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IN THE  
**Supreme Court of the United States**

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EQUITY IN ATHLETICS, INC.,  
PETITIONER,

v.

DEPARTMENT OF EDUCATION, *ET AL.*,  
RESPONDENTS.

\_\_\_\_\_  
**On Petition for Writ of *Certiorari* to the  
U.S. Court of Appeals for the Fourth Circuit**

\_\_\_\_\_  
**PETITION FOR WRIT OF *CERTIORARI***

\_\_\_\_\_  
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## **QUESTIONS PRESENTED**

Whether the implied private right of action under Title IX of the Education Amendments of 1972 (“Title IX”) preempts or otherwise displaces the rights of action under 42 U.S.C. §1983 and *Ex parte Young*?

Whether Title IX, §844 of the Education Amendments of 1974, and the Department of Education Organization Act delegated interpretive authority to the Department of Health, Education & Welfare and transferred that authority to respondent Department of Education?

Whether the Fourth Circuit’s *Blackwelder* and *Quince Orchard* tests apply the proper standard for entitlement to preliminary injunctive relief?

Whether petitioner Equity in Athletics, Inc., has demonstrated entitlement to preliminary injunctive relief?

## **PARTIES TO THE PROCEEDING**

Petitioner is Equity in Athletics, Inc. (“EIA”), a nonprofit membership organization. EIA’s members include, without limitation, coaches, student-athletes, fans, booster clubs, parents, save-our-sport groups, and/or alumni affiliated with various secondary and post-secondary athletic programs. Of particular relevance here, EIA’s members include male and female athletes on the ten intercollegiate athletic teams eliminated by the James Madison University on July 1, 2007, and on the demoted “club” teams that replaced the eliminated intercollegiate teams. In addition, EIA’s members include female athletes on the retained intercollegiate women’s track, cross country, and swimming teams who lost the benefit of associating, training, and participating with their eliminated male counterparts.

Respondents are the U.S. Department of Education (“DOE”), its Secretary and Assistant Secretary for Civil Rights in their official capacities and their individual capacities under color of legal authority, the United States, James Madison University (“JMU”), The Visitors of James Madison University (a Virginia corporate entity), the JMU Rector, Vice Rector, Visitors, President, and Athletic Director in their official capacities and their individual capacities under color of legal authority, and John Does and John Doe entities.

Officer substitutions aside, respondents were the defendants in district court and appellees in the court of appeals.\* DOE's Secretary and Assistant Secretary currently are Margaret Spellings and Stephanie Monroe, respectively, which presumably will change with the incoming federal administration. The JMU Visitors currently are Meredith Strohm Gunter (Rector), James E. Hartman (Vice Rector), Mark T. Bowles, Joseph F. Damico, Ronald C. Devine, Vanessa M. Evans, Lois J. Forbes, Charles H. Foster Jr, Joseph K. Funkhouser, II, Stephen R. Leeolou, Elizabeth V. Lodal, Wharton B. Rivers Jr., Larry M. Rogers, Judith S. Strickler, and Fred D. Thompson, Jr. The JMU President and Athletic Director currently are Linwood H. Rose and Jeffrey T. Bourne, respectively.

Pursuant to this Court's Rule 29.6, petitioner states that EIA is a non-profit corporation, and no publicly held company owns any interest in EIA.

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\* To the extent that officers have changed during the course of this litigation, the successors have substituted for the initial officeholders. FED. R. CIV. P. 25(d)(1); FED. R. APP. P. 43(c)(2); Supreme Court Rule 35.3.

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## **PETITION FOR WRIT OF CERTIORARI**

Equity in Athletics, Inc. (“EIA”) respectfully petitions this Court to issue a writ of *certiorari* to review the judgment of the U.S. Court of Appeals for the Fourth Circuit, which affirmed the district court’s denial of interim injunctive relief.

### **OPINIONS BELOW**

The Fourth Circuit’s unreported decision and judgment are reprinted in the Appendix (“App.”) at 1a and 15a, respectively. The district court’s decision is reported at 504 F.Supp.2d 88 and reprinted with the accompanying order at 16a and 74a, respectively.

### **JURISDICTION**

The court of appeals issued its decision on August 20, 2008. The district court had jurisdiction under 28 U.S.C. §1331 and §1343(a)(3)-(4), and the Fourth Circuit had jurisdiction under 28 U.S.C. §1292(a)(1). This Court has jurisdiction under 28 U.S.C. §1254(1).

### **AUTHORITIES INVOLVED**

The Appendix quotes relevant excerpts from 20 U.S.C. §§1681-1683; 42 U.S.C. §§1983, 1988(a), 5 U.S.C. 551, 553; 45 C.F.R. §86.41; VA. CODE ANN. §2.2-3901; and federal agency orders from 1979, 1996, 2003, and 2005. The authorities fall into three substantive and procedural areas:

1. ***Prohibition of Discrimination.*** Title IX’s protection that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program... receiving Federal financial assistance.” 20

U.S.C. §1681(a); 45 C.F.R. §86.41(a) (same for athletics programs); U.S. CONST. amend. V, XIV, §1 (same for federal and state actions).

2. ***Equal-Opportunity Mandate.*** The Title IX regulations require schools to provide equal athletic opportunity, based on the assessed interests and abilities of both genders, 45 C.F.R. §86.41(c)(1), which Virginia has adopted as its state law. VA. CODE ANN. §2.2-3901. Various federal agency orders collectively purport to amend the regulatory standard to equal participation, based on enrollment. App. 84a-138a.

3. ***Required Procedures.*** The relevant procedural protections include notice-and-comment rulemaking requirements of the Administrative Procedure Act (“APA”), 5 U.S.C. §553, the then-applicable laying-before requirements of the General Education Provisions Act, 20 U.S.C. §1231 (1979) (“GEPA”), as well as the civil rights laws’ requirement for presidential approval before rules, regulations, and orders of general applicability take effect, 20 U.S.C. §1682.<sup>1</sup>

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

EIA seeks reinstatement of ten athletic teams cut by James Madison University (“JMU”) expressly

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<sup>1</sup> Executive Order 12,250 delegates the presidential-approval authority to the Attorney General. 45 Fed. Reg. 72,995 (1980). Because no President or Attorney General has approved DOE’s Title IX regulations, the Department of Health, Education & Welfare (“HEW”) regulations remain in effect for DOE. 20 U.S.C. §3505(a).

to meet the “proportionality test of Title IX.” CAJA 200.<sup>2</sup> 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, then, on competing concepts of “equality” and on the procedural requirements for moving from one to the other. Although this Court reviews denials of interim injunctive relief for abuse of discretion, a “court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law.” *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990); *cf. Winter v. NRDC*, \_\_ U.S. \_\_, \_\_ (2008) (slip op., at 21) (Court may reach merits on appeal of interim relief). Here, EIA asks the Court to review the denial of interim relief after reviewing the underlying legal errors.

### **Factual Background**

On September 29, 2006, JMU announced its decision to cut ten athletic teams (men’s and women’s gymnastics and archery, men’s cross country, indoor and outdoor track and field, swimming, and wrestling, and women’s fencing), effective July 1, 2007, to equalize its athletic-participation and enrollment ratios, by gender. CAJA

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<sup>2</sup> EIA cites the Court of Appeals Joint Appendix as “CAJA.”

200. The announcement stunned the students, who then organized to seek reconsideration of the decision. *Id.* 147, 149, 153, 156, 159, 162, 166, 169, 172, 176, 179, 182, 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.” *Id.* 333.

Men have equivalent or greater interest in the reciprocal sports (cross-country, track, and swimming) that JMU retained for women, and men have equivalent or greater interest in wrestling than women have in women’s non-reciprocal sports that JMU retained. *Id.* at 69, 74-90. Archery, gymnastics, and fencing suffered from JMU’s preemptive action to avert proportionality-backed challenges from women’s clubs (*e.g.*, water polo, equestrian), *id.* at 93, notwithstanding men’s and women’s equivalent interest in those sports. *Compare id.* at 83 *with id.* at 90. The interest-based standard prohibited the former cuts and did not require the latter.

EIA incorporated on February 5, 2007, began publicly accepting members on March 14, 2007, and filed this lawsuit against only the federal defendants on March 19, 2007. *Id.* 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. *Id.* 107. EIA added the JMU defendants on June 1, 2007, and moved for interim injunctive relief on June 15, 2007.

Notwithstanding its state-law obligations to operate transparently, VA. CODE ANN. §2.2-3700(B), JMU conducted its planning in secret and affirmatively misled student-athletes who came to JMU. CAJA 203-04, 334. The students on the ten demoted club teams are ready, willing, and able to compete on reinstated intercollegiate teams. *Id.* 147-48, 159, 163, 166, 169-70, 173, 177, 180, 185. Although student fees provide the athletic budget's "major component," JMU's athletic conference would rebate more than \$200,000 annually (approximately \$22,000 per team) to field the teams. *Id.* 366, 209.

The district court held an evidentiary hearing on July 19, 2007, and denied EIA's motion on August 21, 2007. The Fourth Circuit heard oral argument on March 18, 2008, and affirmed on August 20, 2008.

### **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 programs. 20 U.S.C. §1681(a). Like Title VI, Title IX prohibits intentional discrimination (*i.e.*, actions *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 seeks to eliminate all "quotas," "ceilings," "even splits," "arbitrary ratios," and "specific percentage balances." 117 Cong. Rec. 30,409, 39,251 39,259, 39,262 (1971); 118 Cong. Rec. 5812-13 (1972).

In a key departure from Title VI, Congress included Title VII's restriction against preferential treatment based on imbalances with the 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). Although §901(b) allows agencies to consider “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); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 652-53 (1989).

Like Title VI, Title IX authorizes agencies to “effectuate” the statutory prohibition against intentional discrimination, 20 U.S.C. 1682, authority the Senate sponsor said “to 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. 118 Cong. Rec. 5807 (1972) (emphasis added). Otherwise, §902 is identical to §602, *compare* 20 U.S.C. §1682 *with* 42 U.S.C. §2000d-1, which provides the only relevant history.<sup>3</sup>

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<sup>3</sup> See 118 Cong. Rec. 5803 (Title IX would have the same procedural protections afforded under Title VI) (Sen. Bayh); *id.* at 5808 (“These provisions [including what became Section 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., at 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

(Footnote cont'd on next page)

That history makes clear that agencies must act via rules, regulations, and orders of general applicability, 42 U.S.C. §2000d-1, which do not take effect unless and until signed by the President in the *Federal Register*. *Id.*; 110 Cong. Rec. 2499-00 (1964) (Rep. Lindsay); *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 522 n.12 (1982).<sup>4</sup>

**“Javits Amendment.”** 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

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(Footnote cont'd from previous page.)

coverage as had been provided under Title VI”) (prepared statement of Sen. Bayh) (hereinafter “1975 Hearing”).

<sup>4</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 (letter from Attorney General Kennedy, 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).

revenue-producing sports. *Id.* 15,323. The requirement to publish proposed rules was “not intended to confer on 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), *reprinted in* 120 Cong. Reg. 15,444, 15,477 (1974) *with* Pub. L. No. 93-380, §844, 88 Stat. 484, 612 (1974) (Javits). 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.

In another section of the same title of the Education Amendments of 1974, Congress “[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.

**Department of Education Organization Act.** In splitting HEW into DOE and the Department of 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**

The “Three-Part Test” evolved through a series of interpretations of Title IX’s original 1975 regulations. In summary, the regulatory standard changed from (a) equal opportunity, based on interest, with a mandate to assess the interest of both genders in 1975 to equal participation, based on enrollment, with no need to assess the interest of the “over-represented” gender (*i.e.*, men) in 1996 and beyond; (b) a non-prospective, non-binding document for complaints pending in 1979 to prospective “legal obligations” in 1996 and beyond; (c) subject to a regulatory and statutory prohibition against discrimination in 1975 and 1979 to safe harbors that

authorize gender-conscious cutting and capping solely to meet an enrollment-based quota in 1996 and 2003.

**1975 Regulations.** Unlike the statute, the 1975 regulations: require equal opportunity, based on interest and ability, 45 C.F.R. §86.41(c)(1); “require institutions to take the interests of both sexes into account in determining what sports to offer,” 40 Fed. Reg. 24,128, 24,134 (1975); and authorize schools to do so “in any reasonable way the school considers appropriate,” *id.* HEW’s Secretary testified to Congress that “the interest and abilities of both sexes... obviously involves learning about those interests in one way or another.” *1975 Hearing*, at 440.

**1979 Policy Interpretation.** Contrary to the 1975 regulations, the 1979 Three-Part Test would narrow schools’ latitude to three options: (1) a quota based on enrollment ratios, (2) progress on the way to prong one, and (3) fully accommodating the underrepresented gender’s interest. 44 Fed. Reg. 71,418. In doing so, however, HEW expressly (if obliquely) states that the document does not apply prospectively, 44 Fed. Reg. 71,414 (disavowing “a separate section on institutions’ future responsibilities”), and instead refers future compliance to the interest-and-abilities section of the regulation, *id.* Archival documents from HEW incorporated into the complaint make clear that HEW very carefully and publicly contorted its document to avoid procedural requirements. *See*

CAJA 130-136.<sup>5</sup> In addition, throughout the 1980s, DOE interpreted prong three (“full accommodation”) to mean accommodating the gender’s interest to the same relative extent (*i.e.*, proportional to *interest*, not *enrollment*). CAJA 44-45.

**1996 Clarification.** In its press release announcing its 1996 clarification, DOE characterizes the Three-Part Test as “legal obligations.” CAJA 43. Unlike the 1979 version, the 1996 version purports to be a prospective legal requirement. App. 106a (“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”). Further, unlike the 1979 version, the 1996 version’s third prong requires full accommodation only of the underrepresented gender, changing the 1979 version’s focus on relative accommodation. App. 123a-124a.

**2003 Clarification.** Unlike its 1996 version, the 2003 version makes prongs two and three safe harbors. App. 131a.

**2005 Clarification.** In addition to explaining the contours of DOE-acceptable surveys of athletic interest, the 2005 version clarifies that DOE did not consider the Fourteenth Amendment in its analysis. App. 135a.

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<sup>5</sup> Concerned primarily that its document did not constitute an “interpretation” under GEPA, CAJA 110-136, HEW neglected to consider the breadth of “order,” which this Court announced a year later. *FTC v. Standard Oil Co.*, 449 U.S. 232, 238, n.7 (1980).

## **REASONS TO GRANT THE WRIT**

This litigation presents circuit splits on Title IX's preemption of constitutional review (Section I), the test for preliminary injunctions (Section III), the availability of laches to defendants with unclean hands (Section III), and strict versus intermediate scrutiny under Title IX (Section IV.A.4). Contrary to this Court's recent *Parents Involved* decision, the lower courts allowed numerical balancing as an end in itself for equal-protection analysis (Section IV.A.5). Finally, the litigation offers the opportunity for this Court to address important issues of deference to DOE's sub-regulatory amendments via clarification (Sections II.B-II.C, IV.A.1-IV.A.3) and multi-agency delegations generally (Section II.A). Most significantly, the writ should be granted because the circuits have reached an incorrect 9-0 unanimity on Title IX's Three-Part Test, based on DOE's ignorance of HEW's actions, which only this Court's supervisory power can correct.

### **I. TITLE IX DID NOT PREEMPT §1983 OR *EX PARTE YOUNG***

In affirming the denial of interim relief, the Fourth Circuit cited *Kelley v. Bd. of Trs.*, 35 F.3d 265, 272 (7<sup>th</sup> Cir. 1994), for the proposition that “[i]nsofar as the University actions were taken in an attempt to comply with the requirements of Title IX, plaintiffs' attack on those actions is merely a collateral attack on the statute and regulations and is therefore impermissible.” Citing *Kelley* for the

“impermissible collateral attack” doctrine in essence finds constitutional review preempted,<sup>6</sup> an issue on which the circuits are split. *Compare, e.g., Fitzgerald v. Barnstable School Comm.*, 504 F.3d 165, 179-80 (1<sup>st</sup> Cir. 2007); *Bruneau v. S. Kortright Cent. Sch. Dist.*, 163 F.3d 749, 756 (2<sup>nd</sup> Cir. 1998); *Williams v. Sch. Dist.*, 998 F.2d 168, 176 (3<sup>rd</sup> Cir. 1993); *Pfeiffer v. Marion Ctr. Area Sch. Dist.*, 917 F.2d 779, 789 (3<sup>rd</sup> Cir. 1990) and *Waid v. Merrill Area Pub. Sch.*, 91 F.3d 857, 863 (7<sup>th</sup> Cir. 1996) (§1983 preempted) with *Lillard v. Shelby County Bd. of Educ.*, 76 F.3d 716 (6<sup>th</sup> Cir. 1996); *Crawford v. Davis*, 109 F.3d 1281, 1283 (8<sup>th</sup> Cir. 1997) and *Seamons v. Snow*, 84 F.3d 1226, 1233-34 (10<sup>th</sup> Cir. 1996) (§1983 not preempted). The Court should resolve this split.

The notion that Title IX preempts §1983 – much less insulates school officers from review under *Ex parte Young* – is utterly foreign to the legislative history and common sense. This Court granted a writ of *certiorari* in *Fitzgerald v. Barnstable School Committee*, No. 07-1125 (U.S.), and the same

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<sup>6</sup> At the outset, the panel’s adoption of §1983 preemption is inappropriate when the Fourth Circuit *en banc* allowed Title IX and §1983 actions to proceed concurrently. *Jennings v. Univ. of N. Carolina*, 482 F.3d 686, 702 (4<sup>th</sup> Cir. 2007) (*en banc*). *Stare decisis* demands lower courts’ respect across the board, not selectively. *Indep. Cmty. Bankers of Am. v. Bd. of Governors of Fed. Reserve Sys.*, 195 F.3d 28, 34 (D.C. Cir. 1999); *McMellon v. U.S.*, 387 F.3d 329, 332-33 (4<sup>th</sup> Cir. 2004); *Texaco Inc. v. Louisiana Land & Exploration Co.*, 995 F.2d 43, 44 (5<sup>th</sup> Cir. 1993).

rationale warrants granting a writ of *certiorari* here.<sup>7</sup>

#### **A. Title IX Did Not Preempt §1983**

The “dividing line” that defines §1983’s preemption is “the existence of a *more restrictive* private remedy for *statutory* violations,” and “an *express*, private means of redress in the statute itself is ordinarily an indication that Congress did not intend to leave open a more expansive remedy under §1983.” *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 122 (2005) (emphasis added). Here, Title IX provides no express remedy, no private remedy for regulatory violations beyond the statute’s prohibition, and nothing more restrictive for statutory violations.

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<sup>7</sup> This Court appears to lack Article III subject-matter jurisdiction to resolve the circuit split in *Fitzgerald* because, having already lost their Title IX claim on the merits, the Fitzgeralds will find that issue preclusion on the absence of intentional discrimination preordains their losing the §1983 action that they seek to bring. *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981). “For a court to pronounce upon the meaning or the constitutionality of a... federal law when it has no jurisdiction to do so is, by very definition, for a court to act *ultra vires*. *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 101-02 (1998); *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); *accord Ctr. for Law & Educ. v. Dep’t of Educ.*, 396 F.3d 1152, 1156 (D.C. Cir. 2005); *Rogers v. Stratton Indus.*, 798 F.2d 913, 917 (6<sup>th</sup> Cir. 1986).

This Court already has held that Title IX's *administrative* remedy does not preclude litigation. Indeed, both Title IX and §1983 actions proceed straight to district court, without administrative exhaustion. *Cannon v. Univ. of Chicago*, 441 U.S. 694, 706-08 (1979); *Smith v. Robinson*, 468 U.S. 992, 1012 & n.14 (1984). In finding an implied private action under §901(a), this Court expressly rejected arguments that §902's administrative remedy precludes private litigation, absent "other, more convincing, evidence that Congress meant to exclude the [court] remedy." *Cannon*, 441 U.S. at 711. Thus, unlike *Robinson*, 468 U.S. at 1012-13, private litigation does here not frustrate a statutorily contemplated administrative process that Congress intended to precede litigation.

Nor does Title IX's *statutory* remedy preclude §1983. Indeed, this Court expressly declined to "hold that the availability of a private judicial remedy... *conclusively* establishes[] a congressional intent to preclude §1983." *Abrams*, 544 U.S. at 122 (emphasis added). Instead, express statutory remedies raise mere "ordinary inference[s]" of exclusivity that plaintiffs may "overcome by textual indication[s], express or implicit, that the remedy is to complement, rather than supplant, §1983." *Id.* With Titles VI and IX, Congress expressly and implicitly indicated its intent to retain §1983.

In Title IX's Title VI template, Congress plainly desired to *extend* (not limit) enforcement of constitutional protections to federal recipients, and favorably viewed the Fourth Circuit's landmark *Simkins v. Moses H. Cone Memorial Hospital*

decision. *See Cannon*, 441 U.S. at 711-12 & n.48 (citing floor statements by Senators Humphrey, Pastore, Ribicoff, Allott, and Javits).

Although it has been suggested that the state-action doctrine in *Simkins* is overbroad, there is no denying that the Title VI Congress assumed and approved the availability of private suits against many private recipients of federal funds.<sup>8</sup>

*Cannon*, 441 U.S. at 712 (citation omitted). A Congress that “assumed and approved” §1983 suits could scarcely have intended *sub silentio* to preempt §1983.

Indeed, §602 expressly contemplates enforcement “by any other means authorized by law,” 42 U.S.C. §2000d-1, and the Senate deleted §601’s “notwithstanding” clause from the House bill. *Compare* H.R. 7152, 88<sup>th</sup> Cong. §601 (1963) (“Notwithstanding any inconsistent provision of any other law, no person in the United States...”) *with* 42 U.S.C. §2000d (“notwithstanding” clause deleted). Moreover, even if it preempts §1983, Title IX cannot prevent federal courts’ reaching constitutional issues in cases over which they have jurisdiction. *Robinson*, 468 U.S. at 1012 n.15. Finally, an *implied* remedy cannot repeal an express remedy: “repeals by implication are disfavored, and this canon of

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<sup>8</sup> *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 157 (1978), narrows *Simkins* for private recipients, which is irrelevant for state entities. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 929 (1982).

construction applies with particular force when the asserted repealer would remove a remedy otherwise available.” *Schlesinger v. Councilman*, 420 U.S. 738, 752 (1975) (interior quotations omitted).

For all the foregoing reasons, Title IX cannot preempt §1983. No-one with even passing familiarity with the legislative history of Title VI and Title IX would contend that compliance with a discriminatory federal policy insulates discrimination from judicial redress. Federal bureaucrats cannot, without much apparent thought, extinguish the Fourteenth Amendment by memorandum.

**B. Title IX Did Not Preempt *Ex parte Young***

In suggesting that DOE’s memoranda render EIA’s challenge to JMU’s actions “impermissible,” App 13a, the Fourth Circuit goes beyond preempting §1983 and also seeks to preempt the venerable officer-suit exception to sovereign immunity. *Ex parte Young*, 209 U.S. 123 (1908). Congress certainly did not even consider that issue, and (in any event) lacks the constitutional authority to authorize unconstitutional behavior by recipients of federal funds. *U.S. v. Am. Library Ass’n*, 539 U.S. 194, 203 (2003); *South Dakota v. Dole*, 483 U.S. 203, 210-11 (1987). For the declaratory and injunctive relief that EIA seeks, *Ex parte Young* and §1331 provide the only cause of action that EIA needs to challenge JMU’s misplaced reliance on a substantively and procedurally unlawful federal guidance:

[A]nyone 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). Moreover, EIA and this litigation put JMU on notice that reliance on federal guidance would prove unavailing. *Maynard v. Cartwright*, 486 U.S. 356, 361 (1988) (claimed lack of notice “may be overcome in any specific case where reasonable persons would know that their conduct is at risk”).

Insofar as Congressional spending-clause legislation (and *a fortiori* DOE memoranda) cannot authorize unconstitutional conduct, nothing prohibits constitutional review. Even if Title IX preempts §1983, it does not preempt EIA’s challenge to the lawfulness of JMU’s and DOE’s actions.

## **II. NO STATUTE DELEGATES OR TRANSFERS INTERPRETIVE AUTHORITY TO HEW OR DOE**

The decisions below – and all of the Three-Part Test caselaw – rely on three 1970s-era statutes to find that DOE’s policies warrant deference. None of these statutes delegates or transfers authority that warrants deference from the courts.

### **A. Title IX Did Not Delegate Authority**

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 equally. 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.” *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) (citation omitted).

The 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 “inappropriate” to affirmative-action statute administered equally by four agencies). Particularly because Title IX merely implements the constitutional standard of intentional discrimination, courts should not defer to DOE.

#### **B. §844 Did Not Delegate Authority**

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

*First*, the Javits Amendment directs HEW’s Secretary to issue merely a *proposed* regulation,

which commands no deference. *Matter of Appletree Markets*, 19 F.3d 969, 973 (5<sup>th</sup> Cir. 1994); *Public Citizen 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). 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.C, *infra*. 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.

### **C. DEOA Did Not Transfer Authority**

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” (*i.e.*, §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>9</sup> Thus, like

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<sup>9</sup> Had DEOA transferred HEW’s Office of Civil Rights (“OCR”) to DOE, as the Senate Bill proposed, one could make a

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any other 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.

As the Fourth Circuit noted, App. 3a, this Court has stated in a footnote that “HEW’s functions under Title IX were transferred to [DOE].” *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 517 n.4 (1982). The *North Haven* footnote explains why DOE defended that litigation on *certiorari*.<sup>10</sup> Because nothing of substance hinged on whether HEW, HHS, or DOE defended the Title IX regulations on appeal,

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strained argument that §301(a)(3)’s “relates-to” clause includes any “function” related to any authority wielded by OCR. But the Senate receded to the House in Conference, and 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; *see* 20 U.S.C. §3413. The strained argument is neither availing nor available.

<sup>10</sup> The schools that challenged Title IX’s application to employment received DOE (not HHS) funding under statutes listed in §301(a)(2).

this Court now should disregard its “fleeting footnote.” *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 512-13 & n.9 (2006) (disregarding remarks made “[e]n passant” and in “fleeting footnote[s]” when “our decision did not turn on that characterization, and the parties did not cross swords over it”). As EIA already has explained, and as the fleeting footnote does not refute, the HEW-DOE-HHS transfer provisions transferred substantive authority under various education-related statutes, *see* 20 U.S.C. §3441(a)(2), but did not transfer HEW’s Title IX or Javits Amendment rulemaking authority.

**III. BLACKWELDER AND QUINCE  
ORCHARD MISSTATE THE TEST FOR  
INTERIM RELIEF**

This Court and the other twelve circuits evaluate preliminary injunctions under a four-part balancing test. *Winter*, \_\_ U.S. at \_\_ (slip op., at 10). Under *Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 189 (4<sup>th</sup> Cir. 1977), the Fourth Circuit frontloads its analysis by balancing the harms. *Safety-Kleen, Inc. v. Wyche*, 274 F.3d 846, 868 (4<sup>th</sup> Cir. 2001) (“our decisions... contravene Supreme Court precedents by overvaluing the inquiry into the relative equities”) (Luttig, J., concurring). If the balance tips decidedly to the plaintiff, the Fourth Circuit grants preliminary relief for merits questions so serious, substantial, difficult and doubtful, as to make them fair ground for litigation and more deliberate investigation. *In re Microsoft Corp.*, 333 F.3d 517, 526 (4<sup>th</sup> Cir. 2003). That is not enough.

Where *Blackwelder* provides interim relief too easily, EIA faced the opposite problem: “the court

cannot simply ignore the period of delay between [JMU's] decision and the filing of this action.” App. 42a (emphasis added, citing *Quince Orchard Valley Citizens Assoc. v. Hodel*, 872 F.2d 75, 80 (4<sup>th</sup> Cir. 1989)). *Quince Orchard* held that delay in seeking interim relief could “indicate an absence of the kind of irreparable harm required to support a preliminary injunction” under *Blackwelder*. *Quince Orchard*, 872 F.2d at 80. *Quince Orchard* is as hyper-restrictive as *Blackwelder* is hyper-permissive.

Although the circuits are split, equitable defenses should not protect defendants with unclean hands. Compare, e.g., *Bird v. Centennial Ins. Co.*, 11 F.3d 228, 234 (1<sup>st</sup> Cir. 1993); *Atari Games Corp. v. Nintendo of America, Inc.*, 975 F.2d 832, 846 (Fed. Cir. 1992); and *Hot Wax, Inc. v. Turtle Wax, Inc.*, 191 F.3d 813, 825-26 (7<sup>th</sup> Cir. 1999) with *Alcatel USA, Inc. v. DGI Technologies, Inc.*, 166 F.3d 772, 794-95 (5<sup>th</sup> Cir. 1999). Given JMU's uncontested months of footdragging and years of unlawful secret meetings, a court not only *can* disregard EIA's timing, but *should* disregard it.

#### **IV. EIA IS ENTITLED TO INTERIM RELIEF**

If it grants the writ of *certiorari* on all four questions presented and, on the merits, rules against EIA on each of the other three questions, this Court nonetheless still should find EIA entitled to interim relief, based on its strong likelihood of success on the merits. In particular, EIA is likely to succeed on its “novel” procedural arguments, App. 13a, the merits of which no court ever has addressed. Indeed, the lower courts completely ignored EIA's GEPA argument, which was HEW's primary focus. CAJA

110-136. While the lower courts' arguments are demonstrably wrong (and thus an abuse of discretion), a court also abuses its discretion by ignoring an argument that is demonstrably right.

**A. EIA Is Likely to Succeed on Merits**

Under the Three-Part Test cases cited by the lower courts, preliminarily injunctions are appropriate to protect disadvantaged teams. App. 11a-12a, 44a-53a. Although EIA presents procedural and substantive reasons to reject their definition of "disadvantage," no party has quarreled with these cases' holdings that courts must protect students from discrimination. Procedurally, if this Court recognizes the equal-opportunity fulcrum at the regulations' interest-based opportunity (not the Three-Part Test's enrollment-based participation), JMU's actions become untenable. Substantively, all of those courts improperly deferred to an interpretation that the agency itself never adopted and that, as applied, plainly violates both Title IX and the Fourteenth Amendment.

**1. Rule Change Required 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).<sup>11</sup>

Although the district court considered it “twenty-five years [of]... longstanding and consistent administrative interpretation[],” App. 62a-63a, 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 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

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<sup>11</sup> Because §902 requires agencies to proceed by rule, regulation, and order, note 4, *supra*, Title IX precludes agencies’ *ultra vires* policy-formulation methods even more strictly than the APA does. Agencies cannot exempt themselves from the APA 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).

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). In *American Mining Congress v. M.S.H.A.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993), the D.C. Circuit adopted a four-part test to identify substantive rules that requires notice-and-comment rulemaking: (1) whether absent the rule the agency would have an adequate legislative basis for enforcement; (2) whether the agency has published the rule in the Code of Federal Regulations, (3) whether the agency explicitly invoked its general legislative authority, or (4) whether the rule effectively amends a prior substantive rule. This case ably demonstrates that the Three-Part Test changed the rules: before the cuts, JMU complied with §86.41(c)(1), but violated the Three-Part Test, whereas JMU’s cuts complied with the Three-Part Test, but violated §86.41(c)(1). Obviously, the rule change requires a rulemaking.

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 v. Block*, 755 F.2d 1098, 1103 (4<sup>th</sup> Cir. 1985). Here, neither HEW

nor DOE has ever responded to comments that the Three-Part Test violates Title IX and the Constitution. *See, e.g.,* App. 100a (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.’” App. 64a (*quoting Nat’l Wrestling Coaches Ass’n v. DOE*, 366 F.3d 930, 940 (D.C. Cir. 2004)). *First*, that is a *non sequitur* because 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 the Fourth 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>12</sup>

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<sup>12</sup> When self-described interpretive rules or policy statements legally required notice-and-comment rulemaking, the agency’s having provided notice or taken comment cannot 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

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## 2. Non-Rule Guidance Is an Order

Like its Title VI template, Title IX requires agencies to act by rule, regulation, or order of general applicability, and provides that such 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 4 & 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. H.R. 7152, 88<sup>th</sup>

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notice and comment on the 1979 Policy Interpretation qualified as notice-and-comment rulemaking. CAJA 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 to sidestep comments that the Policy Interpretation was unlawful in 1979.

Cong. §602 (1963) (“Such action *may* be taken by... rule regulation or order”) (emphasis added). Responding to concerns over agencies’ overreaching, Senator Dirksen’s substitute bill amended §602 to its current form. 110 Cong. Rec. 11,926, 11,930 (1964). To repeat, “[f]ew 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).

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 because the Three-Part Test was neither binding nor a prospective standard for Title IX compliance. CAJA 130-139. As EIA advised JMU in March, before JMU’s cuts took effect, “JMU is steering itself to a mirage, not a safe harbor.” CAJA 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”). The Fifth Circuit provides more deference, but nonetheless requires compliance with §602 and encourages schools to use other tools if necessary to comply with the statute or Constitution. *Bd. of Pub. Instruction of Taylor County v. Finch*, 414 F.2d 1068, 1075-77 & n.13 (5<sup>th</sup> Cir. 1969); *U.S. v. Jefferson County Bd. of Ed.*, 380 F.2d 385, 390 (5<sup>th</sup> Cir. 1967) (*en banc*).<sup>13</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. 65a-66a. 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, 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 under §902.

### **3. Courts Failed to Consider GEPA**

Beyond APA’s familiar notice-and-comment requirements and §902’s presidential-approval

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<sup>13</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.

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. 20 U.S.C. §1232(a)(1), (d)(1) (1979) (App. 78a). Because HEW intentionally and expressly avoided GEPA’s laying-before requirement, CAJA 304-05, the Policy Interpretation never took effect under GEPA.

#### **4. Quota-Driven Cuts Violate Title IX**

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

Indeed, numerical, group-based safe harbors that excuse harm to individuals injured along the way to group-based bottom lines are foreign to discrimination law. *Connecticut v. Teal*, 457 U.S. 440, 453-57 (1982) (reaching a presumptively nondiscriminatory statistical “bottom line” does not excuse discrimination in attaining that bottom line). Although arising under Title VII, *Teal* applies equally to all federal anti-discrimination laws, which protect individuals, not groups. *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.

Finally, the circuits are split on the scrutiny that applies to evaluating policies under Title IX. The courts below and others looked to the intermediate scrutiny that would apply under this Court's equal-protection analysis. *See, e.g., Cohen v. Brown Univ.*, 101 F.3d 155, 182 (1<sup>st</sup> Cir. 1996); App 59a; App. 10a. By contrast, other courts have analyzed Title IX under the strict scrutiny that applies to its Title VI template. *See, e.g., Jeldness v. Pearce*, 30 F.3d 1220, 1227 (9<sup>th</sup> Cir. 1994) ("Because Title IX and Title VI use the same language, they should, as a matter of statutory interpretation, be read to require the same levels of protection and equality"). The Three-Part Test is even less defensible under strict scrutiny than under intermediate scrutiny.

#### **5. Fourteenth Amendment Requires Interest-Based Analysis**

If the Court allows as-applied constitutional challenges (Section I, *supra*), EIA will prevail.

*First*, the Three-Part Test's interest (numerical balancing) is not a permissible governmental interest under this Court's equal-protection analysis. *Parents Involved in Community Schools v. Seattle School Dist. No. 1*, 127 S.Ct. 2738, 2757 (2007) (plurality); *id.* at 2794 (Kennedy, J., concurring in part and concurring in the judgment). Government must look to the qualified applicant pool (interest), not the general population (enrollment). *Mayor v. Educational Equality League*, 415 U.S. 605,

620-21 (1974). JMU's reliance on the Three-Part Test is constitutionally unavailing, as applied.

*Second*, because each team seeks to enforce Title IX's equal-opportunity regulations – which exceed the scope of the statutory prohibition – they may resort to 42 U.S.C. §1988(a)'s adoption of not inconsistent state law for equal-protection cases under §1983. Virginia has adopted Title IX *regulatory* violations as statutory violations, VA. CODE ANN. §2.2-3901, which makes the regulations enforceable. At the least, all ten teams deserve reconsideration under the interest-based standard.

*Third*, for swimming, track, and cross-country, JMU unlawfully denied its students' First-Amendment educational and associational rights, which triggers *strict* scrutiny. The suggestion that EIA first raised this by post-hearing brief (App. 67a) begs the question whether the judge read EIA's papers. *See* CAJA 10-11, 144-45, 150-51, 152-53, 156, 202, 218, 313-15, 320-23 (raising issue in complaint, opening brief, reply briefs, affidavits, oral argument, and oral testimony). When such First-Amendment issues arise in equal-protection actions, this Court has the "obligation" to consider them. *Lyng v. Int'l Union*, 485 U.S. 360, 365-66 (1988). That a women-only swimming pool results from a statute modeled on one designed to end whites-only fountains is remarkable. Even worse, that segregation injures women as well as men.

#### **B. EIA's Members Face Irreparable Harm**

The opportunity to compete in intercollegiate athletics is fleeting. As the district court recognized, EIA's members on the cut teams face imminent and

irreparable harm in lost opportunity to compete and (in the case of the reciprocal swimming and track programs) association, App. 41a-42a (describing affidavits and testimony as “compelling” and “moving”), which a court can neither calculate nor reduce to money damages. These “innocent victims,” App. 14a, 73a, are not bound by extra-circuit decisions, which do not compel courts in the Fourth Circuit, much less this Court, to follow DOE’s misdirection. Because these students unquestionably suffer irreparable harm, the courts below could ignore that harm only by misconstruing the law applicable to the EIA’s delay in bring suit (Section III, *supra*) and overstating the harm to JMU (Section IV.C, *infra*). Because the courts below erred on both counts, the harms to EIA clearly outweigh the harms to JMU.

### **C. Harm to JMU Is Merely Financial**

The record demonstrates that – apart from the financial cost of the teams, which an injunction bond could address – the harm to JMU consists of trivial administrative tasks. CAJA 369-71. When interim relief merely requires the non-moving party to maintain the status quo and to refrain from violating the law, moreover, that harm is not cognizable under the balancing test. *D.O.L. v. Wolf Run Mining Co.*, 452 F.3d 275, 280 (4<sup>th</sup> Cir. 2006) (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”).

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. Corp.*, 315 F.3d 264, 285 (4<sup>th</sup> Cir. 2002) (financial harm to defendants holds “little consequence” in balance of hardships); *Frank’s GMC Truck Ctr. v. General Motors Corp.*, 847 F.2d 100, 102 (3<sup>rd</sup> Cir. 1988) (same). 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 reinstate the ten teams. CAJA 57. Thus, interim relief will not cost JMU *anything*: it saves money.

#### **D. Public Interest Favors Interim Relief**

The public interest favors granting interim relief to comply with the applicable legal standards and because JMU has no legitimate countervailing interest.

*First*, as the district court acknowledges, the public-interest prong collapses into the merits. App. 73a; 11A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FED. PRAC. & PROC. Civ.2d §2948.4 (“statute prohibiting the threatened acts that are the subject matter of the litigation has been considered a strong factor in favor of granting a preliminary injunction”). If the equal-opportunity

regulations trump the procedurally defective Three-Part Test (Sections IV.A.1-IV.A.3, *supra*), or DOE's interest in numerical balancing cannot justify discrimination (Section IV.A.5, *supra*), the public interest cannot support JMU.

*Second*, courts have cited *Blackwelder*, 550 F.2d at 189, for the public interest in preserving the status quo until a court reaches the merits. *Maryland Undercoating Co. v. Paine*, 603 F.2d 477, 481 (4<sup>th</sup> Cir. 1979); *Valdez v. Applegate*, 616 F.2d 570, 572 (10<sup>th</sup> Cir. 1980). Even if *Blackwelder* is too lenient, the "basic 'public interest' is further enhanced where, as here, the private controversy may possibly vindicate public policy." *Washington v. Reno*, 35 F.3d 1093, 1103 (6<sup>th</sup> Cir. 1994) ("greater public interest in having governmental agencies abide by the federal laws that govern their... operations").

"Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." *Yakus v. U.S.*, 321 U.S. 414, 441 (1944) (interior quotations omitted). In such cases, the public interest requires balancing the harms, which favors EIA's student-athletes over JMU's administrative burdens. *Marshall*, 628 F.2d at 616 ("balance must be struck in favor of the protection of children"). Title IX, the Fourteenth Amendment, and their Virginia counterparts unquestionably provide a

public-policy interest in education free from discrimination.<sup>14</sup>

*Third*, as explained in Section IV.A.5, *supra*, the only legitimate government interest (avoiding intentional discrimination) has little or no relationship to an enrollment-based participation quota that disregards interest. Indeed, as explained in Section IV.A.1, *supra*, the Title IX regulations (and thus Virginia law) require allocating opportunity to interest, not participation to enrollment. Given such disconnects between government action and legitimate governmental interests, courts reject circular attempts to elevate governments' desired action (here, an enrollment-based quota) as their compelling interest. *Simon & Schuster, Inc. v. N.Y. State Crime Victims Bd.*, 502 U.S. 105, 120 (1991). The public interest favors reinstatement.

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<sup>14</sup> Three circuits suggest "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*, 998 F.2d at 175; *Neal v. Bd. of Tr.*, 198 F.3d 763, 767 (9<sup>th</sup> Cir. 1999); *Cohen*, 101 F.3d at 175-76. Historically a women's college, JMU bypasses that argument. *Cohen v. Brown Univ.*, 991 F.2d 888, 900 n.17 (1<sup>st</sup> Cir. 1993). Moreover, "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). The statute prohibits differential treatment and the regulation requires equal opportunity: reinstatement honors both.

**CONCLUSION**

The petition for writ of *certiorari* should be granted.

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Respectfully submitted,

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