No. 93-559

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

COLORADO STATE BOARD OF AGRICULTURE, in its capacity as the governing board of the Colorado State University,
Petitioner,
v.

JENNIFER ROBERTS, JULIE OSBORNE, JANET BRUMBELOW, LAURA BIELAK, SARA STOUT, AMY RECOUPER, JENNIFER JACOBS, MALIA KUENZLI, STACIE STAFFORD, HEATHER NAKASONE, KIM JOHNSON, AIMEE RICE AINSWORTH, and LISA MIZE, in their individual capacities,
Respondents.

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

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF OF BROWN UNIVERSITY AND COLGATE UNIVERSITY AS AMICI CURIAE IN SUPPORT OF PETITIONER

PHILIP BURLING
Counsel of Record for Amici Curiae
STEPHEN B. DEUTSCH
STEPHEN D. SOWLE
FOLEY, HOAG & ELIOT
One Post Office Square
Boston, MA 02109
(617) 482-1390

Of Counsel:
BEVERLY E. LEDBETTER
BROWN UNIVERSITY
Office of the General Counsel
Providence, RI 02912-3122
(401) 863-1104

GEORGE A. DAVIDSON
HUGHES HUBBARD & REED
One Battery Park Plaza
New York, NY 10004
(212) 837-6585

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-559

COLORADO STATE BOARD OF AGRICULTURE, in its capacity as the governing board of the Colorado State University,

Petitioner,

v.

JENNIFER ROBERTS, JULIE OSBORNE, JANET BRUMBELOW, LAURA BIELAK, SARA STOUT, AMY RECOUPER, JENNIFER JACOBS, MALIA KUENZLI, STACIE STAFFORD, HEATHER NAKASONE, KIM JOHNSON, AIMEE RICE AINSWORTH, and LISA MIZE, in their individual capacities,

Respondents.

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

MOTION OF BROWN UNIVERSITY AND COLGATE UNIVERSITY FOR LEAVE TO FILE BRIEF AMICI CURIAE IN SUPPORT OF PETITIONER

Pursuant to Rule 37 of the Rules of the Supreme Court of the United States, Brown University ("Brown") and Colgate University ("Colgate") hereby move for leave to file the attached brief amici curiae in support of the petition for writ of certiorari. Petitioner Colorado State Board of Agriculture has consented to the filing of the brief; its written consent is filed concurrently herewith. Respondents Jennifer Roberts, *et al.*, have denied consent.

1. Brown and Colgate are institutions of higher education that are directly affected by the application of Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688, to their intercollegiate athletic programs. Brown is the defendant in another case that raises issues virtually identical to those at issue here. *See Cohen v. Brown Univ.*, 991 F.2d 888 (1st Cir. 1993) (affirming issuance of preliminary injunction). Colgate is the defendant in a case that likewise raises similar issues under Title IX. (An earlier suit raising the same allegations against Colgate was dismissed as moot. *See Cook v. Colgate Univ.*, 992 F.2d 17 (2d Cir. 1993).) The Tenth Circuit substantially relied upon *Cohen* in reaching the decision from which the petition for certiorari in the present case arises. The decision in the present case will have a direct and substantial effect on the ability of Brown and Colgate to administer their athletic programs in a fair and efficient manner.

2. Pursuant to Rule 37.1 of the Rules of this Court, Brown and Colgate move to file their brief amici curiae to bring "relevant matter[s] to the attention of the Court that [have] not already been brought to its attention by the parties" that strongly support exercise of the Court's jurisdiction. The brief highlights the following issues, in addition to the matters addressed in detail in the petition for writ of certiorari.

3. First, the brief highlights the stark contradiction between the Tenth Circuit's holding and the express provisions of Title IX. The Tenth Circuit ruled that no educational institution may cut any women's athletic program so long as the percentage of women among those at the institution who participate in athletics is less than the percentage of women in the institution's overall enrollment. This directly contravenes 20 U.S.C. § 1681(b), which provides that educational institutions are *not* required "to grant preferential or disparate treatment to the members of one sex" based only on this type of purely statistical disparity.

4. Second, the brief explains the direct conflict between this Court's precedents interpreting Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to -17, which contains virtually the same language disfavoring preferential treatment found in Title IX, and the result reached by the Tenth Circuit herein in interpreting Title IX.

5. Finally, the brief argues that the Court should grant certiorari to interpret Title IX to avoid the result reached by the Tenth Circuit, thereby avoiding serious equal protection concerns raised by the lower court's holding.

In order to bring these matters to the attention of the Court, Brown and Colgate respectfully move for leave to file the accompanying brief in support of the petition for writ of certiorari.

Respectfully submitted,

PHILIP BURLING
Counsel of Record for
Amici Curiae
STEPHEN B. DEUTSCH
STEPHEN D. SOWLE
FOLEY, HOAG & ELIOT
One Post Office Square
Boston, MA 02109
(617) 482-1390

Of Counsel:
BEVERLY E. LEDBETTER
BROWN UNIVERSITY
Office of the General Counsel
Providence, RI 02912-3122
(401) 863-1104

GEORGE A. DAVIDSON
HUGHES HUBBARD & REED
One Battery Park Plaza
New York, NY 10004
(212) 837-6585

November 3, 1993

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES—Continued

BRIEF OF BROWN UNIVERSITY AND COLGATE UNIVERSITY AS AMICI CURIAE IN SUPPORT OF PETITIONER

INTEREST OF THE AMICI CURIAE

Brown University ("Brown") and Colgate University ("Colgate") are institutions of higher education that are directly affected by the application of Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688, to their intercollegiate athletics programs.

Brown is the defendant in a case that is very nearly identical to this one. In the litigation against Brown, members of two women's teams that the university proposed eliminating (along with two men's teams) sought and obtained a preliminary injunction against the elimination of their teams. On interlocutory appeal, the First Circuit issued an opinion affirming the issuance of the preliminary injunction. *Cohen v. Brown Univ.*, 991 F.2d 888 (1st Cir. 1993). The Tenth Circuit substantially relied upon *Cohen* in reaching the decision from which the petition for certiorari in the present case arises. While the opinion of the court below repeats the principal error of the First Circuit opinion, it also conflicts in important respects with that opinion. Resolution of these important issues is vital to Brown's ability to manage the necessary reduction of its athletic program and more broadly to instruct higher education, nationally, in the appropriate manner of compliance with Title IX in cases of program reductions.

Colgate is the defendant in a case, arising out of the school's failure to elevate the women's ice hockey club team to varsity status, that also raises issues similar to the issues in this case. (An earlier suit raising the same allegations against Colgate was dismissed as moot. *See Cook v. Colgate Univ.*, 992 F.2d 17 (2d Cir. 1993).) Resolution of the issues raised in the Tenth Circuit case is important to Colgate's ability to manage its athletic programs without running afoul of Title IX.

All colleges and universities, including Brown and Colgate, are faced with external financial exigencies. Some

have been required to reduce the size of their athletic programs; others may be required to do so in the future. At the same time, these colleges and universities must comply with the mandates of Title IX. Brown and Colgate therefore wish to bring to the Court's attention certain important statutory and constitutional issues raised by the opinion of the court below, as well as the practical problems that would be imposed on institutions of higher learning by the lower court's decision as these institutions confront the complex and difficult task of deciding how and where to reduce athletic programs, and thus deny to some young women and men the opportunity to play particular sports at the intercollegiate level.

ARGUMENT

Faced with the need to reduce its expenditures for intercollegiate athletics, Colorado State University ("CSU") in 1992 chose to eliminate two varsity teams, a men's baseball team and a women's softball team. The decision eliminated 55 varsity positions for men, and only 18 for women. *Roberts v. Colorado State Univ.*, 814 F. Supp. 1507, 1514 (D. Colo. 1993); Pet. App. at A-11.[1] Moreover, the university devoted some of the savings realized by the cuts to increasing scholarships in other women's sports; it put none of the money towards men's sports.

The net result of these efforts was to increase the proportion of athletic opportunities for women at CSU from 35.2 percent of the total opportunities to 37.7 percent. *Id.* at 1512; Pet. App. at A-7.[2] After cutting the baseball and softball programs, CSU continued to sponsor more women's sports (8) than men's sports (7). CSU, moreover, had been found to be in compliance with Title IX in 1989 by the Department of Education's Office for Civil

[1] Citations to "Pet. App." are to the page numbers in the appendix included with the petition for certiorari.

[2] The university's actions also had the result of decreasing, from 12.7 percent in the 1991-92 academic year to only 10.5 percent the following year, the difference between the women's intercollegiate athletic participation rate and the women's enrollment rate at CSU. *Roberts*, 814 F. Supp. at 1512; Pet. App. at A-7.

Rights (the "OCR"), the agency charged with administering Title IX.[3]

Despite these facts, the court below held that CSU's actions in eliminating the baseball and softball teams violated Title IX. Title IX itself prohibits only "discrimination," 20 U.S.C. § 1681(a), and indeed it contains language expressly providing that it shall *not* be interpreted "to require any educational institution to grant preferential . . . treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating" in the federally-supported program or activity in question. 20 U.S.C. § 1681(b).

In the face of this explicit statutory language, the the Tenth Circuit, following the lead of the First Circuit in *Cohen v. Brown Univ.*, 991 F.2d 888 (1st Cir. 1993),[4] nonetheless found CSU in violation of Title IX by applying a 1979 "Policy Interpretation" of the statute issued by the OCR. *See Title IX of the Education Amendments of 1972; A Policy Interpretation; Title IX and Intercollegiate Athletics*, 44 Fed. Reg. 71,413, 71,418 (1979) (the *Policy Interpretation*). The *Policy Interpretation* was drafted, and initially applied, at a time when universities were expanding athletic opportunities. The Tenth Circuit, however, rigidly applied the *Policy Interpretation* in the very different context of declining funding, and held that under it CSU must cut *only* men's athletic programs because, in comparison with the school's undergraduate enrollment, men's participation in CSU's intercollegiate athletic programs exceeded women's participation.

[3] *See* March 8, 1989 letter from Gilbert D. Roman, Regional Director of the OCR, to Dr. Philip E. Austin, President of CSU; Pet. App. at D-1 to D-3 (announcing that OCR was terminating its monitoring of CSU's athletic programs because CSU had "achieved compliance with Title IX . . . and its implementing regulation, 34 CFR Part 106").

[4] *See Roberts v. Colorado State Bd. of Agriculture*, 998 F.2d 824, 831 (10th Cir. 1993); Pet. App. at C-15 to C-16 (citing *Cohen*).

Such a drastic holding might be justified if it were premised on a finding that the disparate athletic participation ratios at CSU themselves were the result of discrimination by CSU against female athletes. The Tenth Circuit, however, did not base its decision on any such finding. Rather, it rested its holding exclusively on the raw disparity in CSU's athletic participation ratios, together with the fact that, as a result of the 1992 cutbacks, there were some women athletes at CSU—the plaintiffs, former members of the softball team—whose "interests and abilities" were not fully accommodated.

Given the severe economic constraints confronting higher education today, the Tenth Circuit's holding affects every institution of higher learning that receives federal financial assistance. Since male athletic participation ratios exceed female ratios at virtually all such institutions, the Tenth Circuit's holding, unless reversed, will require that at all of these schools, whenever athletic program cutbacks are necessary, the cuts come *solely* from men's athletic programs. This extreme result violates the clear language of Title IX. If left undisturbed, it would make impossible the fair and efficient administration of athletic programs at virtually all educational institutions throughout the country. This Court therefore should grant certiorari in order to reverse the decision.

Moreover, the position taken by the Tenth Circuit contravenes holdings by this Court interpreting Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to -17. That statute prohibits the imposition of liability solely on the basis of evidence of statistical disparities. Title IX contains language that is virtually identical, which the Tenth Circuit completely disregarded in reaching its result. This Court therefore should grant certiorari in order to apply its established interpretation of Title VII to the virtually identical language of Title IX.

Finally, the Court should grant certiorari in order to interpret Title IX to avoid the serious equal protection concerns raised by the lower court's holding.

I. THE HOLDING OF THE COURT BELOW, THAT LIABILITY MAY BE BASED SOLELY ON EVIDENCE OF DIFFERING MALE AND FEMALE ATHLETIC PARTICIPATION RATES, WITH NO SHOWING OF DISCRIMINATION, DIRECTLY CONTRADICTS THE CLEAR LANGUAGE OF TITLE IX AND RAISES ISSUES OF PROFOUND IMPORTANCE FOR VIRTUALLY EVERY EDUCATIONAL INSTITUTION.

Despite the fact that CSU's 1992 cutbacks improved women's participation opportunities in comparison with those of their male counterparts, the Tenth Circuit found that CSU violated Title IX by failing to place the entire burden of absorbing the 1992 cutbacks on men. This holding, based solely on the fact that the proportion of women among CSU athletes at the time the cuts were made was smaller than the proportion of women in the student body as a whole, contravenes the clear language of Title IX and misconstrues the agency interpretations of Title IX on which the court purported to rely.

A. Title IX Does Not Require Educational Institutions to Prefer One Sex Over the Other Based Only on Statistical Evidence of Differences in Athletic Participation Rates.

Title IX prohibits educational institutions from discriminating on the basis of sex. 20 U.S.C. § 1681(a).[5] By its express terms, however, Title IX does *not* require schools to prefer one sex over the other based merely on statistical evidence that one sex participates less than the other in a particular program or activity:

> Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number

[5] 20 U.S.C. § 1681(a) provides 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 or activity receiving Federal financial assistance . . . ."

> or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, state, section, or other area. . . .

20 U.S.C. § 1681(b).

The Tenth Circuit recognized that this language means that "a Title IX violation may not be predicated solely on a disparity between the gender composition of an institution's athletic program and the gender composition of its undergraduate enrollment[.]" 998 F.2d at 831; Pet. App. at C-14. There is good reason for this rule. Creation or elimination of varsity positions has no impact on students generally; it affects only athletes. There was no proof below that the percentages of women and men at CSU who were interested in athletics were identical. Indeed, the evidence was to the contrary. For example, in Colorado high schools (from which the vast preponderance of the CSU student body is drawn), female athletic participation is lower than male participation. As explained below, however, the effect of the Tenth Circuit's decision is to predicate liability on precisely the type of disparate impact evidence prohibited by Title IX, with no requirement whatever that the disparity have resulted from discrimination by the institution involved.

B. The Three-Part "Policy Interpretation" Test Used by the Court Below, When Applied In the Context of Program Cutbacks, Violates Title IX and Its Implementing Regulations.

The formal regulations under Title IX require recipients of federal funds to "provide equal athletic opportunity for members of both sexes" and list ten non-exclusive factors for determining whether an institution has met this requirement.

One of these ten factors requires consideration of "[w]hether the selection of sports and levels of competition effectively accommodate the interests and abilities

of members of both sexes[.]" 34 C.F.R. § 106.41(c)(1).[6] The Tenth Circuit's error came when it tried to determine whether CSU's actions had "effectively accommodated" the interests and abilities of both male and female athletes. To do so, the court relied exclusively on a three-part test contained in the OCR's 1979 *Policy Interpretation*, which provides that an institution "effectively accommodates" interests and abilities if any of the following requirements are satisfied:

> (1) "participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments;" or
>
> (2) if participation opportunities are not substantially proportionate, "the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the [underrepresented] sex;" or
>
> (3) if participation opportunities are not substantially proportionate and the institution cannot show a history or continuing practice of program expansion, "it can be demonstrated that the interests and abilities of the [underrepresented] sex have been fully and effectively accommodated by the present program."

44 Fed. Reg. at 71,418.

The Tenth Circuit recognized that the "substantial proportionality" standard contained in the first prong of this test was designed to be nothing more than a "safe harbor" for educational institutions and that schools would still comply with Title IX if they satisfied the second prong of the test (by continuing to expand opportunities for women), or the third prong (by fully accommodating the interests and abilities of women). 998 F.2d at 829; Pet. App. at C-9. By applying the *Policy Interpretation*'s

[6] The Tenth Circuit rejected CSU's argument that a Title IX violation must be premised on an evaluation of the instituiton's overall compliance with *all* of the listed factors. 998 F.2d at 828; Pet. App. at C-7 to C-8.

three-part test in the context of CSU's 1992 program cutbacks, however, the Tenth Circuit effectively converted the "safe harbor" of the first prong into the exclusive test of CSU's liability. This was error.

1. *The Three-Part Test Was Drafted When Athletic Participation Opportunities Were Expanding for Both Sexes.*

The *Policy Interpretation*'s three-part test was created when the financial and other resources available to educational institutions were increasing. The *Policy Interpretation* itself was based on an historical analysis by the OCR of women's participation opportunities in intercollegiate athletics. This analysis, published in 1979 as an appendix to the *Policy Interpretation* itself, showed that, although differences remained, the opportunities for *both* men and women had expanded during the 1970s, with the increase in women's opportunities significantly outpacing the increase in men's opportunities. 44 Fed. Reg. at 71,419. As a result, "[t]he overall growth of women's intercollegiate programs [had] not been at the expense of men's programs." *Id.*

The three-part test, adopted in this historical context, clearly contemplates that athletic programs will continue to expand. Thus, it sets forth a path for compliance based on expanding opportunities. Under it, in an expanding universe, schools could satisfy the anti-discrimination mandate of Title IX, without penalizing or preferring either sex, by expanding programs under the second prong of the three-part test.

2. *When Applied In the Context of Program Cutbacks, The Three-Part Test Results in Liability Based Solely on Statistical Evidence of Differences in Athletic Participation Rates and Thus Violates Title IX.*

The picture changes dramatically when the assumption of an "expanding" financial universe no longer holds true. Colleges and universities throughout the country have experienced severe economic distress in recent years.

CSU has not been immune from this problem. As a result, CSU, and many other schools, have been forced to cut expenditures in many of their programs, including intercollegiate athletics.

When the three-part test is applied in this context, it becomes nothing more than a prescription for liability. Virtually no college or university in the country now meets the *first* ("substantial proportionality") prong of the test.[7] The *second* ("expanding program") prong is by definition unavailable in the context of program cutbacks. Moreover, as the Tenth Circuit interpreted the test, the *third* prong can never be satisfied if any women's program is cut because, that court held, *any* cut in a women's program means that women's interests are not being "fully and effectively accommodated."

Hence, under the Tenth Circuit's reasoning, schools now may comply with Title IX *only* by "cutting athletic programs such that men's and women's athletic participation rates become substantially proportionate to their representation in the undergraduate population"—in other words, by cutting solely from men's athletic programs until substantial proportionality is achieved. 998 F.2d at 830; Pet. App. at C-13. This rule construes Title IX as a one-way "ratchet" under which schools are absolutely forbidden to make cuts that affect women's athletic programs at all, even if the overall effect of the cuts *improves* proportionality,[8] and it converts Title IX into a

[7] As explained in the petition for certiorari, Pet. at 8 & n.11, at 297 out of 298 Division I schools, the rate of women's participation in intercollegiate athletics is lower than the percentage of women in the student body, and the reason for the rate of participation being the same as the enrollment rate at the remaining school is a state court decision that itself may have required a violation of Title IX.

[8] As noted in the petition for certiorari, Pet. at 6, the result of this reasoning is to hold CSU in violation of Title IX despite the fact that women now have a greater share of athletic opportunities than in 1989, when the OCR found CSU's athletic program to be in compliance with Title IX.

rigid requirement of statistical parity, without regard for the subtleties and complexities of university life.

The lower court's reasoning, converting the "safe harbor" of substantial proportionality into *the sole test of liability* when a school is forced to cut its athletic expenditures, flatly contradicts 20 U.S.C. § 1681(b) by making universities liable solely on the basis of a statistical showing of disparity in participation rates, with no finding that the disparity results from discrimination. Nowhere in its opinion does the court grapple with—or even explicitly recognize—this contradiction, a fact that is all the more puzzling given the court's acknowledgment, noted above, that a Title IX violation *may not* be predicated "solely on a disparity between the gender composition of an institution's athletic program and the gender composition of its undergraduate enrollment[.]" 998 F.2d at 831; Pet. App. at C-14.

3. *As Applied by the Court Below, the Three-Part Test Precludes Educational Institutions From Distributing Athletic Opportunities on the Basis of the Interests and Abilities of Both Sexes.*

Title IX and its implementing regulations mandate that educational institutions must strive to meet the interests and abilities of *both* men and women, without discrimination against either sex. The Tenth Circuit's decision utterly ignores this mandate. Under the Tenth Circuit's approach, educational institutions are required to take gender into account explicitly whenever programs must be cut. Indeed, as noted above, the court's rule forces them in such circumstances to cut only men's opportunities when substantial proportionality does not exist, even where there is no evidence that the difference in rates of participation is due to any discrimination by the institution. This absolute preference for women over men would require schools to allocate athletic opportunities explicitly "on the basis of sex," and thus directly contravenes section 1681(a).

The Title IX regulations themselves make clear that educational institutions are required to ensure equality of

opportunity, not in comparison with the number of men and women in the school population as a whole, but rather in comparison with the number of men and women who possess the "interests and abilities" necessary to compete in intercollegiate athletics. As 20 U.S.C. § 1681(b) clearly indicates, Congress, in adopting Title IX, did not assume that men and women have equal interests in participating in athletics or any other particular program offered by educational institutions. The regulations implementing Title IX likewise make no such assumption, requiring instead that schools "effectively accommodate the *interests and abilities* of members of *both* sexes." 34 C.F.R. § 106.41(c) (emphasis added). Thus, where athletic oportunities are limited, this language clearly requires that available opportunities be rationed between the sexes on the basis of demonstrated interest and ability—not on the basis of raw enrollment statistics, as the Tenth Circuit would require.

In sum, while the "substantial proportionality" prong of the three-part test can be a "safe harbor" by which a school can demonstrate compliance, it cannot be required for compliance.

The *Policy Interpretation* itself states that "the governing principle [in determining interests and abilities] is that the athletic interests and abilities of male and female students must be *equally effectively accommodated.*" 44 Fed. Reg. at 71,414. *See also id.* at 71,417 (institutions must "accommodate effectively the interests and abilities of students to the extent necessary to provide *equal opportunity* in the selection of sports and levels of competition available to members of *both sexes*") (emphasis added). The Tenth Circuit's approach, by requiring schools to cut exclusively from men's athletic programs, clearly violates this principle. This Court should grant certiorari to correct this error.

II. THE HOLDING OF THE COURT BELOW CONFLICTS WITH DECISIONS OF THIS COURT INTERPRETING THE SECTION OF TITLE VII THAT MIRRORS TITLE IX'S PROVISION DISFAVORING PREFERENTIAL TREATMENT.

Title IX's broad prohibition against sex discrimination in educational programs receiving federal assistance, 20 U.S.C. § 1681(a), was patterned on the similarly-worded prohibition against discrimination on the grounds of race, color, or national origin in federally-funded programs appearing in Title VI, 42 U.S.C. § 2000d. Unlike Title VI, however, Title IX explicitly disclaims any requirement of "preferential or disparate treatment to the members of one sex" based on statistical disparities that may exist between that sex's participation in the program in question and the "total number or percentage of persons of that sex in any community . . . ." 20 U.S.C. § 1681(b). Unlike the rest of Title IX, this provision is patterned on Title VII. *See* 42 U.S.C. § 2000e-2(j). This Court's interpretation of the admonition against preferential treatment in the employment context in section 2000e-2(j) of Title VII thus provides authoritative guidance concerning the interpretation of its nearly identically-worded Title IX counterpart. *See West Virginia University Hospitals, Inc. v. Casey,* 499 U.S. 83 (1991).

The reasoning and the result in the court below are utterly incompatible with this Court's cases construing section 2000e-2(j), however. In woodenly applying the three-prong test of the *Policy Interpretation* to a situation in which an educational institution must reduce, rather than expand, its athletic offerings, the Tenth Circuit ignored those cases, which make clear that Title IX does not permit the kind of preferential treatment required by the Tenth Circuit.

As explained above, the Tenth Circuit's application of the *Policy Interpretation* to program curtailments resulted in a finding of liability based solely on the difference between women's and men's athletic participation rates at CSU. This exclusive reliance purely on statistical disproportion contradicts this Court's interpretation of section 2000e-2(j). In *International Brotherhood of Teamsters v. United States,* 431 U.S. 324 (1977), for example, the Court addressed a union's argument that statistical disproportion alone could not be the basis for liability under Title VII, noting that section 2000e-2(j) does not require statistical proportionality. The Court stated that although statistical evidence was relevant, "[section 2000e-(j)] makes clear that Title VII imposes no requirement that a work force mirror the general population." *Id.* at 339-40 n.20. Yet the Tenth Circuit decision, by imposing liability solely on the basis of the disproportionate athletic participation rates of men and women at CSU, does exactly that.

The *Teamsters* Court further noted that "evidence showing that the figures for the general population might not accurately reflect the pool of qualified job applicants would also be relevant." *Id.* at 340. This observation, applied in the Title IX context, underscores the necessity for an inquiry into the "interests and abilities" of female and male college students, not just their raw enrollment statistics, given that the proportion of women and men "interested" in athletics may well differ from the percentages of women and men enrolled in the educational institution.[9]

This Court also addressed this issue in *Wards Cove Packing Co. v. Atonio,* 490 U.S. 642 (1989), where it held that statistical evidence showing a high percentage of nonwhite workers in an employer's nonskilled jobs and a low percentage of nonwhite workers in the same employer's skilled jobs was not sufficiently probative to make out a prima facie case of employment discrimination. The Court explained that the relevant comparison was "between the racial composition of the qualified persons in the

[9] This is one basis for amici's belief that the decision in *Cohen v. Brown Univ.,* 991 F.2d 888 (1st Cir. 1993), also is incorrect. There, the First Circuit rejected Brown's argument that athletic opportunities should be provided in proportion to the percentage of female and male students expressing interest in athletics, not in proportion to the percentage of women and men in the student body as a whole.

labor market and the persons holding at-issue jobs," *id.* at 650, and that the employer could not be held liable "[i]f the absence of minorities holding such skilled positions [wa]s due to a dearth of qualified nonwhite applicants (for reasons that are not petitioners' fault)." [10] *Id.* at 651.[11]

Similarly, to the extent that the proportion of women among the athletes at a particular school is lower than the proportion of women in that school's student body, the disproportion cannot be assumed to be the school's "fault," or the result of discrimination, and it may not be used by itself to find the school liable for a Title IX violation. Just as it cannot be assumed that all members of a given population group are qualified for a job, it cannot be assumed that every student in a university community has the interest to participate in intercollegiate athletics.

Section 2000e-2(j) also provides guidance concerning the extent to which race- or gender-conscious remedies may be adopted voluntarily or imposed by courts. As the interpretive memorandum to section 2000e-2(j) explains, "[t]here is no requirement in title VII that an employer maintain a racial balance in his work force. On the contrary, any deliberate attempt to maintain a racial balance . . . would involve a *violation* of title VII because maintaining such a balance would require an employer to hire or refuse to hire on the basis of race." 110 Cong. Rec. 7213 (1964) (emphasis supplied). Citing section 2000e-2(j), the Court in *Wards Cove* similarly remarked that if pure statistical imbalance were enough to make out a prima facie case of employment discrimination, employers would be tempted to adopt "numerical quotas in the workplace, a result that Congress and this Court have rejected repeatedly in the past." 490 U.S. at 653. Such "inappropriate prophylactic measures," as several members of this Court have warned, clearly would violate section 2000e-2(j). *Watson v. Fort Worth Bank & Trust,* 487 U. S. 977, 992 (1988) (plurality opinion). *See also Price Waterhouse v. Hopkins,* 490 U.S. 228, 275 (1989) (disapproving liability standards that would provide an "incentive to preferential treatment in violation of Section 2000e-2(j)") (opinion of O'Connor, J.).

Yet the Tenth Circuit decision would not merely encourage such quotas; it would require them. Under the Tenth Circuit's approach, only equal participation ratios can save a university from a finding of liability under Title IX when it is forced, for financial reasons, to curtail the size of its athletic programs.

Although it is clear that Title VII does permit race- or gender-conscious relief as a remedy for past discriminatory practices, *see Local 28, Sheet Metal Workers' Internat'l Ass'n v. Equal Employment Opportunity Comm'n,* 478 U.S. 421 (1986), it is equally clear that such remedies may not be imposed in the absence of any finding of discrimination. Just as "an employer would not violate the statute merely by having a racially imbalanced work force," a court "could not order an employer to adopt racial preferences merely to correct such an imbalance." *Id.* at 453. Nonetheless, that is precisely what the Tenth Circuit has ordered in this case. Based solely on a statistical difference in participation rates, the Tenth Circuit has ordered CSU to immunize women's athletics from any cuts until pure statistical proportionality is reached. Under this injunction, none of the 120 varsity participation opportunities for women (who make up 48.2 percent of CSU's total enrollment) may be eliminated until CSU

[10] Similarly, in *Watson v. Fort Worth Bank & Trust,* 487 U.S. 977 (1988), a plurality of this Court noted that "[i]t is completely unrealistic to assume that unlawful discrimination is the sole cause of people failing to gravitate to jobs and employers in accord with the laws of chance. It would be equally unrealistic to suppose that employers can eliminate, or discover and explain, the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces." *Id.* at 992 (citation omitted).

[11] Congress amended Title VII in 1991 in response to two other sections of the Supreme Court's decision in *Wards Cove* concerning proof of causation under Title VII and the employer's burden once plaintiff has established a prima facie case. *See* 42 U.S.C. § 2000e-2(k). This amendment did not affect the holding discussed here.

has eliminated 68 of the currently existing 198 varsity participation opportunities for men and has thus arrived at perfect statistical proportionality of athletic participation to enrollment.[12] Such a draconian result would be impermissible in the employment context under section 2000e-2(j), and it is likewise unacceptable under section 1681 (b) of Title IX.

Indeed, the Tenth Circuit's requirement that *only* men's athletic programs be eliminated until statistical balance is achieved is too harsh to stand even where there is a finding of discrimination. Remedial plans, whether voluntary or court-imposed, are permissible only to the extent that they do not "unnecessarily trammel[] the rights of male employees or create[] an absolute bar to their advancement." *Johnson v. Transportation Agency,* 480 U.S. 616, 637-38 (1987); *accord, Local 28, Sheet Metal Workers,* 478 U.S. at 479. If the Tenth Circuit's result in this case does not "unnecessarily trammel" the rights of male athletes at CSU, or does not "create an absolute bar to their advancement," it is hard to imagine what could.

The *Johnson* Court cautioned against blind reliance on numbers without consideration of qualifications:

> If [an affirmative action] plan failed to take distinctions in qualifications into account in providing guidance for actual employment decisions, it would dictate mere blind hiring by the numbers, for it would hold supervisors to "achievement of a particular percentage of minority employment or membership . . . regardless of circumstances such as economic conditions or the number of available qualified minority applicants . . . ."

480 U.S. at 636 (citation omitted). Rather than "blind *hiring* by the numbers," what the court below has ordered is essentially "blind *firing* by the numbers," since the order requires the systematic elimination of men's athletic opportunities until statistical proportionality is achieved before a single women's athletic position may be cut. This is impermissible.

[12] *See Roberts,* 814 F. Supp. at 1512, 1514-15; Pet. App. at A-7, A-12.

As this Court has made clear, "distinctions in actual qualifications" (or, in the Title IX context, distinctions in "interests and abilities") must be taken into account, both in determining liability and in formulating a remedy. By refusing to take interests and abilities into account, the decision below reads section 1681(b) out of Title IX and conflicts with prior holdings of this Court concerning section 2000e-2(j).

III. TITLE IX MUST BE INTERPRETED TO AVOID THE SERIOUS EQUAL PROTECTION PROBLEMS RAISED BY THE LOWER COURT'S DECISION.

The court below interpreted Title IX to require a harsh result: that only men's athletic opportunities at CSU may be cut until pure statistical proportionality between male and female athletic participation at CSU is achieved. This interpretation raises serious constitutional problems, and this Court should construe the statute to avoid such problems. *See, e.g., Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council,* 485 U.S. 568, 575 (1988).

Since the statute, as construed and applied by the Tenth Circuit, discriminates on the basis of gender by permitting cuts only in men's athletic programs, it can pass constitutional muster only if it serves "important governmental objectives" and if the "discriminatory means employed" are "substantially related to the achievement of those objectives." *Mississippi University for Women v. Hogan,* 458 U.S. 718, 724 (1982). This Court's prior decisions in similar cases make clear that the Tenth Circuit's interpretation of Title IX cannot survive such scrutiny.

In *Wygant v. Jackson Board of Education,* 476 U.S. 267 (1986), the case most closely on point, the Court considered the constitutionality of a provision in a collective bargaining agreement that provided for preferential protection from layoffs for minority schoolteachers. Specifically, in the event that layoffs became necessary, the

provision required that the proportion of minority to nonminority teachers be preserved, even if nonminority teachers who had accumulated greater seniority than some minority teachers would have to be laid off. *See id.* at 270.

The Court held that this provision violated the Equal Protection Clause, U.S. Const. amend. XIV. The plurality gave two reasons for this conclusion. First, the interests and purposes advanced to justify the racial classification were insufficient, because they consisted mostly of general recitals of societal discrimination and statistics showing that the percentage of minority teachers was smaller than the percentage of minority students in the district. The Court held that neither vague recitals nor statistical imbalances, without more, were sufficiently compelling to warrant race-based "remedial" measures.[13] Here, the purposes and interests served by the gender classification are similarly vague; the Tenth Circuit's finding of a Title IX violation rests, as discussed in Part I above, purely on a finding of statistical difference, and not on a finding of discrimination. Such a justification is insufficient to support a rigid gender-based quota system of the kind the Tenth Circuit required.

The second reason the *Wygant* court struck down the layoff provision at issue in that case was that it "was not a legally appropriate means of achieving even a compelling purpose." *Id.* at 278. This was so in part because layoffs are a uniquely intrusive and burdensome method of achieving racial balance. The Court specifically indicated that, "[alt]hough hiring goals may burden some innocent individuals, they simply do not impose the same kind of injury that layoffs impose." *Id.* at 282. Here, the Tenth Circuit would require, in essence, "laying off" only

[13] Similarly, in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), the Court found that a purportedly "remedial" minority preference program established by the city could not be justified on the basis of vague recitals of discrimination, or on the basis of statistical showings that few minority construction firms had been successful in gaining city contracts.

male athletes until gender proportionality is achieved.[14] This harsh result would violate the Equal Protection Clause just as the *Wygant* plan did.[15]

The Tenth Circuit's interpretation of Title IX is also constitutionally suspect because of its use of a rigid quota system as its "remedial" mechanism. The Court has long disfavored quota systems, even where the need for remedial measures is clear, because quotas pose virtually insurmountable barriers to the advancement of the individuals not granted preferential treatment. In *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), for example, the Court observed that "[s]ince the city must

[14] The fact that the "layoffs" here involve athletic opportunities, not jobs, is irrelevant; the distinction made by the Court in *Wygant* was between the *dilution* of opportunity resulting from affirmative action in hiring programs and the *denial* of opportunity resulting from layoffs: "In cases involving valid *hiring* goals, the burden to be borne by innocent individuals is diffused to a considerable extent among society generally." 476 U.S. at 282 (emphasis in original). The nature of the deprivation suffered by male athletes whose athletic opportunities are to be cut under the Tenth Circuit's reading of Title IX should not be trivialized.

[15] *Metro Broadcasting, Inc. v. Federal Communications Comm'n* 497 U.S. 547 (1990), is not to the contrary. *Metro Broadcasting* involved minority preference policies adopted by the Federal Communications Commission with respect to the allocation of radio and television broadcast licenses. The Court gave considerable weight to the "scarcity of [electromagnetic frequencies]," noting that because of that scarcity

> ". . . the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium." The Government's role in distributing the limited number of broadcast licenses is not merely that of a "traffic offier"; rather, it is axiomatic that broadcasting may be regulated in light of the rights of the viewing and listening audience and that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."

Id. at 566-67 (citations omitted).

Moreover, in *Metro Broadcasting* the minority preferences were in effect "hiring preferences," and did not require "laying off" any current holders of licenses.

already consider bids and waivers on a case-by-case basis, it is difficult to see the need for a rigid numerical quota." *Id.* at 508. Similarly, in *Regents of University of California v. Bakke,* 438 U.S. 265 (1978), the Court struck down the university's admissions quota system, but refused to enjoin the university from ever considering the race of an applicant as part of its admissions program.

Where, as here, a particular interpretation of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless the constitutional construction is plainly contrary to the intent of Congress. *See, e.g., Edward J. DeBartolo Corp.,* 485 U.S. at 575 (because National Labor Relations Board's construction of the National Labor Relations Act to proscribe peaceful handbilling raised serious First Amendment issues, Court would construe statute so as not to forbid such handbilling); *National Labor Relations Bd. v. Catholic Bishop,* 440 U.S. 490, 499-501 (1979). This Court therefore should grant certiorari in this case in order to ensure that Title IX is not construed in an unconstitutional manner.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

PHILIP BURLING
Counsel of Record for
Amici Curiae
STEPHEN B. DEUTSCH
STEPHEN D. SOWLE
FOLEY, HOAG & ELIOT
One Post Office Square
Boston, MA 02109
(617) 482-1390

Of Counsel:
BEVERLY E. LEDBETTER
BROWN UNIVERSITY
Office of the General Counsel
Providence, RI 02912-3122
(401) 863-1104

GEORGE A. DAVIDSON
HUGHES HUBBARD & REED
One Battery Park Plaza
New York, NY 10004
(212) 837-6585

November 3, 1993