d 732 (6th Cir. 2002) (en banc) .....                         | 55     |
| Grutter v. Bollinger, 539 U.S. 306 (2003).....   | 52     |
| Hoechst Diafoil Co. v. Nan Ya Plastics Corp.,<br>174 F.3d 411 (4th Cir. 1999).....         | 73     |
| Horner v. Kentucky High School Athletic Ass'n,<br>206 F.3d 685 (6th Cir. 2000).....        | 41     |
| Hunt v. Washington State Apple Adver. Comm'n,<br>432 U.S. 333 (1977).....                  | 16     |
| I.N.S. v. Nat'l Ctr. for Immigrants' Rights, Inc.,<br>502 U.S. 183 (1991).....             | 51     |
| In re Microsoft Corp., 333 F.3d 517 (4th Cir. 2003).....                                   | 60, 61 |
| Independent U.S. Tanker Owners Comm.<br>v. Lewis, 690 F.2d 908 (D.C. Cir. 1982) .....      | 26-27  |
| INS v. Cardoza-Fonseca, 480 U.S. 421 (1987).....   | 29, 33 |
| Jennings v. Univ. of N. Carolina, 482 F.3d 686<br>(4th Cir. 2007) (en banc).....           | 50-51  |
| Jones v. Bd. of Governors of Univ. of North Carolina,<br>704 F.2d 713 (4th Cir. 1983)..... | 40, 64 |
| Kelley v. Board of Trustees,<br>35 F.3d 265 (7th Cir. 1994).....                           | 50-51  |
| Kentuckians for Commonwealth Inc. v. Rivenburgh,<br>317 F.3d 425 (4th Cir. 2003).....      | 32     |
| Land v. Dollar, 330 U.S. 731 (1947) .....  | 1      |

|   |        |
|---|--------|
| Larson v. Domestic & Foreign Commerce Corp.,<br>337 U.S. 682 (1949).....                | 17     |
| Litman v. George Mason Univ., 186 F.3d 544 (4th Cir. 1999) .....                        | 17     |
| Loving v. U.S., 517 U.S. 748 (1996) .....   | 25     |
| Luckenbach S.S. Co. v. U.S., 312 F.2d 545 (2nd Cir. 1963).....                          | 69     |
| Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) .....                               | 16     |
| Lujan v. Franklin County Bd. of Educ.,<br>766 F.2d 917 (6th Cir. 1985).....             | 29     |
| Lynch v. Household Fin. Corp., 405 U.S. 538 (1972).....                                 | 19     |
| Lyng v. Int'l Union, 485 U.S. 360 (1988) .....  | 56     |
| Mada-Luna v. Fitzpatrick, 813 F.2d 1006 (9th Cir. 1987) .....                           | 39     |
| Manning v. Hunt, 119 F.3d 254 (4th Cir. 1997).....                                      | 62, 63 |
| Maryland Conservation Council, Inc. v. Gilchrist,<br>808 F.2d 1039 (4th Cir. 1986)..... | 67     |
| Maryland Dep't of Human Resources v. U.S.D.A.,<br>976 F.2d 1462 (4th Cir. 1992).....    | 72     |
| Maryland Undercoating Co. v. Paine,<br>603 F.2d 477 (4th Cir. 1979).....                | 71     |
| Matter of Appletree Markets, Inc., 19 F.3d 969 (5th Cir. 1994) .....                    | 36     |
| McDonald v. Centra, Inc.,<br>946 F.2d 1059 (4th Cir. 1991).....                         | 18     |
| McLouth Steel Products Corp. v. Thomas,<br>838 F.2d 1317 (D.C. Cir. 1988).....          | 27     |
| Metro Broadcasting, Inc. v. F.C.C., 497 U.S. 547 (1990).....                            | 51     |
| Metro-North Commuter R. Co. v. Buckley,<br>521 U.S. 424 (1997).....                     | 20     |
| Miami Univ. Wrestling Club v. Miami Univ.,<br>302 F.3d 608 (6th Cir. 2002).....         | 49-51  |
| Mississippi Univ. for Women v. Hogan,<br>458 U.S. 718 (1982).....                       | 49     |
| Mohasco Corp. v. Silver, 447 U.S. 807 (1980) .....                                      | 29     |

|   |        |
|---|--------|
| Moor v. Alameda County, 411 U.S. 693, 699-700 (1973).....   | 19     |
| Motor Vehicle Ass'n v. State Farm Mut. Automobile Ins. Co.,<br>463 U.S. 29 (1983).....  | 39     |
| Multi-Channel TV Cable Co. v. Charlottesville Quality<br>Cable Operating Co., 22 F.3d 546 (4th Cir. 1994).....  | 63     |
| N.R.D.C. v. Watkins, 954 F.2d 974 (4th Cir. 1992).....  | 70     |
| Nat'l Ass'n of Farmworkers Orgs. v. Marshall,<br>628 F.2d 604 (D.C. Cir. 1980).....   | 64     |
| Nat'l Tour Brokers Ass'n v. U. S.,<br>591 F.2d 896 (D.C. Cir. 1978).....  | 27     |
| Nat'l Wrestling Coaches Ass'n v. Dep't of Educ., 366 F.3d 930 (D.C. Cir.<br>2004), reh'g denied, 383 F.3d 1047 (D.C. Cir. 2004), cert. denied,<br>545 U.S. 1104 (2005), reh'g denied, 545 U.S. 1154 (2005)..... | 21, 26 |
| Neal v. Bd. of Tr., 198 F.3d 763 (9th Cir. 1999).....   | 42     |
| Newsom ex rel. Newsom v. Albemarle County Sch. Bd.,<br>354 F.3d 249 (4th Cir. 2003).....  | 1, 63  |
| Oceanair of Florida, Inc. v. N.T.S.B.,<br>888 F.2d 767 (11th Cir. 1989).....  | 22     |
| Ohio River Valley Env'tl Coalition, Inc. v. Kempthorne,<br>473 F.3d 94 (4th Cir. 2006).....   | 24     |
| Pacific Gas & Elec. Co. v. F.P.C., 506 F.2d 33 (D.C. Cir. 1974).....  | 38-39  |
| Palmer v. Merluzzi, 868 F.2d 90 (3rd Cir. 1989).....  | 40     |
| Parents Involved in Community Schools v. Seattle School<br>Dist. No. 1, 127 S.Ct. 2738 (2007).....  | 53     |
| Pennhurst State Sch. & Hosp. v. Halderman,<br>465 U.S. 89 (1984).....   | 18-19  |
| Pers. Adm'r v. Feeney, 442 U.S. 256 (1979).....   | 3      |
| Planned Parenthood v. Camblos,<br>155 F.3d 352 (4th Cir. 1998) (en banc).....   | 22     |
| Plyler v. Doe, 457 U.S. 202 (1982).....   | 52     |
| Public Citizen, Inc. v. Shalala, 932 F.Supp. 13 (D.D.C. 1996).....  | 36     |

|   |        |
|---|--------|
| Quince Orchard Valley Citizens Assoc., Inc. v. Hodel,<br>872 F.2d 75 (4th Cir. 1989)..... | 66-70  |
| Ranjel v. City of Lansing, 417 F.2d 321 (6th Cir. 1969).....                              | 29     |
| Reynolds Metals Co. v. Rumsfeld,<br>564 F.2d 663 (4th Cir. 1977).....                     | 25, 27 |
| Roberts v. U.S. Jaycees, 468 U.S. 609 (1984).....   | 56     |
| Romer v. Evans, 517 U.S. 620 (1996).....  | 53     |
| Rum Creek Coal Sales, Inc. v. Caperton,<br>926 F.2d 353 (4th Cir. 1991).....              | 61     |
| Russello v. U.S., 464 U.S. 16 (1983).....   | 10     |
| Sch. Dist. v. H.E.W., 431 F.Supp. 147 (E.D. Mich. 1977).....                              | 30     |
| Scott v. Vandiver, 476 F.2d 238 (4th Cir. 1973).....                                      | 19     |
| Scotts Co. v. United Indus. Corp., 315 F.3d 264 (4th Cir. 2002).....                      | 65-66  |
| Seamons v. Snow, 84 F.3d 1226 (10th Cir. 1996).....                                       | 50     |
| Simon & Schuster, Inc. v. N.Y. State Crime Victims Bd.,<br>502 U.S. 105 (1991).....       | 72     |
| Smith v. Robinson, 468 U.S. 992 (1984).....   | 51     |
| Southeastern Cmty. Coll. v. Davis, 442 U.S. 397 (1979).....                               | 44     |
| Springs Mills, Inc. v. C.P.S.C., 434 F.Supp. 416 (D.S.C. 1977).....                       | 22     |
| Stafford v. Briggs, 444 U.S. 527 (1980).....  | 17     |
| Steel Co. v. Citizens for a Better Environment,<br>523 U.S. 83 (1998).....                | 20     |
| Stemple v. Bd. of Educ. of Prince George's County,<br>623 F.2d 893 (4th Cir. 1980).....   | 65     |
| Texaco, Inc. v. F.P.C., 412 F.2d 740 (3rd Cir. 1969).....                                 | 24, 39 |
| Thomas Jefferson Univ. v. Shalala, 512 U.S. 504 (1994).....                               | 39     |
| Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997).....                           | 57     |
| Truax v. Raich, 239 U.S. 33 (1915).....   | 49     |
| U.S. v. Am. Library Ass'n, 123 S.Ct. 2297 (2003).....                                     | 52     |
| U.S. v. Eaton, 169 U.S. 331 (1898).....   | 37     |

|   |        |
|---|--------|
| U.S. v. Fordice, 505 U.S. 717 (1992) .....  | 48     |
| U.S. v. Hoechst Celanese Corp., 128 F.3d 216 (4th Cir. 1997).....                             | 59     |
| U.S. v. Jones, 225 F.3d 468 (4th Cir. 2000).....  | 60     |
| U.S. v. Mead Corp., 533 U.S. 218 (2001) .....   | 32     |
| U.S. v. Morrison, 529 U.S. 598 (2000) .....   | 46     |
| U.S. v. Picciotto, 875 F.2d 345 (D.C. Cir. 1989) .....  | 24     |
| U.S. v. Virginia, 518 U.S. 515 (1996).....  | 53-54  |
| U.S. v. White, 366 F.3d 291 (4th Cir. 2004) .....   | 20     |
| United Steelworkers of Am. v. Weber, 443 U.S. 193 (1979).....                                 | 43     |
| Utah Wilderness Alliance v. Dabney,<br>222 F.3d 819 (10th Cir. 2000).....                     | 36     |
| Verlinden B.V. v. Central Bank, 461 U.S. 480 (1983) .....                                     | 15     |
| Village of Arlington Heights v. Metro. Housing<br>Development Corp., 429 U.S. 252 (1977)..... | 57     |
| Village of Willowbrook v. Olech, 528 U.S. 562 (2000).....                                     | 57     |
| Virginia Soc’y for Human Life, Inc. v. F.E.C.,<br>263 F.3d 379 (4th Cir. 2001).....           | 59-60  |
| Wachtel v. Office of Thrift Supervision,<br>982 F.2d 581 (D.C. Cir. 1993).....                | 32     |
| Waid v. Merrill Area Pub. Sch., 91 F.3d 857 (7th Cir. 1996) .....                             | 50     |
| Wards Cove Packing Co., Inc. v. Atonio, 490 U.S. 642 (1989).....                              | 44, 54 |
| Washington Legal Found. v. U.S. Sentencing Comm’n,<br>89 F.3d 897 (D.C. Cir. 1996).....       | 17     |
| Washington v. Reno, 35 F.3d 1093 (6th Cir. 1994).....   | 71     |
| Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988) .....                                  | 44, 54 |
| Webster v. Fall, 266 U.S. 507 (1925) .....  | 60     |
| Wetzel v. Edwards, 635 F.2d 283 (4th Cir. 1980) .....   | 65     |
| Williams v. Sch. Dist., 998 F.2d 168 (3rd Cir. 1993) .....                                    | 42, 50 |
| Woodall v. Federal Bureau of Prisons,<br>432 F.3d 235 (3rd Cir. 2005).....                    | 18     |

## STATUTES

|  |  |
|--|--|
| U.S. CONST. art. I, §1 .....   | 25                                     |
| U.S. CONST. art. I, §8, cl. 1 .....                                      | 46                                     |
| U.S. CONST. amend. XI.....   | 17                                     |
| U.S. CONST. amend. XIV .....   | 14, 15, 18, 46, 49, 52, 53, 57, 71, 72 |
| 5 U.S.C. §§551-706, Administrative Procedure Act .....                   | 23, 24, 26, 27                         |
| 5 U.S.C. §551(4) .....   | 24, 30                                 |
| 5 U.S.C. §551(5) .....   | 24                                     |
| 5 U.S.C. §551(6) .....   | 30-31                                  |
| 5 U.S.C. §553(b) .....   | 24                                     |
| 5 U.S.C. §553(b)(A) .....  | 38                                     |
| 5 U.S.C. §553(b)(B) .....  | 10                                     |
| 5 U.S.C. §706 .....  | 26                                     |
| 20 U.S.C. §1232, General Education Provision Act .....                   | 23, 26, 31                             |
| 20 U.S.C. §§1681-1687, Title IX<br>of Education Amendments of 1972 ..... | <i>passim</i>                          |
| 20 U.S.C. §1681(a) .....   | <i>passim</i>                          |
| 20 U.S.C. §1681(b) .....   | 4, 43-44                               |
| 20 U.S.C. §1682 .....  | 4, 23-24, 27, 31, 41                   |
| 20 U.S.C. §3413(a) .....   | 35                                     |
| 20 U.S.C. §3441(a)(1).....   | 7-8, 34                                |
| 20 U.S.C. §3441(a)(2).....   | 7-8, 34                                |
| 20 U.S.C. §3441(a)(3).....   | 7-8, 34                                |
| 20 U.S.C. §3441(a)(4).....   | 7-8                                    |
| 20 U.S.C. §3441(a)(5).....   | 7-8                                    |
| 20 U.S.C. §3441(a)(6).....   | 7-8                                    |
| 20 U.S.C. §3441(b) .....   | 7-8                                    |
| 20 U.S.C. §3505(a) .....   | 23, 31                                 |

|   |                  |
|---|------------------|
| 20 U.S.C. §3508(b) .....  | 7, 35            |
| 28 U.S.C. §1292 .....   | 1                |
| 28 U.S.C. §1331 .....   | 1, 15            |
| 28 U.S.C. §1343(a)(3).....  | 1, 15, 19        |
| 28 U.S.C. §1343(a)(4).....  | 1, 15, 19        |
| 28 U.S.C. §2201 .....   | 15               |
| 28 U.S.C. §2202 .....   | 15               |
| 42 U.S.C. §1988(a) .....  | 2, 18-19         |
| 42 U.S.C. §2000d et seq., Title VI<br>of the Civil Rights Act of 1964.....  | <i>passim</i>    |
| 42 U.S.C. §2000d-1 .....  | 4, 5, 28, 30, 33 |
| 42 U.S.C. §2000d-7(a).....  | 17               |
| 42 U.S.C. §2000e et seq., Title VII<br>of the Civil Rights Act of 1964..... | 4, 43            |
| 42 U.S.C. §7601(a)(1).....  | 33               |
| Pub. L. 93-380, §801, 88 Stat. 484, 597 (1974).....                         | 7, 10            |
| Pub. L. 93-380, §844, 88 Stat. 484, 612 (1974).....                         | 6-8, 34-37       |
| Va. Code §2.2-3700(B) .....   | 67               |
| Va. Code §2.2-3901 .....  | 18               |

**LEGISLATIVE HISTORY**

|   |       |
|---|-------|
| Conf. Rep. 93-1026, <i>reprinted in</i> 1974 U.S.C.C.A.N. 4206, 4271 .....                        | 7, 36 |
| Tower Amendment, H.R. 69, §536, <i>reprinted in</i><br>120 Cong. Reg. 15,444, 15,477 (1974) ..... | 6     |
| H.R. 7152, 88th Cong. §602 (1963) .....   | 5     |
| 110 Cong. Rec. 2499-00 (1964).....  | 5     |
| 110 Cong. Rec. 5256 (1964) .....  | 5     |
| 110 Cong. Rec. 6544 (1964) .....  | 5     |
| 110 Cong. Rec. 6562 (1964) .....  | 5     |
| 110 Cong. Rec. 6749 (1964) .....  | 5     |

|                                       |       |
|---------------------------------------|-------|
| 110 Cong. Rec. 6988 (1964) .....      | 5     |
| 110 Cong. Rec. 7058 (1964) .....      | 5     |
| 110 Cong. Rec. 7059 (1964) .....      | 5     |
| 110 Cong. Rec. 7066 (1964) .....      | 5     |
| 110 Cong. Rec. 7067 (1964) .....      | 5     |
| 110 Cong. Rec. 7103 (1964) .....      | 5     |
| 110 Cong. Rec. 11,930 (1964) .....    | 5     |
| 110 Cong. Rec. 11,941 (1964) .....    | 5     |
| 110 Cong. Rec. 12,716 (1964) .....    | 5     |
| 110 Cong. Rec. 13,334 (1964) .....    | 5     |
| 110 Cong. Rec. 13,377 (1964) .....    | 5     |
| 117 Cong. Rec. 30,404 (1971) .....    | 33    |
| 117 Cong. Rec. 30,407 (1971) .....    | 33    |
| 117 Cong. Rec. 39,251 (1971) .....    | 3     |
| 117 Cong. Rec. 39,259 (1971) .....    | 3     |
| 117 Cong. Rec. 39,262 (1971) .....    | 3, 44 |
| 118 Cong. Rec. 5803 (1972) .....      | 4, 33 |
| 118 Cong. Rec. 5807 (1972) .....      | 4, 34 |
| 118 Cong. Rec. 5808 (1972) .....      | 4     |
| 118 Cong. Rec. 5812-13 (1972). .....  | 3     |
| 120 Cong. Rec. 15,322-23 (1974) ..... | 6     |

**REGULATIONS AND RULES**

|                                  |               |
|----------------------------------|---------------|
| 45 C.F.R. §86.3.....             | 48            |
| 45 C.F.R. §86.41(a) .....        | 8, 25, 42, 48 |
| 45 C.F.R. §86.41(b) .....        | 48            |
| 45 C.F.R. 86.41(c).....          | 9, 25, 42     |
| 45 C.F.R. §86.41(c)(1) .....     | 8, 9, 25      |
| 45 C.F.R. §86.41(c)(2)-(10)..... | 9             |

|                                  |               |
|----------------------------------|---------------|
| 29 Fed. Reg. 16,274 (1964) ..... | 28            |
| 32 Fed. Reg. 14,555 (1967) ..... | 28            |
| 40 Fed. Reg. 24,128 (1975) ..... | 8, 9, 28, 48  |
| 43 Fed. Reg. 58,070 (1978) ..... | 10            |
| 44 Fed. Reg. 71,413 (1979) ..... | <i>passim</i> |
| 45 Fed. Reg. 30,802 (1980) ..... | 10, 11        |
| 45 Fed. Reg. 72,995 (1980) ..... | 5             |
| 46 Fed. Reg. 29,704 (1981) ..... | 5             |
| FED. R. CIV. P. 15(b) .....      | 20            |
| FED. R. CIV. P. 54(C) .....      | 20            |

**OTHER AUTHORITIES**

|   |      |
|---|------|
| 42 Am. Jur. 2d Injunctions §8 (2007) .....  | 65   |
| Sex Discrimination Regulations: Hearings Before the Subcomm. on<br>Postsecondary Education of the House Comm. on Education and<br>Labor, 94th Cong., at 170 (1975)..... | 4, 9 |

**JURISDICTION**

On August 21, 2007, the district court denied plaintiff Equity in Athletics, Inc.’s (“EIA”) motion for interim injunctive relief. Under 28 U.S.C. §1331 and §1343(a)(3)-(4), the district court had jurisdiction over EIA’s challenge to discriminatory actions by James Madison University (“JMU”), a state school that receives federal funds. On September 12, 2007, EIA noticed this appeal (JA 413). Under 28 U.S.C. §1292(a)(1), this Court has jurisdiction over the district court’s final denial of interim injunctive relief (JA 372-412).

**STATUTES AND REGULATIONS**

The Addendum excerpts relevant statutes and regulations.

**STANDARD OF REVIEW**

This Court reviews district courts’ denials of interim injunctive relief for abuse of discretion. *Newsom ex rel. Newsom v. Albemarle County Sch. Bd.*, 354 F.3d 249, 254 (4<sup>th</sup> Cir. 2003). While “accept[ing] the district court’s findings of fact absent clear error, [the Court] review[s] the district court’s] legal conclusions *de novo*.” *Id.*; *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990) (“court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law”); *cf. Land v. Dollar*, 330 U.S. 731, 735 (1947) (courts

may decide merits at jurisdictional stage “where... jurisdiction is dependent on... the merits”).

#### **STATEMENT OF ISSUES**

EIA asks this Court to overturn the denial of interim injunctive relief. In reviewing that discretionary matter, this Court must consider several underlying legal issues: (1) whether the district court had subject-matter jurisdiction; (2) the substantive and procedural lawfulness of the so-called “Three-Part Test” and JMU’s actions to comply with it; (3) the appropriate level of deference to the Three-Part Test; (4) the appropriate level of scrutiny applicable to EIA’s constitutional injuries; (5) federal courts’ authority under 42 U.S.C. §1988(a) to enforce state law against state officers in a federal §1983 action; (6) the precedential effect of decisions by courts without subject-matter jurisdiction; (7) the impact of EIA’s timing on irreparable harm; and (8) if relevant, what injunction bond to set.

#### **STATEMENT OF THE CASE**

EIA seeks reinstatement of ten athletic teams cut in JMU’s misguided attempt to meet the “proportionality test of [T]itle IX.” In place of “proportionality,” EIA argues that the original Title IX regulatory standard (equal opportunity, based on athletic interest)

remains in effect and forbids JMU’s cuts. Supported by the federal parties responsible for the confusion, JMU argues its rival standard (equal participation, based on enrollment), which is substantively foreign to both civil-rights law and Title IX. The case hinges on these competing conceptions of “equality” and on the procedural requirements for moving from one to the other. Before its Statement of Facts, EIA summarizes the statutory and regulatory background to put the facts in context.

#### **STATUTORY BACKGROUND**

##### **Title IX**

Modeled on Title VI of the Civil Rights Act of 1964, Title IX prohibits gender-based discrimination in federally funded education. 20 U.S.C. §1681(a). Like Title VI, Title IX prohibits only intentional discrimination (*i.e.*, action taken *because* of gender, not merely *in spite of* gender), *Alexander v. Sandoval*, 532 U.S. 275, 282-83 & n.2 (2001), *Pers. Adm’r v. Feeney*, 442 U.S. 256, 279 (1979), and prohibits all gender-based “quotas,” “ceilings,” “even splits,” “arbitrary ratios,” and “specific percentage balances.” *See* 117 Cong. Rec. 30,409, 39,251 39,259, 39,262 (1971); 118 Cong. Rec. 5812-13 (1972).

In a significant departure from Title VI, Congress included Title VII's restriction against preferential treatment based on imbalances with the total population. 20 U.S.C. §1681(b). Like Title VI, Title IX authorizes funding agencies to issue rules, regulations, and orders to effectuate the statutory prohibition against intentional discrimination, 20 U.S.C. §1682, authority the Senate sponsor said would "permit differential treatment by sex" only in "*very unusual* cases" where "such treatment is *absolutely necessary*," such as the need for privacy in locker rooms and classes for pregnant women. 118 Cong. Rec. 5807 (1972) (emphasis added). Congress intended §902 to mirror §602, *compare* 20 U.S.C. §1682 *with* 42 U.S.C. §2000d-1, so §602's legislative history controls.<sup>1</sup> That history makes clear that agencies must effectuate the

---

<sup>1</sup> See 118 Cong. Rec. 5803 (Title IX has same procedural protections as Title VI) (Sen. Bayh). *id.* 5808 ("These provisions [including §902] parallel Title VI of the 1964 Civil Rights Act") (Sen. Bayh); *Sex Discrimination Regulations: Hearings Before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor*, 94th Cong., 170 (1975) ("the setting up of an identical administrative structure and the use of virtually identical statutory language substantiates the intent of the Congress that the interpretation of Title IX was to provide the same coverage as had been provided under Title VI") (prepared statement of Sen. Bayh) (hereinafter "*1975 Hearing*").

statute via rules, regulations, and orders,<sup>2</sup> 42 U.S.C. §2000d-1, which do not take effect unless and until signed by the President in the *Federal Register*.<sup>3</sup> 42 U.S.C. §2000d-1; 110 Cong. Rec. 2499-00 (1964) (Rep. Lindsay) (offering presidential-approval amendment).

---

<sup>2</sup> The House bill permissively authorized agencies to proceed by rule, regulation, or order, H.R. 7152, 88<sup>th</sup> Cong. §602 (1963) ("Such action *may* be taken by... rule regulation or order") (emphasis added), but Senator Dirksen's substitute bill amended §602 to its current form. 110 Cong. Rec. 11,926, 11,930 (1964); *see Bd. of Pub. Instruction of Taylor County v. Finch*, 414 F.2d 1068, 1075-77 & n.13 (5<sup>th</sup> Cir. 1969) (§602's procedural provisions are mandatory).

<sup>3</sup> Title VI's proponents repeatedly cited presidential approval as a bulwark against bureaucratic overreaching. *See* 110 Cong. Rec. 6562 (Sen. Kuchel); 110 Cong. Rec. 7059 (Sen. Pastore); 110 Cong. Rec. 5256 (Sen. Humphrey); 110 Cong. Rec. 6544 (Sen. Humphrey); 110 Cong. Rec. 6749 (Sen. Moss); 110 Cong. Rec. 6988 (explanatory memorandum by Rep. McCulloch, inserted by Sen. Scott); 110 Cong. Rec. 7058 (Sen. Pastore); 110 Cong. Rec. 7066 (Sen. Kuchel); 110 Cong. Rec. 7067 (Sen. Kuchel); 110 Cong. Rec. 7103 (Sen. Javits); 110 Cong. Rec. 11,941 (Attorney General Kennedy's letter, inserted by Sen. Cooper); 110 Cong. Rec. 12,716 (Sen. Humphrey); 110 Cong. Rec. 13,334 (Sen. Pastore); 110 Cong. Rec. 13,377 (Sen. Allott). In 1980, the President delegated the rule-approval and enforcement authority to the Attorney General. 45 Fed. Reg. 72,995 (1980) (Executive Order 12,250). In 1981, the Attorney General delegated enforcement authority (but not rule-approval authority) to the Assistant Attorney General for Civil Rights. 46 Fed. Reg. 29,704 (1981).

### **Education Amendments of 1974**

In 1974, Senator Tower introduced an amendment to exempt revenue-producing intercollegiate athletics from §901(a) and to require the Commissioner of Education to publish proposed Title IX regulations within 30 days. 120 Cong. Rec. 15,322-23 (1974). Although his review of the legislative history indicated Title IX's inapplicability to athletics, he offered his amendment to clarify that – *if a court found Title IX to apply to athletics* – it nonetheless would exempt revenue-producing sports. *Id.* 15,323. The requirement to publish proposed rules was “not intended to confer on [the Department of Health, Education and Welfare (“HEW”)] any authority it does not already have under the act.” *Id.* The Tower Amendment passed the Senate, but was amended in conference (becoming the “Javits Amendment”) to require the HEW Secretary (in place of the Commissioner of Education) to publish the proposed regulations and to replace the revenue-sport exemption by requiring the proposed regulations to “include with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports.” *Compare* H.R. 69, §536 (Tower Amendment), *reprinted in* 120 Cong. Reg. 15,444, 15,477 (1974) *with* Pub. L. No. 93-380, §844, 88 Stat.

484, 612 (1974). The conference committee did not indicate any other changes to the Senate bill. Conf. Rep. 93-1026, *reprinted in* 1974 U.S.C.C.A.N. 4206, 4271.

The same statute “[r]ecogniz[ed] that the Nation’s economic, political, and social security require a well-educated citizenry,” “reaffirm[ed], as a matter of high priority, the Nation’s goal of equal educational opportunity,” and declare[d] it... the policy of the United States that every citizen is entitled to an education to meet his or her full potential.” Pub. L. No. 93-380, §801, 88 Stat. 597 (“§801”).

### **Department of Education Organization Act**

In splitting HEW into the Departments of Education (“DOE”) and the Health & Human Services (“HHS”), the Department of Education Organization Act, Pub. L. No. 96-88, 93 Stat. 668 (1979) (“DEOA”) reserved to HHS all functions not transferred to DOE. 20 U.S.C. §3508(b). DEOA §301 transferred “functions” from HEW and its officers to DOE and its officers. *See* 20 U.S.C. §3441(a)(1)-(6), (b). Specifically, §301(a)(1), (a)(5)-(6), and (b) transfer functions of education-related subordinate HEW officers and offices, which do not address HEW authority under either Title IX or the Javits Amendment. Likewise,

§301(a)(4) transferred HEW functions under the Rehabilitation Act and administered by the Commissioner of Rehabilitation Services. And §301(a)(2) transferred all HEW functions under seventeen enumerated statutes, which do not include Title IX or the Javits Amendment. 20 U.S.C. §3441(a)(2) (listing transferred functions). Last, §301(a)(3) transferred “all [HEW] functions with respect to or being administered by the [HEW] Office of Civil Rights *which relate to functions transferred by this section.*” 20 U.S.C. §3441(a)(3) (emphasis added).

### **REGULATORY BACKGROUND**

#### **1975 Regulations**

In response to Senator Tower’s finding that Title IX inapplicable to athletics, HEW included §86.41(a) in its athletics regulation to parallel §901(a). *Compare* 45 C.F.R. §86.41(a) *with* 20 U.S.C. §1681(a); *see* 40 Fed. Reg. 24,128, 24,134 (1975). In addition, unlike §901(a), the 1975 regulations require equal opportunity, based on interest and abilities. 45 C.F.R. §86.41(c)(1). HEW indicated that this “require[s] institutions to take the interests of both sexes into account in determining what sports to offer.” 40 Fed. Reg. 24,134. HEW’s Secretary testified that “the interest and abilities of both sexes... obviously involves learning about those interests in one way or

another.” 1975 *Hearing*, 440. President Ford signed HEW’s Title IX regulations. 40 Fed. Reg. 24,137.

#### **1979 Policy Interpretation**

In 1979, HEW issued a “Policy Interpretation” to provide a framework to resolve then-pending complaints and guidance on Title IX’s requirements for intercollegiate athletics. 44 Fed. Reg. 71,413 (1979). Like the regulations, the Policy Interpretation addresses athletic scholarships (45 C.F.R. §86.37(c)), other benefits (45 C.F.R. §86.41(c)(2)-(10)), and “interests and abilities” (45 C.F.R. §86.41(c)(1)) in discrete sections (§VII.A-VII.C). *Id.* 71,415-71,418.

Contrary to the 1975 regulations, HEW’s 1979 Three-Part Test *appears* to narrow schools’ latitude to three options: (1) have “participation opportunities” substantially proportional to enrollment ratios, (2) show progress toward prong one, or (3) fully accommodate the underrepresented gender’s interest. 44 Fed. Reg. 71,418. In addition, however, HEW obliquely acknowledged that this did not apply prospectively. 44 Fed. Reg. 71,414 (Policy Interpretation “does not contain a separate section on institutions’ future responsibilities[.]... institutions remain obligated by the Title IX regulation to accommodate

effectively the interests and abilities of male and female students with regard to the selection of sports and levels of competition available”).

Consistent with the regulations and §801, 1979’s Three-Part Test addressed equal *opportunity*, not equal *participation*. 45 C.F.R. 86.41(c); 44 Fed. Reg. 71,418 (“[w]hether intercollegiate level *participation opportunities* for male and female students are provided in numbers substantially proportionate to their respective enrollments”) (emphasis added); 43 Fed. Reg. 58,070, 58,072 (1978) (“Intercollegiate athletic programs that provide *equal opportunities* for both sexes may... have *different participation rates*”) (emphasis added). Indeed, 1979’s Policy Interpretation included a separate scholarship section that defined “participant,” implying that “participation opportunities” meant something other than “participant.” *Russello v. U.S.*, 464 U.S. 16, 23 (1983). If they meant the same thing in 1979, HEW would not have used two phrases.

### **1980 Regulations**

Upon its formation, DOE promulgated education-related provisions of HEW’s regulations in Title 34. 45 Fed. Reg. 30,802 (1980) (invoking 5 U.S.C. §553(b)(B)’s “good-cause” exemption to notice-and-

comment rulemaking). President Carter did not sign the DOE regulations. 45 Fed. Reg. 30,803.

### **The Clarifications**

The Assistant Secretary has issued several “clarifications” of the Three-Part Test. Unlike the 1979 version, the 1996 Three-Part Test purports to be a prospective legal requirement that creates a safe harbor for prong one (enrollment proportionality) and authorizes gender-conscious cutting and capping solely to meet proportionality: “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.” Add. 36. It also revises the third prong to require full accommodation of only the underrepresented gender, *i.e.*, disregarding the 1979 version’s focus on relative accommodation. The 1996 action also redefines 1979’s “participation opportunity” to mean “participant” and implies that the Three-Part Test applies interscholastically.

Unlike the 1996 version, the 2003 version elevates the Three-Part Test’s second and third prongs to safe-harbor status.

The 2005 version classifies the Three-Part Test as creating obligations, indicates that schools need assess only the

underrepresented gender's interests, and acknowledges that equal-protection requirements may differ from the Three-Part Test.

#### STATEMENT OF FACTS

On September 29, 2006, JMU decided to cut ten athletic teams, effective July 1, 2007, expressly to equalize its athletic-participation and enrollment ratios, by gender, to comply with Title IX's proportionality test. JA 200. The announcement stunned and deeply hurt the students, who then organized to seek reconsideration of the decision. JA 147 (¶5), 149 (¶3), 153 (¶4), 156 (¶4), 159 (¶5), 162 (¶5), 166 (¶6), 169 (¶5), 172 (¶7), 176 (¶7), 179 (¶4), 182 (¶6), 333, "[B]ecause JMU dragged [its] feet so long during the school year," the students could not present their reinstatement request to JMU's Board of Visitors until January 12, 2007, which they rejected with "a blanket response that was... written out beforehand." JA 333. EIA incorporated on February 5, 2007, began publicly accepting members on March 14, 2007, and filed this lawsuit on March 19, 2007. JA 1. By letter dated March 23, 2007, EIA forwarded JMU the initial complaint under a cover letter explaining EIA's legal position and notifying JMU that EIA would name it as a defendant unless JMU deferred its planned cuts, which

JMU rejected on April 4, 2007. JA 107. EIA amended its complaint to name JMU on June 1, 2007, and moved for interim injunctive relief on June 15, 2007. After hearing the matter on July 19, 2007, the district court denied EIA's motion on August 21, 2007.

Significantly, notwithstanding its state-law obligations to operate transparently, JMU conducted its planning in secret and affirmatively misled students who came to JMU to compete in these sports. JA 203-04 (¶3(a), 334. The students on the ten teams are ready, willing, and able to compete on reinstated teams. JA 147-48 (¶8), 159 (¶7), 163 (¶6), 166 (¶7), 169-70 (¶7), 173 (¶8), 177 (¶9), 180 (¶5), 185 (¶12). Although student fees provide the athletic budget's "major component," the National Collegiate Athletic Association would rebate JMU an additional \$200,000 for fielding these ten teams. JA 366, 209.

In drafting its 1979 Policy interpretation, HEW recognized it would trigger statutory procedural obligations, JA 110-19, 222-24, 227-232, but decided to avoid them by adding preamble language tying institutions' future responsibilities to the interest-and-abilities *regulation*, rather than the Three-Part Test, and moving the Test from an interest-and-ability factor to an "other factor" to consider levels of

competition, including the opportunity for team competition. JA 130-36 (Hamlin memorandum); *compare id.* 259 (pre-Hamlin draft) *with* 44 Fed. Reg. 74,414.

### **SUMMARY OF ARGUMENT**

Procedurally, courts plainly have jurisdiction to decide federal equal-protection suits, which may include state-law elements and associational injuries Sections I.A.1-I.C). Substantively, JMU’s cuts violated Title IX’s intentional-discrimination standard, the regulations’ equal-opportunity standards and procedures, and the Equal Protection Clause, all to comply with a nonexistent “proportionality test.” Specifically, Title IX does not delegate authority to DOE for disparate-impact standards (Section II.D), and DOE did follow the procedures required to adopt a new Title IX standard, *even if it had the authority* (Section II.A). Accordingly, the Three-Part Test does not deserve judicial deference (Section II.B) and constitutes an unconstitutional quota, both facially and as applied (Section II.E). Accordingly, EIA is highly likely to succeed on the merits, and its members deserve interim relief to avoid irreparable harm, which neither JMU’s financial harms

nor EIA’s timing (attributable in large part to JMU’s delay and unlawful secret meetings) offset (Sections III.A-III.B).

### **ARGUMENT**

#### **I. PROCEDURAL ISSUES**

##### **A. Jurisdiction for Relief**

Courts evaluate their jurisdiction under plaintiffs’ interpretation of federal law, notwithstanding that they may lack jurisdiction under the defendant’s interpretation. *Verlinden B.V. v. Central Bank*, 461 U.S. 480, 492-93 (1983). At the threshold, then, courts assume EIA’s merits views.

##### **1. Subject-Matter Jurisdiction**

EIA’s claims against JMU arise under federal civil-rights laws (Title IX and the Fourteenth Amendment’s Equal Protection Clause), over which district courts have subject-matter jurisdiction. 28 U.S.C. §§1331, 1343(a)(3)-(4). As explained in Section I.A.2, *infra*, moreover, EIA has associational standing, which provides a “case or controversy” sufficient for declaratory and injunctive relief. 28 U.S.C. §§2201-2202.

##### **2. Standing**

Membership organizations have associational standing if their members have standing to sue, the interest that the suit seeks to

protect is germane to the organization's purpose, and neither the asserted claims nor the requested relief require members' individual participation. *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). Thus, EIA has standing if its members have suffered an injury in fact, causally linked to a defendant's conduct, with the likelihood that judicial relief will redress the injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992).

EIA claims that JMU violated its members' Title IX, equal-protection, and due-process rights, which qualify as injuries for purposes of standing. *Gratz v. Bollinger*, 539 U.S. 244, 262 (2003) ("*injury in fact*'... is the denial of equal treatment [from] imposition of the barrier, not the ultimate inability to obtain the benefit") (emphasis added); *Clinton v. New York*, 524 U.S. 417, 433 & n.22 (1998) (same for third-party standing). Moreover, because JMU itself took the challenged actions, causation and redressability naturally follow. *Defenders of Wildlife*, 504 U.S. at 561-62. EIA's members, and thus EIA itself, unquestionably have standing to seek injunctive and declaratory relief against JMU.

### 3. Sovereign Immunity

Although the Eleventh Amendment protects state entities from certain litigation, Congress has abrogated that immunity for Title IX claims. 42 U.S.C. 2000d-7(a); *Litman v. George Mason Univ.*, 186 F.3d 544, 550 (4<sup>th</sup> Cir. 1999). By contrast, to assert constitutional violations, EIA arguably must rely on *Ex parte Young*, 209 U.S. 123 (1908), to reach JMU's actions under 42 U.S.C. §1983.

For state and federal officers acting in violation of federal law, it is well settled that sovereign immunity does not shield the officer from injunctive or declaratory relief because the "officer is not doing the business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden." *Washington Legal Found. v. U.S. Sentencing Comm'n*, 89 F.3d 897, 901 (D.C. Cir. 1996). *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689 (1949) ("where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions").<sup>4</sup>

---

<sup>4</sup> EIA named all officer defendants in both their official capacities and their individual capacities under color of law. See *Stafford v. Briggs*, 444 U.S. 527, 539 (1980).

#### 4. Administrative Exhaustion

To challenge intentional discrimination under Title IX, EIA need not exhaust administrative remedies. *Cannon v. Univ. of Chicago*, 441 U.S. 694, 706-08 (1979). To the extent that EIA asserts its interpretation of federal regulations over JMU's and DOE's interpretations, EIA need not exhaust administrative remedies because the matter is purely legal and exhaustion would be futile. *McDonald v. Centra, Inc.*, 946 F.2d 1059, 1063-64 (4<sup>th</sup> Cir. 1991); *Woodall v. Federal Bureau of Prisons*, 432 F.3d 235, 239 n.2 (3<sup>rd</sup> Cir. 2005) (futility applies when challenging regulation's validity, as distinct from its application).

#### B. Enforcing State-Law Standards via §1983

EIA's complaint cites not only Title IX, the Fourteenth Amendment, and 42 U.S.C. §1983, but also 42 U.S.C. §1988(a), the Virginia Human Rights Act ("VHRA"), and the Virginia Constitution's Due Process Clause. JA 27, 19, 59-60, 63-65 (¶¶10, 16, 164, 165, 167, 168.B, 168.D).<sup>5</sup> While *Ex parte Young* may not generally authorize federal suits against state officers to enforce state law, *Pennhurst State*

---

<sup>5</sup> Under VHRA, Title IX regulatory violations are "unlawful discriminatory practices." VA, STAT. §2.2-3901.

*Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984), EIA argues that 42 U.S.C. §1988(a) "federalizes" state-law doctrines into EIA's federal cause of action under 28 U.S.C. §1343 and 42 U.S.C. §1983. *Compare Antrican v. Odom*, 290 F.3d 178, 187-88 (4<sup>th</sup> Cir. 2002) *with Bragg v. West Virginia Coal Ass'n*, 248 F.3d 275, 292 (4<sup>th</sup> Cir. 2001). The district court's reliance on *Moor v. Alameda County*, JA 409-10, is misplaced because, unlike EIA, the *Moor* plaintiff lacked a §1983 cause of action, *see* 411 U.S. 693, 699-700 (1973), which makes *Moor* irrelevant. *See Scott v. Vandiver*, 476 F.2d 238, 242 (4<sup>th</sup> Cir. 1973) (federal court may use state law to supply §1983 claim's elements) (*citing Jenkins v. Averett*, 424 F.2d 1228, 1231 (4<sup>th</sup> Cir. 1970)).<sup>6</sup>

#### C. Associational Injuries

The district court faulted EIA for raising members' associational injuries in a post-hearing brief as an "entirely new claim... *not* asserted in [EIA's] complaint." JA 407 (court's emphasis). EIA addressed associational injuries in its complaint, its affidavits, its opening brief, in passing in its reply briefs to JMU and to DOE, and in hearing testimony

---

<sup>6</sup> *See Lynch v. Household Fin. Corp.*, 405 U.S. 538, 544 n.7 (1972) (§1988(a)'s "Title 24" includes 28 U.S.C. §1343 and 42 U.S.C. §1983.).

and argument. See JA 10-11 (¶20), 144-45, 150-51 (¶¶5-7), 152-53 (¶¶4-6), 156 (¶¶4-5), 202, 218, 313-15, 320-23. Moreover, these associational injuries to EIA’s female members on the surviving cross-country, swimming and track teams are not a new *claim*: they are injuries that support EIA’s claim that JMU unlawfully cut men’s cross-country, swimming and track. Assuming *arguendo* that EIA had not pleaded an associational “claim,” nothing would preclude a court’s considering it. *U.S. v. White*, 366 F.3d 291, 294 n.2 (4<sup>th</sup> Cir. 2004); *Metro-North Commuter R. Co. v. Buckley*, 521 U.S. 424, 455 (1997) (“party should experience little difficulty in securing a remedy other than that demanded in the pleadings as long as the party shows he is entitled to it”); FED. R. CIV. P. 15(b), 54(c).

#### **D. Decisions without Jurisdiction Non-Precedential**

The district court relied on opinions by courts that lacked jurisdiction, which should constitute not even the law of those extra-circuit cases, much less precedent here. See *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 101-02 (1998) (“[f]or a court to pronounce upon the meaning or the constitutionality of... federal law when it has no jurisdiction to do so is, by very definition, for a court to act *ultra*

*vires*”); *U.S. v. Troup*, 821 F.2d 194, 197 (3<sup>rd</sup> Cir. 1987) (“lack of subject matter jurisdiction goes to the very power of a court to hear a controversy;... [the] earlier case can be accorded no weight either as precedent or as law of the case”) (quoting *Ala. Hosp. Ass’n v. U.S.*, 228 Ct.Cl. 176, 656 F.2d 606 (1981)) (alterations in original); *Orff v. U.S.*, 358 F.3d 1137, 1149-50 (9<sup>th</sup> Cir. 2004) (same); cf. *Baker v. General Motors Corp.*, 522 U.S. 222, 237-38 & n.11 (1998) (“[i]n no event... can issue preclusion be invoked against one who did not participate in the prior adjudication”). For example, the D.C. Circuit’s merits views and the First Circuit’s constitutional views on the Three-Part Test are *dicta*, which should not guide this Court. *Nat’l Wrestling Coaches Ass’n v. DOE*, 366 F.3d 930 (D.C. Cir. 2004) (discussing merits, notwithstanding that plaintiffs lacked standing) (“NWCA”); *Cohen v. Brown Univ.*, 101 F.3d 155, 170, 181 & n.17 (1<sup>st</sup> Cir. 1996) (reaching constitutional merits without addressing private school’s standing to raise third-parties’ equal-protection rights).

## **II. MERITS ISSUES**

Because the facts are not in dispute, this Court can resolve the substantive merits to correct (or affirm) the district court’s legal

reasoning. *Planned Parenthood v. Camblos*, 155 F.3d 352, 359-60 (4<sup>th</sup> Cir. 1998) (*en banc*). If this Court declines, the same merits issues will return for this Court's *de novo* review in another year, after further unnecessary district-court proceedings. Even if disinclined to *reach* the underlying legal merits, however, this Court must consider EIA's likelihood of merits success.

#### **A. Procedural Invalidity**

"The history of liberty has largely been the history of observance of procedural safeguards." *Dart v. U.S.*, 848 F.2d 217, 218 (D.C. Cir. 1988) (*quoting McNabb v. U.S.*, 318 U.S. 332, 347 (1943)). Procedures "protect the [public] from arbitrary action on the part of [agencies], however unintended." *Oceanair of Florida, Inc. v. N.T.S.B.*, 888 F.2d 767, 770 (11<sup>th</sup> Cir. 1989) (*citing McNabb*). Procedure plays an even greater role against agency overreaching:

It is evident... that the [agency] does what it pleases with little concern for the restrictions or limitations placed upon it by the Congress or the Constitution[... which] are classic examples of the arrogance of bureaucracy and the abuse of power.

*Springs Mills, Inc. v. C.P.S.C.*, 434 F.Supp. 416, 434 (D.S.C. 1977) (*citing McNabb*). To counteract unintended consequences and

overreaching, courts "must be strict in reviewing an agency's compliance with procedural rules" and, "in reviewing an agency's procedural integrity, the court[s] rel[y] on [their] own independent judgment." *Chocolate Mfrs. Ass'n v. Block*, 755 F.2d 1098, 1103 (4<sup>th</sup> Cir. 1985) (citing cases).

The next three sections outline Administrative Procedure Act ("APA") notice-and-comment rulemaking, §902's presidential-approval requirements, and the General Education Provisions Act's ("GEPA") then-applicable laying-before requirements. DEOA's savings provision continued in effect only orders, rules, and regulations *in effect* on May 4, 1980. 20 U.S.C. §3505(a). Because the Three-Part Test never took effect under §902 or GEPA, the 1979 version neither continued in effect nor transferred from HEW to DOE. *Id.* Similarly, because the Three-Part Test required APA notice-and-comment rulemaking, the failure to undertake that process renders the Three-Part Test void *ab initio*. Either way, quite simply, there is no Three-Part Test.

#### **1. Notice-and-Comment Rulemaking**

As summarized in the Regulatory Background, *supra*, the regulatory standard purportedly changed from (a) 1975's equal interest-

based opportunity, after assessing both genders' interest, to equal enrollment-based participation, with no need for schools like JMU to assess men's interest; (b) 1979's non-prospective, nonbinding document to a prospective legal obligation; (c) 1979's prohibition against regulatory and statutory discrimination to safe harbors that authorizes gender-conscious cutting and capping solely to meet an enrollment-based quota; and (d) 1979's "participation opportunities" to 1996's "participants." Even if *substantively* lawful, such changes require notice-and-comment rulemaking. 5 U.S.C. §§551(4)-(5), 553(b); *Ohio River Valley Envt'l Coalition, Inc. v. Kempthorne*, 473 F.3d 94, 102 (4<sup>th</sup> Cir. 2006) ("rulemaking" required to amend a "rule") (citing 5 U.S.C. §551(4)-(5)).<sup>7</sup>

---

<sup>7</sup> Because §902 authorizes agencies to proceed only by rule, regulation, and order, Title IX precludes agencies' creative (*i.e.*, *ultra vires*) policy-formulation methods even more strictly than the APA does. See note 2, *supra*. Agencies cannot write themselves an APA exemption by promulgating authority to consider "other factors" and then inventing new factors at will. *Texaco, Inc. v. F.P.C.*, 412 F.2d 740, 744 (3<sup>rd</sup> Cir. 1969) (agency cannot "replace the statutory scheme with a rule-making procedure of its own invention"); *U.S. v. Picciotto*, 875 F.2d 345, 346-49 (D.C. Cir. 1989) (agency cannot interpret general authority to consider "additional reasonable conditions" in specific permits to impose new, across-the-board conditions)

Although the district court considered it "twenty-five years [of]... longstanding and consistent administrative interpretation[]," JA 404 n.8, the Three-Part Test hatched by DOE's neglect in 1996, not HEW's design in 1979, and changed at least twice since 1996. Further, because it was nonbinding, the 1979 Three-Part Test could not have established safe harbors that somehow excuse intentional discrimination. Indeed, an interpretation of §86.41(c) – or §86.41(c)(1) – cannot displace §86.41(a), which prohibits intentional discrimination in athletics, independent of §86.41(c). 45 C.F.R. §86.41(a), (c). A binding Three-Part Test with safe harbors is altogether foreign to HEW's 1979 action. Oblivious to the fine distinctions that HEW drew in 1979, DOE's subsequent "clarifications" actually *create* legal requirements, which federal agencies simply cannot accomplish by memorandum. U.S. CONST. art. I, §1 ("All legislative Powers [vested] in a Congress"); *Loving v. U.S.*, 517 U.S. 748, 771 (1996).

Instead, "notice and comment is required if the rule makes a substantive impact on the rights and duties of the person subject to regulation." *Reynolds Metals Co. v. Rumsfeld*, 564 F.2d 663, 669 (4<sup>th</sup> Cir. 1977); *City of Alexandria v. Helms*, 728 F.2d 643, 647-48 (4<sup>th</sup> Cir. 1984).

The right to comment enables the public to convince agencies to change an unwise (“arbitrary or capricious”) or unlawful (“not in accordance with the law”) course. 5 U.S.C. §706. “The notice-and-comment procedure encourages public participation in the administrative process and educates the agency, thereby helping to ensure informed agency decisionmaking.” *Chocolate Mfrs. Ass’n*, 755 F.2d at 1103. Here, neither HEW nor DOE has ever responded to comments that the Three-Part Test violates Title IX and the Constitution. *See, e.g.*, Add. 33 (1996 Clarification’s declining to respond to comments that questioned Three-Part Test’s lawfulness). Assuming that DOE in 1996 was unaware of HEW’s intentional non-finality in 1979, DOE’s 1996 “clarification” *accidentally created* the Three-Part Test, without ever considering its lawfulness.

The district court reasoned that “the challenged policies ‘are interpretive guidelines that [DOE] was not obligated to issue in the first place.’” JA 404-05 (*quoting NWCA*, 366 F.3d at 940). *First*, GEPA, APA, and Title IX obligated DOE *not to issue* those guidelines without the required procedures. *Second*, the *NWCA dictum* does not reflect the law of the *D.C. Circuit*, much less *this Circuit*. *Independent U.S. Tanker*

*Owners Comm. v. Lewis*, 690 F.2d 908, 918 (D.C. Cir. 1982) (agency “not required by law to promulgate any rules limiting its discretion [but] was nonetheless bound by [APA] when it decided to do so”).<sup>8</sup> Substance aside, changing from equal interest-based opportunity to equal enrollment-based participation obviously “makes a substantive impact on the rights and duties of the person subject to regulation,” *Reynolds Metals*, 564 F.2d at 669, which renders the Three-Part Test *procedurally* invalid and void *ab initio*.

## 2. Presidential Approval under §902

Like its Title VI template, Title IX requires agencies to act by rule, regulation, or order of general applicability, and provides that such

---

<sup>8</sup> When a self-described interpretive rule or policy statement legally required notice-and-comment rulemaking, the agency’s having provided notice or taken comment does not satisfy the APA. *Nat’l Tour Brokers Ass’n v. U.S.*, 591 F.2d 896, 899 & nn.8-10 (D.C. Cir. 1978); *McLouth Steel Prod. Corp. v. Thomas*, 838 F.2d 1317, 1323 (D.C. Cir. 1988) (“agency may not introduce a proposed rule in [the] crabwise fashion” of discussing the issue in a *Federal Register* preamble). HEW recognized this by expressly and publicly disavowing that notice and comment on the 1979 Policy Interpretation somehow qualified as notice-and-comment rulemaking. *See* JA 136 n.\* (HEW’s “voluntary effort” at notice and comment did not qualify as rulemaking), 140-41, 304-05 (publicizing HEW’s position). Significantly, that position enabled HEW avoid responding to comments that the Policy Interpretation was unlawful in 1979.

actions do not take effect until approved by the President. 42 U.S.C. §2000d-1; 20 U.S.C. §1682. As explained, the legislative history makes clear that presidential approval meant signed by the President in the *Federal Register*, and Title VI's proponents repeatedly cited presidential approval as a bulwark against bureaucratic overreaching. See note 3 & accompanying text, *supra*. For a contemporaneous and longstanding Executive interpretation, EIA notes that President Johnson signed the initial seven agencies' Title VI regulations seven times, 29 Fed. Reg. 16,274, 16,279, 16,280, 16,283, 16,284, 16,287, 16,293, 16,297, 16,298, 16,303, 16,305, 16,309 (1964), as well as amendments, 32 Fed. Reg. 14,555, 14,557 (1967). President Ford signed HEW's initial Title IX regulations, 40 Fed. Reg. 24,137.

The legislative history forecloses the argument that Congress did not mean what it plainly said. The House bill permissively authorized agencies to proceed by rule, regulation, or order. See note 2, *supra*. Responding to concerns over agencies' overreaching, Senator Dirksen's substitute bill amended §602 to its current form. *Id.* "Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it

has earlier discarded in favor of other language." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) (citation omitted).

Significantly, Senator Dirksen needed these concessions against administrative overreaching to break a Senate filibuster. *Mohasco Corp. v. Silver*, 447 U.S. 807, 819-20 (1980); *E.E.O.C. v. Commercial Office Products Co.*, 486 U.S. 107, 117 (1988) (Civil Rights Act's opponents feared "the steady and deeper intrusion of the Federal power"). Where such "language was clearly the result of a compromise," courts must "give effect to the statute as enacted." *Mohasco Corp.*, 447 U.S. at 818-19.

As the record demonstrates, DOE's predecessor openly and intentionally bypassed otherwise-applicable procedures (including presidential approval) because the Three-Part Test was neither binding nor a prospective standard for Title IX compliance. As EIA advised JMU in March, before JMU's cuts took effect, "JMU is steering itself to a mirage, not a safe harbor." JA 103; see also *Lujan v. Franklin County Bd. of Educ.*, 766 F.2d 917, 923 (6<sup>th</sup> Cir. 1985) (presidential approval "a prerequisite to [an agency memorandum's] validity as a binding general order"); *Ranjel v. City of Lansing*, 417 F.2d 321, 323 (6<sup>th</sup> Cir. 1969)

(agency guidance without presidential approval “does not rise to the dignity of federal law”); *Finch*, 414 F.2d at 1075-77 & n.13 (judiciary retains a constitutional obligation to interpret the statute and §602’s provisions are mandatory); *U.S. v. Jefferson County Bd. of Ed.*, 380 F.2d 385, 390 (5<sup>th</sup> Cir. 1967) (“when [HEW] guidelines are... *within lawful limits*,” courts “should give great weight to future HEW Guidelines,” but “percentages referred to in the Guidelines... are not a method for setting quotas or striking a balance” and “school officials” not only can but “should try other tools” if necessary to comply with the statute and Constitution) (emphasis added) (*en banc*).<sup>9</sup>

Rejecting these authorities, the district court relied on two untenable, extra-circuit district-court decisions that found the Three-Part Test exempt from presidential approval as a guideline, as distinct from a rule or order. JA 405-06. An agency can act only by rule or by order. 5 U.S.C. §551(4), (6); *FTC v. Standard Oil Co.*, 449 U.S. 232, 238,

---

<sup>9</sup> In *Sch. Dist. v. H.E.W.*, “HEW assert[ed] that Title VI does not require Presidential approval of these regulations, as they are procedural only and do not define what constitutes discriminatory practices prohibited by Title VI.” 431 F.Supp. 147, 151 (E.D. Mich. 1977). Under HEW’s contemporaneous view, then, the Three-Part Test required presidential approval as a substantive amendment.

n.7 (1980). There is no middle ground: issuing a non-rule “guideline” is *an order*. 5 U.S.C. §551(6). Whether an unapproved *rule* or an unapproved *order*, the Three-Part Test never took effect.

### **3. GEPA’s Laying-Before Process**

In addition to APA’s familiar notice-and-comment requirements and §902’s presidential-approval requirement, in 1979, GEPA provided that no HEW “regulation” – defined broadly as “any generally applicable rule, regulation, guideline, interpretation, or other requirement” – would take effect until 45 days after presentment to Congress. See JA 111-16 (HEW General Counsel opinion discussing GEPA’s laying-before requirements). Because HEW intentionally avoided GEPA’s laying-before requirement (JA 304-05), the Policy Interpretation never took effect under GEPA.

#### **B. No Deference Warranted**

The next five sections outline independent reasons why the Three-Part Test does not warrant deference. Before those specifics, however, EIA reiterates that DOE does not have Title IX regulations because no President or Attorney General has approved DOE’s Title IX regulations. Instead, HEW’s regulations continue in effect for DOE under DEOA’s savings clause. 20 U.S.C. §3505(a). Thus, contrary to the district court,

JA 403-04, DOE is not entitled to deference for its interpretation of its own regulations: *the effective regulations are not DOE's*. Further, even if the Three-Part Test *grammatically* interpreted the Title IX regulations, it nonetheless deserves no deference because – as explained in Sections II.A.1 (regulations), II.D (statute), and II.E (Constitution) – it does not *lawfully* interpret them. *Kentuckians for Commonwealth Inc. v. Rivenburgh*, 317 F.3d 425, 439-40 (4<sup>th</sup> Cir. 2003) (no deference to regulatory interpretation that renders regulations unlawful).

### 1. Multi-Agency Delegations

Extra-circuit decisions that support the Three-Part Test rest on “*Chevron*” deference to DOE’s interpretation of Title IX. Notwithstanding those decisions, EIA submits that either no deference or the lesser “*Skidmore*” deference applies to regulatory regimes that (like Title IX) provide identical authority to multiple agencies. *Compare Chevron, U.S.A., Inc. v. N.R.D.C.*, 467 U.S. 837, 843-44 (1984) *with Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *see Bragdon v. Abbott*, 524 U.S. 624, 642 (1998); *U.S. v. Mead Corp.*, 533 U.S. 218, 227-28 (2001); *Bowen v. Am. Hospital Ass’n*, 476 U.S. 610, 643 n.30 (1986) (plurality); *Wachtel v. O.T.S.*, 982 F.2d 581, 585 (D.C. Cir. 1993)

(*Chevron* deference is “inappropriate” to affirmative-action statute administered equally by four agencies).<sup>10</sup>

### 2. Title IX’s Mere “Effectuation”

With congressional authority only to *effectuate* §901(a)’s intentional-discrimination prohibition, Title IX’s delegation lacks *Chevron’s* breadth. *See* 42 U.S.C. §7601(a)(1) (“Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under this chapter”) (delegation in *Chevron*). “Far from displaying congressional intent to create new rights, §602 limits agencies to ‘effectuat[ing]’ rights already created by §601.” *Sandoval*, 532 U.S. at 289 (alteration in original). That narrow delegation does not empower agencies to impose disparate-impact standards. *Cf.* 118 Cong.

---

<sup>10</sup> Senator Bayh’s failed 1971 amendment explicitly delegated rulemaking authority only to HEW. 117 Cong. Rec. 30,399, 30,404 (1971); *accord id.* 30,407 (Sen. Bayh). Senator Bayh’s 1972 amendment (which, with the House bill, became Title IX) delegates rulemaking authority to *all* federal agencies. 118 Cong. Reg. 5803 (1972). “Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language.” *Cardoza-Fonseca*, 480 U.S. at 442-43 (citation omitted).

Rec. 5807 (regulations “permit differential treatment by sex” only in “very unusual cases” where “absolutely necessary”).

### 3. HEW’s Deference Non-Transferable

In splitting HEW into DOE and HHS, Congress did not transfer HEW’s interpretive authority to DOE. Nothing in DEOA §301 or elsewhere in the DEOA transfers Title IX rulemaking authority to DOE. DEOA §301(a)(1)’s laundry list of inferior HEW offices does not include the HEW Secretary, and DEOA §301(a)(2)’s laundry list of statutes does not include Title IX or the Javits Amendment. 20 U.S.C. §3441(a)(1)-(2). Because it applies only to “functions transferred by this section,” DEOA §301(a)(3) cannot include Title IX (or the Javits Amendment) rulemaking authority, which “this section (§301) did not transfer. 20 U.S.C. §3441(a)(3). Moreover, as distinct from *enforcement* authority, HEW’s *rulemaking* authority was administered by the *HEW Secretary*, and thus was not “being administered by the Office of Civil Rights,” as required by §301(a)(3)’s terms.<sup>11</sup> Thus, like any other

---

<sup>11</sup> Had DEOA transferred HEW’s Office of Civil Rights (“OCR”) to DOE, as the Senate Bill proposed, one could make a strained argument that Subsection 301(a)(3)’s “relates-to” clause includes any “function” related to any authority wielded by OCR. But the Senate receded to the

(Footnote cont’d on next page)

agency, DOE draws its rulemaking authority from Title IX itself, which authorizes and directs *each* federal agency to issue Title IX regulations. 20 U.S.C. §1682. Under this authority, DOE issued regulations upon its formation in 1980, 34 C.F.R. pt. 106, while HHS retained the original HEW regulations, 45 C.F.R. pt. 86. One of two situations applies: (1) as inheritor of all non-transferred HEW authority, HHS is the nation’s Title IX czar, 20 U.S.C. §3508(b), or (2) consistent with their plain language and legislative histories, neither Title IX nor the Javits Amendment delegated special authority to HEW, HHS, or DOE.

### 4. “Javits Amendment”

Because agencies axiomatically lack any authority unless expressly delegated to them, *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988), and that judicial deference applies only to actions within that delegation, *Chevron*, 467 U.S. at 865, the Javits Amendment cannot justify deference.

---

(Footnote cont’d from previous page.)

House in Conference, and the DEOA created a new OCR within DOE instead of transferring HEW’s OCR. H.R. Conf Rep. 96-459, 46-47, *reprinted in* 1979 U.S.C.C.A.N. 1612, 1626; 20 U.S.C. § 3413 (*creating* DOE’s OCR). Thus, the strained argument is neither availing nor available.

*First*, the Javits Amendment directs HEW's Secretary to issue merely a *proposed* rule, which commands no deference. *Matter of Appletree Markets, Inc.*, 19 F.3d 969, 973 (5<sup>th</sup> Cir. 1994) (“inappropriate to defer to proposed regulations”); *Public Citizen, Inc. v. Shalala*, 932 F.Supp. 13, 18 n.6 (D.D.C. 1996) (citing *Public Citizen Health Research Group v. Commissioner, F.D.A.*, 740 F.2d 21, 32-33 (D.C. Cir. 1984)) (same); *Utah Wilderness Alliance v. Dabney*, 222 F.3d 819, 829 (10<sup>th</sup> Cir. 2000) (non-final agency policies not entitled to *Chevron* deference). By requiring only proposed regulations, the Tower-Javits Amendment met the stated objective of “not... confer[ring] on HEW any authority it does not already have.” 120 Cong. Rec. 15,323; Conf. Rep. 93-1026, *reprinted in* 1974 U.S.C.C.A.N. 4271 (adopting Senate's rulemaking provision).

*Second*, assuming *arguendo* that it confers authority, the Javits Amendment confers only the one-time authority to issue a proposed rule within 30 days of the enactment of the Education Amendments of 1974. As such, courts would owe deference only to HEW's 1974 proposal, not to HEW's 1975 final rule, much less to agencies' subsequent actions, proposed or final. Unlike the broad delegation in *Chevron*, such temporary, special-circumstance delegations cannot elevate the

delegate. *Cf. U.S. v. Eaton*, 169 U.S. 331, 343 (1898) (“Because the subordinate officer is charged with the performance of the duty of the superior for a limited time and under special and temporary conditions he is not thereby transformed into the superior and permanent official”).

*Third*, assuming *arguendo* that the Javits Amendment conferred authority for the Three-Part Test, the Javits Amendment's exclusive focus on *intercollegiate* athletics would leave HEW without deference for *interscholastic* athletics. Similarly, and again assuming *arguendo* that the Javits Amendment conferred *any* authority on HEW, DOE still could not claim that authority: DEOA left any Javits Amendment delegation with HHS, not with DOE. *See* Section II.B.3, *supra*. Because Congress likely did not intend either to create an intercollegiate-interscholastic dichotomy or to crown HHS as the nation's Title IX czar, this Court should read the Javits Amendment not to have conferred any new authority.

## 5. Policy Statements

DOE made a significant concession below: “The *Policy Interpretation* and subsequent clarifications *do not state whether a*

*violation of the regulations has occurred*; instead, this determination is made on a case-by-case basis in DOE's investigative letters of findings and other compliance documents." JA 215 (emphasis added). By retreating from classifying the Three-Part Test as obligatory, DOE aligns itself with HEW's "Hamlin Memorandum," JA 133 ("failure to meet the [Policy Interpretation] compliance factors does not constitute proof that an educational institution violated Title IX"). In administrative-law terms, DOE retreated from an "interpretive rule" or "substantive rule" to a "general statement of policy." 5 U.S.C. §553(b)(A).

General statements of policy have two defining characteristics: (1) they operate only prospectively by announcing factors that the agency will consider in resolving future substantive questions, and (2) they nonetheless leave the agency free to exercise its discretion, without establishing a "binding norm." *Burroughs Wellcome Co. v. Schweiker*, 649 F.2d 221, 224 (4<sup>th</sup> Cir. 1981). Significantly, such statements are not entitled to deference when an agency relies on them to resolve a future substantive question because, logically, the future action (not the initial statement) is the final agency action. *Pacific Gas*

*& Elec. Co. v. F.P.C.*, 506 F.2d 33, 38-39 (D.C. Cir. 1974); *Texaco*, 412 F.2d at 744; *Amrep Corp. v. FTC*, 768 F.2d 1171, 1178 (10<sup>th</sup> Cir. 1985); *Mada-Luna v. Fitzpatrick*, 813 F.2d 1006, 1013-14 (9<sup>th</sup> Cir. 1987). To the extent that the Three-Part Test is a mere general statement of policy, neither DOE nor *a fortiori* JMU can demand deference.

By contrast, if DOE or JMU maintain that the Three-Part Test imposes obligations or creates a "safe harbor" for what otherwise would violate the regulation and the statute, the Three-Part Test nonetheless lacks deference. A court can uphold agency action only on the basis that the agency articulated, *Motor Vehicle Ass'n v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 50 (1983), and 1979's Three-Part Test was neither binding nor even an "interpretation." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (no deference required if alternate reading compelled by agency intent at the time of promulgation); *cf. Fed'l Mar. Bd. v. Isbrandtsen Co.*, 356 U.S. 481, 499-500 (1958) (no deference for new interpretation of policy passed between agencies). Whether a general statement of policy (1979) or a newly minted interpretive or substantive rule (1996, 2003, and 2005), the Three-Part Test warrants no deference.

### **C. Actionable Procedural Violations**

On *procedural* due-process, notwithstanding the “great deference” to the “procedures [administered] by state educational institutions,” federal courts intervene to “ensur[e] rudimentary precautions against unfair or mistaken findings... and arbitrary exclusion.” *Jones v. Bd. of Governors of Univ. of North Carolina*, 704 F.2d 713, 715-16 (4<sup>th</sup> Cir. 1983) (upholding preliminary injunction to reinstate student pending hearing on disciplinary suspension) (interior quotations omitted). Although the defendants did not directly challenge EIA’s procedural due-process argument, JA 143, the district court found that athletics lack due-process protection. JA 407 n.10.

Protected property and liberty interests can arise under federal or state law, *Goss v. Lopez*, 419 U.S. 565, 573 (1975) (analyzing school suspension under Ohio law), which can include athletics. *Compare Palmer v. Merluzzi*, 868 F.2d 90, 95 (3<sup>rd</sup> Cir. 1989) (hearing due-process claim for 60-day athletic suspension under New Jersey law) *with Angstadt v. Midd-West Sch. Dist.*, 377 F.3d 338, 344 (3<sup>rd</sup> Cir. 2004) (dismissing athletics due-process claim under Pennsylvania law). Here, the Title IX regulations (and thus VHRA) require assessing both

genders’ interests and allocating opportunity accordingly, which JMU did not do. DOE suggests that EIA can enforce these procedures directly, because its regulations implement §901(a), not §902. EIA disputes DOE’s premise, but not its conclusion. VHRA creates state-law rights to JMU’s Title IX regulatory compliance, which (along with students’ contractual and quasi-contractual rights from elevated student fees and JMU’s representations) EIA can enforce via §1983 and procedural due process.

### **D. No Title IX Authority**

No-one disputes that §901(a) prohibits only intentional, gender-based discrimination. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173-74 (2005). It would be “absurd” to contend otherwise. *Sandoval*, 532 U.S. at 282 & n.2. Whether one characterizes them as affirmative-action, equal-opportunity, or disparate-impact requirements, §86.41(c) clearly exceeds the statutory prohibition. *Horner v. Kentucky High Sch. Athletic Ass’n*, 206 F.3d 685, 694 (6<sup>th</sup> Cir. 2000) (distinguishing the regulations’ equal-opportunity mandate from intentional discrimination). For example, schools could meet the intentional-discrimination statute by fielding only teams that generate

enough revenue to pay their expenses. As long as they did not erect any gender-based barriers to fundraising or gate receipts, schools could limit their athletic departments to profitable men's football teams, clearly violating §86.41(c), without violating §901(a) or §86.41(a).

Three circuits have argued that “it would require blinders to ignore that the motivation for promulgation of the regulation on athletics was the historic emphasis on boys’ athletic programs to the exclusion of girls’ athletic programs.” *Williams v. Sch. Dist.*, 998 F.2d 168, 175 (3<sup>rd</sup> Cir. 1993); *Neal v. Bd. of Tr.*, 198 F.3d 763, 767 (9<sup>th</sup> Cir. 1999); *Cohen*, 101 F.3d at 175-76. As a historically women’s college, JMU falls outside that argument. *Cohen v. Brown Univ.*, 991 F.2d 888, 900 n.17 (1<sup>st</sup> Cir. 1993). In any event, “it is not, and cannot be, our practice to restrict the unqualified language of a statute to the particular evil that Congress was trying to remedy.” *Brogan v. U.S.*, 522 U.S. 398, 403 (1998). EIA submits that this Court must honor the statute that Congress enacted, which prohibits intentional gender discrimination and eliminates all “quotas,” “ceilings,” “even splits,” “arbitrary ratios,” and “specific percentage balances.” See Statutory Background, *supra*.

Indeed, numerical, group-based safe harbors that excuses any harms to individuals injured along the way to a group-based bottom line are foreign to discrimination law. *Connecticut v. Teal*, 457 U.S. 440, 453-57 (1982) (under Title VII, reaching a presumptively nondiscriminatory statistical “bottom line” does not excuse discrimination used to attain that bottom line). Although arising under Title VII, *Teal* applies equally to all federal anti-discrimination laws, which protect individuals, not groups. *Betsey v. Tuttle Creek Assoc.*, 736 F.2d 983, 987 (4<sup>th</sup> Cir. 1984); *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 640 (1999) (applying Title VII precedents to Title IX). Even if it establishes proportionality *as Title IX compliant*, the 1979 Policy Interpretation nowhere insulates JMU’s discriminatory actions *to reach* proportionality.

Reliance on Title VII is particularly appropriate here: Title IX incorporates Title VII’s restriction against preferential treatment based on imbalances with the total population, 20 U.S.C. §1681(b), which is “designed to prevent.... undue ‘Federal Government interference.... because of some Federal employee’s ideas of.... balance.’” *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 206-07 (1979) (citations

omitted).<sup>12</sup> Title IX's author and House floor manager was explicit in accepting that provision as a floor amendment: "a quota system would hurt our colleges and universities [and I oppose them] even in terms of attempting to end discrimination on the basis of sex." 117 Cong. Rec. 39,262 (1971) (Rep. Green). Nothing describes the Three-Part Test better than "hurt[ing] colleges and universities" because of "some Federal employee's idea of balance." Because they must "honor the clear meaning of a statute, as revealed by its language, purpose, and history," courts must hold that agencies "lack[] the authority" "to impose an affirmative-action obligation on all recipients of federal funds" when "neither the [statute's] language, purpose, nor history... reveals an intent to impose [one]." *Southeastern Cmty. Coll. v. Davis*, 442 U.S. 397, 411-12 (1979). *Davis* reflects the law far more accurately than do the

---

<sup>12</sup> Although §901(b) allows consideration of "statistical evidence" in a specific "hearing or proceeding," 20 U.S.C. §1681(b), it "would be contrary to Congress' clearly expressed intent" to allow "quotas and preferential treatment [to] become the only cost-effective means of avoiding expensive litigation." *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 993 (1988) (plurality); *accord Wards Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 652-53 (1989).

extra-circuit decisions that mistakenly defer to a Three-Part Test that HEW never adopted.

The district court did not address the foregoing arguments that DOE lacks authority for the Three-Part Test in the first instance. Instead, the district court focused on EIA's argument that the Supreme Court's supervening *Sandoval* decision undercuts extra-circuit authority. JA 402-03.<sup>13</sup> Although the district court thought it significant that Congress had not corrected DOE's alleged error, congressional silence "lacks persuasive significance,'... particularly where

---

<sup>13</sup> Extra-circuit decisions rely explicitly or implicitly on DOE's authority to issue disparate-impact regulations under the intentional-discrimination statutes like Title IX and Title VI. *Sandoval* held that such statutes do not provide a private cause of action to enforce disparate-impact regulations because the statute did not create those rights, and agency regulations cannot create rights beyond the statute. 532 U.S. at 291. Before *Sandoval*, the federal government had relied on *Guardians Ass'n v. Civil Serv. Comm'n* and *Alexander v. Choate* for the proposition that federal agencies may adopt disparate-impact regulations. JA 193 & n.48 (pre-*Sandoval* Title IX Manual). In rejecting that position, the Court noted that neither *Guardians* nor *Choate* held that agencies have such authority, which would be in considerable tension with the statute. *Sandoval*, 532 U.S. at 281-82. Ironically, notwithstanding the federal government's losing *Sandoval* more than six years ago, its Title IX Manual still relies not only *dicta* that *Sandoval* discredited, but also on the district court decision that *Sandoval* overturned. JA 193 n.48 (*citing Sandoval v. Hagan*, 7 F.Supp.2d 1234, 1253 (M.D. Ala. 1998)).

administrative regulations are inconsistent with the controlling statute.” *Brown v. Gardner*, 513 U.S. 115, 121 (1994). Congressional inaction cannot support the theory that Congress ratified either HEW’s original Three-Part Test in 1979 or DOE’s 1996, 2003, and 2005 amendments by “clarification.” *See id.* (Congressional inaction frequently results from “unawareness, preoccupation, or paralysis”). Indeed, in 1979, HEW assured Congress that the Three-Part Test was not a rule or interpretation. JA 304-05.

The district court viewed JMU’s cuts as benevolently remedying historical discrimination against women athletes. JA 410. Congress adopted Title IX under the Spending Clause, not under the Fourteenth Amendment.<sup>14</sup> In Title IX, as in Title VI, Congress merely conditioned

---

<sup>14</sup> Significantly, if Congress had adopted it under the Fourteenth Amendment, Title IX would exceed Congress’ authority as applied to private schools. *U.S. v. Morrison*, 529 U.S. 598, 621-22 (2000) (“Fourteenth Amendment... prohibits only state action [and] erects no shield against merely private conduct, however discriminatory or wrongful”) (interior citations and quotations omitted). Thus, this Court should reject the notion that Title IX involves a finding of past discrimination against female athletes and simply apply the clear terms of the statute. JMU students have standing to challenge Title IX’s application to private schools because the Three-Part Test interferes with their First-Amendment interests, which authorizes a *facial*

(Footnote cont’d on next page)

federal funding on the prospective cessation of *all* intentional discrimination, including reverse discrimination. Whatever discrimination academia inflicted on women pales in comparison to this nation’s discrimination against African-Americans, and Congress chose the Title VI template for Title IX.

Significantly, HEW expressly did not find “the universal presence of discrimination” in 1979, 44 Fed. Reg. 71,420, and DOE has not found it since. As a former women’s college, JMU has *no history* of discrimination against women that would justify the imposition of gender-conscious remedies against men. *Civil Rights Cases*, 109 U.S. 3, 14 (1883) (invalidating remedial measure not tied to prior equal-protection violations). Quite the contrary: since 2000, JMU has operated a bifurcated athletic department designed in significant part to discriminate against male athletes, JA 161-63 (¶¶3, 7), 171-73 (¶¶4, 8), 184 (¶¶10-11), making JMU a candidate for gender-conscious remedies *in favor of men* and a school at which opportunities for male athletes

---

(Footnote cont’d from previous page.)

*challenge* against an overbroad rule, even if – as applied at JMU – the private-school issue would not arise. *See* note 16, *infra*.

have been limited. 45 C.F.R. §86.41(b).<sup>15</sup> Under the regulations, only prior intentional discrimination authorizes a gender-conscious remedy that entails reverse discrimination. 45 C.F.R. §§86.3, .41(a); *U.S. v. Fordice*, 505 U.S. 717, 732 n.7 (1992).

Ultimately, it does not matter what Congress, HEW, or DOE intended: the “power to interpret the Constitution... remains in the Judiciary.” *City of Boerne v. Flores*, 521 U.S. 507, 524 (1997). Congressional silence is irrelevant to whether this Court accepts DOE’s interpretation as constitutional. Even congressional intent for (or acquiescence to) the Three-Part Test could not make an unconstitutional quota constitutional:

The fact that [§901(a)(5)] applies to [the school] provides the State no solace: “[A] statute apparently governing a dispute cannot be applied by judges, consistently with their obligations under the Supremacy Clause, when such an application... would conflict with the Constitution.

---

<sup>15</sup> Thus, if JMU will not reinstate men’s cross-country to run *with* women’s cross-country, JMU must allow men to run *on* the women’s team. 40 Fed. Reg. 24,134 (§86.41(b) asks whether opportunity was limited “at the institution in question”).

*Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 731-33 (1982). This Court must read Title IX consistent with its legislative history and the Constitution, not with administrative accident and legerdemain.

#### **E. Unconstitutional Quota**

The Equal Protection Clause “essentially... direct[s] that all persons similarly situated... be treated alike,” *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985), and “protect *persons*, not *groups*.” *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (emphasis in original). Assuming *arguendo* that Title IX somehow authorizes the Three-Part Test, JMU remains subject to the Fourteenth Amendment, which clearly prohibits such quotas. *Truax v. Raich*, 239 U.S. 33, 41 (1915) (“If [employment] could be refused solely upon the ground of [class membership], the prohibition of the denial to any person of the equal protection of the laws would be a barren form of words”). After refuting the district court’s analysis and laying out the applicable constitutional standards, EIA demonstrates its entitlement to relief under each applicable standard of constitutional scrutiny.

To reject EIA’s equal-protection arguments, the district court relied exclusively on *Miami Univ. Wrestling Club v. Miami Univ.*, 302

F.3d 608, 614 (6<sup>th</sup> Cir. 2002), and *Kelley v. Board of Trustees*, 35 F.3d 265, 272 (7<sup>th</sup> Cir. 1994), JA 406-07, notwithstanding that neither decision reaches the equal-protection arguments that EIA raised. Because “[n]othing in any version of the complaint can be construed as a direct [constitutional] challenge to either the law, the regulations or the Policy Interpretation,” the *Miami* court did not reach the plaintiffs’ equal-protection argument. *Miami Univ.*, 302 F.3d at 614. As the district court notes, *Miami* relied on *Kelley*, JA 406, which found an equal-protection challenge to Title IX compliance plans to constitute an “impermissible” “collateral attack.” *Kelley*, 35 F.3d at 272. While some circuits, including the Seventh Circuit, have held Title IX to preempt equal-protection challenges under §1983, see *Waid v. Merrill Area Pub. Sch.*, 91 F.3d 857, 863 (7<sup>th</sup> Cir. 1996); *Williams*, 998 F.2d at 176, other circuits disagree. *Communities for Equity v. Michigan High School Athletic Ass’n*, 459 F.3d 676, 694 (6<sup>th</sup> Cir. 2006); *Crawford v. Davis*, 109 F.3d 1281, 1283 (8<sup>th</sup> Cir. 1997); *Seamons v. Snow*, 84 F.3d 1226, 1233-34 (10<sup>th</sup> Cir. 1996). As evidenced by its recent *en banc* decision, this Circuit allows plaintiff simultaneously to assert Title IX and equal-protection challenges. *Jennings v. Univ. of N. Carolina*, 482 F.3d 686, 702 (4<sup>th</sup> Cir.

2007) (*en banc*); cf. *Smith v. Robinson*, 468 U.S. 992, 1012 n.15 (1984) (nothing prevents federal courts’ reaching constitutional issues in cases over which the federal court has jurisdiction). Thus, the “impermissible collateral attack” argument is foreign in this Circuit.

*Kelley* also briefly considered whether “Title IX and the applicable regulation – rather than the actions of the defendants – are unconstitutional.” *Kelley*, 35 F.3d at 272. Relying on *Metro Broadcasting, Inc. v. F.C.C.*, 497 U.S. 547, 565-66 (1990), to review “benign” classifications under lesser scrutiny, *Kelley* summarily rejected that facial challenge. *Id.* Subsequently, the Supreme Court overruled *Metro Broadcasting’s* lesser scrutiny for “benign” classifications. *Adarand*, 515 U.S. at 228. In summary, *Kelley* found an as-applied challenge “impermissible” and rejected a facial challenge based on a since-overruled decision. Given that EIA brings both a direct challenge and a *permissible* as-applied challenge, neither *Miami* nor *Kelley* present any obstacle. See *I.N.S. v. Nat’l Ctr. for Immigrants’ Rights, Inc.*, 502 U.S. 183, 188 (1991) (“[t]hat the regulation may be invalid as applied... does not mean that the regulation is facially invalid”).

If it authorizes JMU to act unconstitutionally, the Three-Part Test obviously is unlawful. *U.S. v. Am. Library Ass'n*, 123 S.Ct. 2297, 2303 (2003) (Congress cannot use spending power to induce recipients “to engage in activities that would themselves be unconstitutional”); *Frost v. R.R. Comm.*, 271 U.S. 583, 594 (1926) (“[i]t is inconceivable that guaranties embedded in the Constitution... may... be manipulated out of existence” by conditioning their “surrender... in exchange for a valuable privilege”).

Whatever scrutiny this Court applies, compliance with a quota – just to make the numbers look good – is simply not a government interest. *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003) (“outright... balancing [] is patently unconstitutional”); *Freeman v. Pitts*, 503 U.S. 467, 494 (1992) (“balance is not to be achieved for its own sake,” and there is “no duty to remedy imbalance... caused by demographic factors”); *Craig v. Boren*, 429 U.S. 190, 198 (1976) (“administrative ease and convenience [are insufficient] to justify gender-based classifications”); *Plyler v. Doe*, 457 U.S. 202, 221-22 (1982) (“denial of education to some isolated group of children poses an affront to one of the goals of the Equal Protection Clause: the abolition of governmental

barriers presenting unreasonable obstacles to advancement on the basis of individual merit”); *Romer v. Evans*, 517 U.S. 620, 623 (1996) (“Constitution neither knows nor tolerates classes among citizens”) (interior quotations omitted).

As five justices recently found, balance is simply not an end in itself. *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 127 S.Ct. 2738, 2757 (2007) (rejecting balancing as a compelling interest) (plurality); *id.* at 2794 (rejecting “plan... [that] relies upon a mechanical formula... on the basis of... rigid criteria”) (Kennedy, J., concurring in part and concurring in the judgment). If the schools’ minor balancing in *Parents Involved* qualifies as unconstitutionally mechanical, JMU’s wholesale reliance on a quota *a fortiori* violates the Fourteenth Amendment. As its resolution demonstrates, JMU cut the teams precisely and only to attain enrollment proportionality (*i.e.*, a quota). Whatever the level of scrutiny, that is no reason at all.

### 1. Intermediate Scrutiny

Under intermediate scrutiny, “[p]arties who seek to defend gender-based government action must demonstrate an ‘exceedingly persuasive justification.’” *U.S. v. Virginia*, 518 U.S. 515, 531 (1996).

They “must show at least that the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives,” *Virginia*, 518 U.S. at 533 (internal quotations omitted, alteration in original), for which the “burden of justification is demanding and... rests entirely on the [government].” *Id.* JMU cannot meet that standard.

The only legitimate interest (avoiding intentional discrimination) has little or no relationship to an enrollment-based participation quota, regardless of interest. *Wards Cove*, 490 U.S. at 651 (“nonsensical” to measure alleged discrimination by comparing participation in specialized pursuits with general population); *Watson*, 487 U.S. at 996 (1988) (“statistics based on an applicant pool containing individuals lacking minimal qualifications for the job would be of little probative value”); *Belk v. Charlotte-Mecklenburg Bd. of Educ.*, 269 F.3d 305, 332 (4<sup>th</sup> Cir. 2001) (“disparity does not, by itself, constitute discrimination”). Because the applicant pool’s genders participate in athletics at different rates, *compare* JA 69 (JMU participation) *with* JA 77-90 (Virginia and national participation), it should surprise no-one that JMU’s

participation rates differ. Under the circumstances, it violates equal protection to demand equal participation: “[f]undamental injustice... undoubtedly result[s] if the law were to treat different people as though they were the same.” *Faulkner v. Jones*, 10 F.3d 226, 230 (4<sup>th</sup> Cir. 1993). That men participate in athletics at higher rates than women do (or that football teams have large squad sizes) does not constitutionally justify penalizing men as a group.

## 2. Strict Scrutiny

While the “distinction between an ‘important interest’ under intermediate scrutiny and a ‘compelling interest’ under strict scrutiny” remains “unclear,” *Grutter v. Bollinger*, 288 F.3d 732, 742 n.7 (6<sup>th</sup> Cir. 2002) (*en banc*), *aff’d* 539 U.S. 306 (2003), the First Amendment injuries here may make its resolution unnecessary. EIA has argued that the planned cuts injure not only EIA’s members’ procedural due-process and substantive equal-protection rights but also their associational rights. *See* Section I.C, *supra*. The district court rejected this argument based on a series of inapposite cases on cut teams’ rights of association *among those cut teams’ members* or athletics as insufficiently “expressive” under the First Amendment. *See* JA 407-08 n.10 (citing

cases). EIA raises associational injuries only on behalf of the “one big family” (*i.e.*, the men’s and women’s cross-country, swimming, and track teams) that JMU severed. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984) (“implicit in the right to engage in activities protected by the First Amendment” is “a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, *educational*, religious, and cultural ends”) (emphasis added). The technical critique and error correction between male and female teammates clearly constitutes protected *educational* association.

Significantly, courts have the *obligation* to consider such associational injuries when they arise in an equal-protection context. *Lyng v. Int’l Union*, 485 U.S. 360, 365-66 (1988) (obligation arises when government action “directly and substantially interfere[s] with [EIA member’s] ability to associate” “in pursuit of a common goal by lawful means”) (internal quotations and citations omitted).<sup>16</sup> Under the

---

<sup>16</sup> Because the Three-Part Test interferes with First-Amendment interests, EIA has standing for a *facial challenge* its overbreadth. *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973) (“Overbreadth attacks... allowed where... rights of association were ensnared in statutes which, by their broad sweep, might... burden[] innocent associations”).

circumstances, JMU must meet strict scrutiny before restricting the swimming, track, and cross-country teams’ rights to associate, with little or no marginal cost, for educational purposes. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (political association).

### 3. Rational-Basis Test

The district court ignored EIA’s argument that JMU’s cuts cannot survive rational-basis review. “The purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State’s jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.” *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (internal quotation marks and alteration omitted). Thus, not only the men’s and women’s archery and gymnastics teams (who arguably do not suffer intentional gender discrimination) but also the other teams “allege[] that [they] ha[ve] been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.” *Id.*; *cf. Village of Arlington Heights v. Metro. Housing Development Corp.*, 429 U.S. 252, 263 (1977) (discrimination aside, “[f]oremost” among the

public's rights is the "right to be free of arbitrary or irrational government actions"). This component of EIA's equal-protection claim hinges on the procedural validity of the Three-Part Test, which JMU felt both authorized and compelled to meet. JA 91, 204. If JMU's basis for acting was error (*i.e.*, if JMU's pre-cut alignment *complied* with Title IX and Virginia law), the teams have a right to have their fate reconsidered under the proper standards. Significantly, the teams deserve reconsideration under the appropriate Title IX (and Virginia) standards, regardless of whether the Three-Part Test (and JMU's cuts) *substantively violate* the Title IX (as applied or facially) or whether Title IX merely allows, without requiring, compliance via the Three-Part Test. *Carey v. Phipus*, 435 U.S. 247, 266-67 (1978) ("right to procedural due process is 'absolute'"). Only if the Three-Part Test forecloses compliance via additional tests – which even DOE could not answer, JA 311 – can Title IX shield JMU from rational-basis review.

**F. Reliance on Federal Officers**

EIA informed JMU in March 2007 of the Three-Part Test's unlawfulness. Compl. ¶130 & Ex. 7. JMU cannot defend its conduct with reliance on federal officers' misinformation:

Whatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority.

*F.C.I.C. v. Merrill*, 332 U.S. 380, 384 (1947); *U.S. v. Hoechst Celanese Corp.*, 128 F.3d 216, 224 (4<sup>th</sup> Cir. 1997) ("ignorance of the law or a mistake of the law is no defense"). Not can JMU blindly invoke federal guidance *now* where EIA expressly and explicitly warned them *in March* that that federal guidance was unavailing. *See* JA 102-06; *Hoechst Celanese*, 128 F.3d at 224 ("claim of lack of notice 'may be overcome in any specific case where reasonable persons would know that their conduct is at risk'") (*quoting Maynard v. Cartwright*, 486 U.S. 356, 361 (1988)). Because JMU has made no answer – much less a *reasoned* answer – to the notice that they received in March, JMU cannot qualify as "reasonable persons [who did not] know that their conduct is at risk" *Hoechst Celanese*, 128 F.3d at 224.

**G. Extra-Circuit Decisions Non-Controlling**

This Court has not addressed the Three-Part Test, and extra-circuit decisions cannot control here. *Virginia Soc'y for Human Life, Inc. v. F.E.C.*, 263 F.3d 379, 393 (4<sup>th</sup> Cir. 2001). Moreover, EIA presents

procedural arguments and evidence that those extra-circuit decisions never considered:

Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.

*Webster v. Fall*, 266 U.S. 507, 511 (1925); *U.S. v. Jones*, 225 F.3d 468, 469 (4<sup>th</sup> Cir. 2000) (same). Certainly, the extra-circuit “cases cannot be read as foreclosing an argument that they never dealt with.” *Waters v. Churchill*, 511 U.S. 661, 678 (1994). Particularly where EIA presents significant arguments and evidence that those circuits ruled incorrectly, this Court’s *de novo* review will avoid “substantially thwart[ing] the development of important questions of law.” *Virginia Soc’y*, 263 F.3d at 393 (interior quotations omitted).

### III. **BLACKWELDER FACTORS**

“[A] preliminary injunction serves the limited function during the course of litigation to protect the status quo and to prevent irreparable harm ultimately to preserve the court’s ability to render a meaningful judgment on the merits.” *In re Microsoft Corp.*, 333 F.3d 517, 531 (4<sup>th</sup> Cir. 2003). Interim relief is appropriate “if the court is satisfied that there is a probable right and a probable danger, and that the right may

be defeated, unless the injunction is issued, and considerable weight is given to the need of protection to the plaintiff as contrasted with the probable injury to the defendant.” *Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 189, 193 (4<sup>th</sup> Cir. 1977) (interior quotations omitted).

When considering a request for interim injunctive relief, this Circuit balances four factors: (1) the irreparable harm to the plaintiff if interim relief is denied; (2) the harm to the defendant if the requested relief is granted; (3) the likelihood that the plaintiff will succeed on the merits; and (4) the public interest. *D.O.L. v. Wolf Run Mining Co., Inc.*, 452 F.3d 275, 280 (4<sup>th</sup> Cir. 2006).

In this Circuit, “irreparable harm to the plaintiff and the harm to the defendant are the two most important factors.” *Rum Creek Coal Sales, Inc. v. Caperton*, 926 F.2d 353, 359 (4<sup>th</sup> Cir. 1991). Balancing these first two factors “results in a sliding scale that demands less of a showing of likelihood of success on the merits when the balance of hardships weighs strongly in favor of the plaintiff, and vice versa.” *In re Microsoft*, 333 F.3d at 526.

If, after balancing [the first] two factors, the balance tips decidedly in favor of the plaintiff, a preliminary injunction will be granted if the plaintiff has raised questions going to the merits

so serious, substantial, difficult and doubtful, as to make them fair ground for litigation and thus for more deliberate investigation.

*Id.* (alterations in original); *Blackwelder*, 550 F.2d at 195 (same). The following four sections analyze the balance of harms, the likelihood of success, the public interest, and an appropriate injunction bond.

#### **A. Balance of Harms**

“[T]he balancing of hardships must be made before reaching the question of likelihood of success on the merits, because until that balance of harm has been made, the district judge cannot know how strong and substantial must be the plaintiff’s showing of likelihood of success.” *Manning v. Hunt*, 119 F.3d 254, 263-64 (4<sup>th</sup> Cir. 1997) (internal quotations and citation omitted). As set forth below, the balance of harms tips decidedly to EIA.

##### **1. Irreparable Injury**

The opportunity to compete in intercollegiate athletics is fleeting and, once gone, is forever gone. As the district court recognized, JA 389-90, EIA’s members on the cut teams face imminent and irreparable harm in lost opportunity to compete, JA 390 (describing affidavits and testimony as “compelling” and “moving”), which a court can neither calculate nor reduce to money damages. *Direx Israel, Ltd. v.*

*Breakthrough Med. Group*, 952 F.2d 802, 812 (4<sup>th</sup> Cir. 1991) (injury must be “neither remote nor speculative, but actual and imminent”) (citation omitted); *Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.*, 22 F.3d 546, 551-52 (4<sup>th</sup> Cir. 1994) (damages’ susceptibility to calculation is one factor relevant to irreparable harm). In addition, EIA’s members on the continuing women’s cross-country, swimming, and track teams suffer First-Amendment associational injuries, JA 150-51 (¶¶5-7), 152-53 (¶¶4-6), 156 (¶¶4-5), which also qualify as irreparable: “loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Newsom*, 354 F.3d at 261 (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). Except for EIA’s alleged delay in bringing suit (Section III.A.3, *infra*) and its alleged failure to raise association injuries (Section I.C, *supra*), EIA’s members unquestionably face significant and irreparable injuries.

##### **2. Defendants’ Harm**

Although the Court cannot determine the requisite likelihood of success without first balancing the harms, *Manning*, 119 F.3d at 263-64, the Court must evaluate the underlying merits to determine

whether JMU would suffer a cognizable harm. Under the Three-Part Test caselaw relied on by the district court and the defendants, courts can and should preliminarily enjoin schools to maintain disadvantaged teams. JA 392-98 (citing cases); *see also Eisenberg ex rel. Eisenberg v. Montgomery County Public Sch.*, 197 F.3d 123, 133-34 (4<sup>th</sup> Cir. 1999) (enjoining substantively unlawful school actions); *Jones*, 704 F.2d at 715-16 (enjoining procedurally defective school action). If EIA succeeds in moving the equal-opportunity fulcrum away from the Three-Part Test’s equal enrollment-based participation and back to Title IX regulations’ equal interest-based opportunity, neither JMU nor the district court can quarrel with interim (or permanent) injunctive relief.

Moreover, interim relief that merely requires the non-moving party to maintain the status quo and to refrain from violating the law does not constitute a cognizable harm under the balancing test. *Wolf Run Mining Co.*, 452 F.3d at 280 (finding no harm to defendant under balancing test where “the harm to a party by granting or denying a preliminary injunction is essentially the same as the consequence to a particular party in winning or losing on the merits”); *Nat’l Ass’n of Farmworkers Orgs. v. Marshall*, 628 F.2d 604, 615 (D.C. Cir. 1980)

“results do not constitute substantial harm for the purpose of delaying injunctive relief” where “[they] are no different from the Department’s burdens under the statutory scheme”). Specifically, this Circuit distinguishes between interim relief that merely maintains the status quo and “mandatory relief” that disturbs the status quo in the movant’s favor. *Wetzel v. Edwards*, 635 F.2d 283, 286 (4<sup>th</sup> Cir. 1980).<sup>17</sup> This Circuit sets a higher bar for the latter, which courts “should... grant[] only in those circumstances when the exigencies of the situation demand such relief,” *id.*, which EIA also meets.

Here, EIA seeks merely to preserve the status quo until the Court can reach the merits. If EIA obtains an injunction but ultimately loses on the merits, JMU will not suffer harm remotely comparable to the irreparable harm faced by EIA’s members. *Scotts Co. v. United Indus.*

---

<sup>17</sup> The “status quo preserved by a preliminary injunction is the last actual, peaceable, noncontested status that preceded the pending controversy.” 42 AM. JUR. 2d Injunctions §8 (2007); *accord Stemple v. Bd. of Educ. of Prince George’s County*, 623 F.2d 893, 898 (4<sup>th</sup> Cir. 1980) (“courts... will frame any equitable relief to preserve the last uncontested status between the parties which preceded the controversy until the outcome of the final hearing”). Here, the status quo consists of the ten teams as they existed no later than April 4, 2007, when JMU clearly had become a Doe defendant. The status quo does not include JMU’s *fait accompli*.

*Corp.*, 315 F.3d 264, 285 (4<sup>th</sup> Cir. 2002) (financial harm to defendants holds “little consequence” in balance of hardships). Indeed, if EIA loses its merits challenge to DOE’s Title IX regime, JMU also must comply with DOE’s “scholarship proportionality” test, which will cost JMU *more* in new scholarships than it would cost to field the same teams that JMU fielded in 2006-07. *See* Section III.D, *infra*. Thus, interim relief will not cost JMU *anything*: it saves money.

### 3. Timing Consistent with Irreparable Injury

As the district court found, JMU’s argument based on *Quince Orchard Valley Citizens Assoc., Inc. v. Hodel*, 872 F.2d 75 (4<sup>th</sup> Cir. 1989), is not dispositive. JA 389 n.3. “*Quince Orchard* simply does not require [courts] to find, as a matter of law, that the plaintiff suffered no irreparable injury because it delayed in initiating its request for a preliminary injunction.” *Candle Factory, Inc. v. Trade Assocs. Group, Ltd.*, 23 Fed.Appx. 134, 138, 2001 Copr. L. Dec. P 28,348 (4<sup>th</sup> Cir. 2001).

*Quince Orchard* played out over a dramatically longer timeframe, with significantly more prejudicial delay by the *Quince Orchard* plaintiffs than JMU can cite here. The challenged highway projects began their planning phases in 1971, but the plaintiffs did not sue until

1985 to enjoin the project, pending its receipt of the requisite federal approvals. *Maryland Conservation Council, Inc. v. Gilchrist*, 808 F.2d 1039, 1041 (4<sup>th</sup> Cir. 1986). After the *Gilchrist* court denied rehearing in March 1987, 808 F.2d at 1039, the case returned to the district court for discovery, which was interrupted when the federal government issued the required approvals in June 1987. *Quince Orchard*, 872 F.2d at 76. In July 1987, the plaintiffs voluntarily dismissed their claims *with prejudice*, only to file a new action *in another forum* nine months after the federal approvals. *Id.* After the second court transferred that action back to Maryland, the district court denied injunctive relief based on the plaintiffs’ delay, and this Court affirmed. *Id.*

By contrast, EIA filed this lawsuit on March 19, 2007, less than six months after JMU announced on September 29, 2006, that they intended to eliminate the ten athletic teams on July 1, 2007. Moreover, unlike the almost 15 years that the *Quince Orchard* defendants operated publicly before the *Quince Orchard* plaintiffs first sued, JMU unlawfully concealed their actions during a secret two-year planning phase. JA 203-04 (¶3(a)); VA. CODE §2.2-3700(B) (“this chapter... ensures the people of the Commonwealth... free entry to meetings of

public bodies wherein the business of the people is being conducted. The affairs of government are not intended to be conducted in an atmosphere of secrecy"). If JMU had not conducted its affairs secretly for two years, this litigation would have started much earlier and the merits would have resolved by now. As it is, it took EIA slightly more than two months to amend its complaint to address JMU-specific facts, to work with students (over the periods for final examinations and graduation) to prepare affidavits, and to outline and draft a motion for a preliminary injunction. To compare the time it took EIA to reach this stage to the *Quince Orchard* plaintiff's actions is untenable.

*First*, the period between September and January was largely attributable to JMU, not to EIA's members. JA 333. *Second*, JMU's nine-month argument implicitly claims that EIA's actions in June constitute JMU's first notice of EIA's intention to seek reinstatement, which is disingenuous. EIA advised JMU in March that EIA would amend its complaint to add them as named defendants if they did not defer their cuts, JA 102-06, and captioned its initial complaint against not only DOE but also John Doe parties that plainly included JMU unless it deferred its planned cuts. JA 7-9 ¶¶5-6. JMU had full and

actual notice of the issues raised here and rejected EIA's overture on April 4, 2007, JA 107, making JMU a Doe defendant since April 4, 2007, at the latest. Even without Doe-defendant status, JMU could have intervened in this well-publicized litigation to secure negative declaratory relief on its planned cuts' lawfulness: "the action for a... negative declaration is simply a broadening of the equitable action for the removal of a cloud from title to cover the removal of clouds from legal relations generally." *Luckenbach S.S. Co. v. U.S.*, 312 F.2d 545, 551-52 (2<sup>nd</sup> Cir. 1963). Instead of undertaking that prudent action or their own analysis of DOE's guidance, *see* Section II.F, *supra*, JMU proceeded recklessly, in reliance on federal guidance that JMU knew faced substantive attack in its local courthouse, based largely on the unlawfulness of JMU's plans. *See* JA 10 (¶¶11-12) (describing JMU's actions as illegal). *Third*, JMU did not introduce any evidence to rebut Coach Walton's testimony that the burdens posed by EIA's timing were trivial administrative matters that JMU easily could overcome. JA 369-71.

This case presents none of the *Quince Orchard* plaintiff's questionable tactics and none of the *Quince Orchard* defendant's

blamelessness. Under the circumstances, the district court committed legal error in concluding that “[it] *cannot* simply ignore the period of delay.” JA 390 (emphasis added). Given the many differences with *Quince Orchard*, a district court *could* disregard EIA’s timing, and this Court *should* disregard it.

**B. Likelihood of Success**

For the several independent reasons in Sections I and II, *supra*, EIA is highly likely to succeed on the merits. Indeed, because the balance of harms tips so decidedly in its favor, EIA need only raise a “serious question” on the merits to qualify for interim relief, *N.R.D.C. v. Watkins*, 954 F.2d 974, 981 (4<sup>th</sup> Cir. 1992), which Sections I and II, *supra*, clearly do. Either way, this Court should grant interim relief.

**C. Public Interest**

The public interest favors granting interim relief. *First*, even the district court acknowledges that the fourth *Blackwelder* prong collapses into the merits. JA 410. If the equal-opportunity regulation trumps the procedurally defective Three-Part Test (Section II.A, *supra*), and if DOE’s interest in its quota cannot justify reverse discrimination under equal-protection analysis (Section II.E, *supra*), the public interest cannot support JMU. *Second*, the public interest is best served by

“preserving the status quo *ante litem* until the merits of a serious controversy can be fully considered by a trial court.” *Maryland Undercoating Co. v. Paine*, 603 F.2d 477, 481 (4<sup>th</sup> Cir. 1979). *Third*, the “basic ‘public interest’ is further enhanced where, as here, the private controversy may possibly vindicate public policy” under the applicable statutes. *Blackwelder*, 550 F.2d at 197. Title IX, the Fourteenth Amendment, and their Virginia counterparts unquestionably provide a public-policy interest in public education free from intentional gender discrimination. *Fourth*, the public interest favors JMU’s following the law. *Washington v. Reno*, 35 F.3d 1093, 1103 (6<sup>th</sup> Cir. 1994) (describing “greater public interest in having governmental agencies abide by the federal laws that govern their... operations).

As explained in Section II.E.1, *supra*, the only legitimate interest (avoiding intentional discrimination) has little or no relationship to an enrollment-based participation quota, regardless of interest. Indeed, as explained in Section II.A.1, *supra*, the Title IX regulations (and thus VHRA) require allocating opportunity to interest, not participation to enrollment. Given such disconnects between government action and legitimate governmental interests, courts reject governments’ proffered

justification for discrimination. *Simon & Schuster, Inc. v. N.Y. State Crime Victims Bd.*, 502 U.S. 105, 120 (1991). The public interest clearly favors reinstatement.

#### **D. Injunction Bond**

Because JMU plainly, blatantly, and knowingly violated the Equal Protection Clause, Title IX, the Title IX regulations, and corresponding provisions of Virginia law, this Court has ample discretion to set a nominal injunction bond. *Candle Factory*, 23 Fed.Appx. at 139, 2001 Copr. L. Dec. P 28,348 (“TAG had no right to sell infringing candles in the first instance [so] the district court’s decision to fix a bond in the sum of \$500 was an appropriate exercise of its discretion”); see also *Maryland Dep’t of Human Resources v. U.S.D.A.*, 976 F.2d 1462, 1483 (4<sup>th</sup> Cir. 1992) (“computation of the bond... may be set in such sum as the court deems proper”) (interior quotations omitted). To paraphrase *Candle Factory*, because JMU “had no right to [ignore interest and to cut teams to meet a quota] in the first instance,” this Court can exercise its discretion to require EIA to post a nominal bond.

Indeed, JMU did not dispute EIA’s argument that – if the defendants prevail – Title IX also obligates JMU to meet “scholarship

proportionality.” By reinstating the ten teams, JMU would alleviate an otherwise-applicable gap in scholarships that exceeds the cost of reinstating the cut teams. Because JMU does not dispute that reinstating the teams will reduce (not increase) their financial obligations, this Court would be will within its discretion to set a nominal injunction bond. *Hoechst Diafoil Co. v. Nan Ya Plastics Corp.*, 174 F.3d 411, 421 & n.3 (4<sup>th</sup> Cir. 1999) (“a nominal bond may suffice” “[w]here... the risk of harm is remote... [or] circumstances otherwise warrant it”). Indeed, the marginal costs of allowing men to compete alongside women under the same coach in the three reciprocal sports are trivial. See JA 169 (¶6), 159 (¶7), 150 (¶5), 153 (¶3), 155-56 (¶3), 350-55; see also JA 209 (NCAA revenue-sharing).

#### **CONCLUSION**

EIA’s members are “innocent victims,” JA 410, not bound by extra-circuit decisions, and those decisions cannot bind this Court to follow DOE’s mistakes and misdirection. Given the Civil War vintage of the rights at issue, EIA asks the Court to accept that the Three-Part Test cannot fool all of the people, all of the time.

EIA respectfully asks this Court to reverse the motion for a preliminary injunction and to require a \$500.00 injunction bond.

Dated: November 13, 2007

Respectfully submitted,

---

Lawrence J. Joseph  
1250 Connecticut Av, NW,  
Suite 200  
Washington, DC 20036  
Tel: (202) 669-5135  
Fax: (202) 318-2254

---

Douglas G. Schneebeck  
Modrall Sperling  
500 Fourth Street, NW Suite 700  
Albuquerque, NM 87102  
Tel: (505) 848-1869  
Fax: (505) 848-1882  
*Counsel for Appellants*

**CERTIFICATE OF COMPLIANCE**

Pursuant to Rule 32(a) of the FEDERAL RULES OF APPELLATE PROCEDURE and the Fourth Circuit's Local Rule 32(b), the undersigned counsel hereby certifies that the attached brief is proportionately spaced, has a typeface of Century Schoolbook, 14 points, and contains 13,999 words, including footnotes, but excluding required tables and certificates and the corporate disclosure statement. I have relied on Microsoft Word 2002's word calculation feature for the calculation.

Dated: November 13, 2007

Respectfully submitted,

---

Lawrence J. Joseph  
1250 Connecticut Av, NW  
Suite 200  
Washington, DC 20036  
Tel: (202) 669-5135  
Fax: (202) 318-2254  
*Counsel for Appellant*

**CERTIFICATE OF SERVICE**

I hereby certify that on this 13<sup>th</sup> day of November 2007, I have caused two copies of the foregoing “Appellant’s Opening Brief” (including the attached Addendum to Appellant’s Opening Brief) to be served by Federal Express, with a courtesy copy sent via electronic mail, on the following counsel:

Thomas M. Bondy  
Appellate Staff, Civil Division  
U.S. Department of Justice  
950 Pennsylvania Ave., N.W.  
Washington, DC 20530  
Tel: (202) 514-4825

The Hon. William E. Thro  
John F. Knight  
Office of the Attorney General  
900 East Main Street  
Richmond, VA 23219  
Tel: (804) 786-2436

*for Federal Appellees*

*for University Appellees*

On the same day, I caused seven copies and one original of the foregoing “Appellant’s Opening Brief” (including the attached Addendum to Appellant’s Opening Brief) to be served on the Court via Federal Express, next business-day delivery.

---

Lawrence J. Joseph