No. 07-1125

In the
Supreme Court of the United States

LISA RYAN FITZGERALD and
ROBERT FITZGERALD,

Petitioners,

v.

BARNSTABLE SCHOOL COMMITTEE and
RUSSELL DEVER,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether Title IX's implied right of action precludes Section 1983 constitutional claims to remedy sex discrimination by federally funded educational institutions.

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IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of Petitioners Lisa Ryan Fitzgerald and Robert Fitzgerald.[1]

PLF was founded thirty-five years ago and is recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of thousands of supporters nationwide, advocating limited government, individual rights, and free enterprise. PLF attorneys have litigated dozens of cases addressing the interpretation of statutes designed to prevent discrimination against individuals based on their race or gender, and were counsel of record in the *Petition of the College Sports Council to Repeal, Amend, and Clarify Rules Applying Title IX to High School Athletics* (U.S. Dep't of Education, filed June 19, 2007). PLF attorneys have represented amici curiae in this Court in several discrimination cases, including recently in *Crawford v. Marion County Election Board*, 128 S. Ct. 610 (2008), and *Parents*

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

Involved in Community Schools v. Seattle School District No. 1, 127 S. Ct. 2738 (2007).

PLF attorneys have considerable experience in cases involving the interpretation of anti-discrimination statutes, including, specifically, Title IX. PLF's analysis of the need for a judicial and regulatory return to Title IX's text and plain meaning will provide a useful additional viewpoint to assist the Court in resolving this case.

SUMMARY OF ARGUMENT

The operative provision of Title IX of the Education Amendments of 1972 reads:

> No 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.

20 U.S.C. § 1681(a) (1972). There is nothing in this text, nor in Title IX's legislative history, that suggests Congress intended for Title IX to be the exclusive remedy for sex discrimination claims brought against federally funded education programs.

The lower court's holding to the contrary illustrates a pervasive tendency for courts and government regulators alike to read into Title IX provisions that are not there, and that Congress did not intend. In the realm of athletics, particularly at the high school level, misguided regulatory enforcement effectively has required the very gender discrimination Title IX was intended to eliminate. This Court should hold that the judiciary and federal

regulators must interpret and apply Title IX in a manner consistent with its text and legislative history.

ARGUMENT

I

NOTHING IN TITLE IX'S TEXT SUGGESTS PRECLUSION OF SECTION 1983 CLAIMS

"This [case] calls to mind what Judge Friendly described as Felix Frankfurter's 'threefold imperative to law students' in his landmark statutory interpretation course: '(1) read the statute; (2) read the statute; (3) read the statute!'" *In re England*, 375 F.3d 1169, 1182 (D.C. Cir. 2004) (quoting Henry J. Friendly, *Benchmarks* 202 (1967)). Nothing in the statute at issue in this case compels the First Circuit's holding, as Title IX's plain language, 20 U.S.C. §§ 1681-1688, does not suggest Congress intended for Title IX to preclude the validation of constitutional claims via 42 U.S.C. § 1983.

In 2006, the Sixth Circuit Court of Appeals offered the most comprehensive elaboration on Justice Frankfurter's advice with respect to the issue in this case. In *Communities for Equity v. Michigan High School Athletic Ass'n*, the Sixth Circuit held that Title IX does not preclude Section 1983 claims. 459 F.3d 676 (6th Cir. 2006). The court came to this conclusion after studying the plain meaning of the texts of both Title IX and Section 1983, within the framework of this Court's opinions on "the intersection between statutory remedies and § 1983." *Id.* at 681.

The Sixth Circuit began its review with this Court's decisions in *Middlesex County Sewerage*

Authority v. National Sea Clammers, 453 U.S. 1 (1981), and, later, *Smith v. Robinson*, 468 U.S. 992 (1984). In these cases, this Court asserted that where an organic statute expressly and specifically provides for a cause of action comprised of "unusually elaborate enforcement provisions," 459 F.3d at 681 (citation omitted), Section 1983 preclusion is appropriate. That is, where use of Section 1983 would do nothing but duplicate an existing cause of action, its use is precluded. However, where violations of the constitutional guarantees such as equal protection and due process are distinct from—"in addition to"—merely implied statutory remedies, there is no preclusion. *Id.* at 683.

Such was the outcome the Sixth Circuit found with respect to Title IX. As in this case, the plaintiff in *Communities for Equity* "invoked § 1983 not as a vehicle to enforce the substantive federal law found in Title IX, but as a vehicle to recover for alleged violations of the Equal Protection Clause of the Fourteenth Amendment." *Id.* at 684. The court distinguished this setting from instances where this Court has found preclusion by noting that Title IX does not provide for remedies of constitutional violations, but only for violations of Title IX itself (and only impliedly at that, *id.* at 686).[2] *Id.* Reading into Title IX the preclusion of Section 1983 claims necessarily reads out of the law the right to equal protection against discrimination by federally funded schools.

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[2] As the Sixth Circuit noted in *Communities for Equity*, the only *expressly* authorized enforcement mechanism in Title IX is the withholding of federal funds from an offending institution. 459 F.3d at 686 ("Title IX, after all, contains *no* express private remedy at all.") (citations omitted).

The Sixth Circuit correctly noted that there is no indication whatsoever, in Title IX's text or legislative history, that Congress intended such a result. *Id.* at 686.

This focus on congressional intent and its expression in statutory text is of the utmost importance. Where this Court has analyzed questions of Section 1983 preemption, it has started with "the procedures and guarantees set out in the [substantive statute] and Congress' express efforts" to afford parties the right to "go directly to court with an equal protection claim." *Id.* at 682 (quoting *Smith v. Robinson*, 468 U.S. at 1011-12). Congressional intent to preclude Section 1983 constitutional claims, "according to [this] Court, was found in the comprehensive procedures and guarantees established" in the substantive statute. *Id.* Thus, according to this Court and the Sixth Circuit, congressional intent of preclusion is expressed via statutory text. This is a basic tenet of statutory construction, *see, e.g., American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982), and one that argues against a finding of preclusion in this case, for nothing in Title IX's plain language suggests congressional intent to foreclose Section 1983 claims.

II

TITLE IX IS ENFORCED IN A MANNER INCONSISTENT WITH ITS TEXT AND LEGISLATIVE HISTORY

This case is not the only instance of Title IX's interpretation conflicting with the law's text and legislative history. For years, the federal government has applied Title IX in such a way to make it mean precisely the opposite of what it plainly says. This

regulatory divergence from Title IX's text parallels the judicial divergence at issue in this case, and should compel this Court's affirmation of both regulatory and judicial adherence to Title IX's text and legislative history.

Regulatory deviance from Title IX's text and history is most pronounced in the realm of athletics. Unfortunately, the federal government's regulatory apparatus has misinterpreted Title IX to require the very gender discrimination the law was passed to prevent, carried out through a quota system and the capping and elimination of male athletic opportunities.

A. Title IX's Regulatory Framework Diverges from the Law's Text

Congress modeled Title IX after Title VI of the Civil Rights Act of 1964; like Title VI, Title IX was enacted to prohibit intentional discrimination, and sought to eliminate from federally funded education all "quotas" and "percentage balances." *See* 117 Cong. Rec. 30,409, 39,262 (1971); 118 Cong. Rec. 5812 (1972). In its one departure from Title VI's template, Congress included in Title IX a restriction against preferential treatment linked to statistical disparities within the total population. 20 U.S.C. § 1681(b). This provision was substantively identical to a measure found in Section 703 of Title VII of the Civil Rights Act that precluded the federal government from requiring preferential treatment based on notions of numerical "balance." *United Steelworkers of Am., AFL-CIO-CLC v. Weber*, 443 U.S. 193, 206 (1979). While this Title IX provision does allow courts and agencies to consider "statistical evidence" in a specific "hearing or proceeding," such an allowance does nothing to override the predominant prohibition against requiring

preferential or discriminatory decisions based on overall population imbalances. A contrary interpretation not only perverts the plain reading of Title IX's text, as based on Title VII, but also "can violate the Constitution." *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 993 (1988); *see also Freeman v. Pitts*, 503 U.S. 467, 494 (1992) (holding that in the context of race, "balance is not to be achieved for its own sake," and there is "no duty to remedy imbalance . . . caused by demographic factors").

Like Title VI, Title IX authorizes the federal government to issue rules, regulations, and orders to enforce the statutory prohibition against intentional discrimination. 20 U.S.C. § 1682. Under Title IX, asserted Senator Birch Bayh, the law's Senate sponsor, such authority permitted "differential treatment by sex" only in "very unusual cases" where "such treatment is absolutely necessary," such as the need for privacy in locker rooms and classes for pregnant women. 118 Cong. Rec. 5807 (1972). Since Title IX's passage, however, the federal government has promulgated regulations that pervert the law's text, in ways—similar to the holding of the court below—that functionally amend Title IX to require what Congress did not.

In 1974, Senator John Tower introduced an Education Amendment aimed at exempting revenue-producing college sports from Title IX's requirements. Tower's Amendment also required the Commissioner of Education to publish proposed Title IX regulations pertaining to intercollegiate athletics within thirty days of the Amendment's enactment. 120 Cong. Rec. 15,322-23 (1974). Senator Tower stated on the Senate floor that his review of Title IX's legislative

history indicated that Congress did not intend for the law to apply to athletic endeavors, but also that he offered his measure merely to clarify that if a court held that Title IX did so apply, it would not pertain to revenue-producing sports. *Id*. Regarding his Amendment's directive to the Education Commissioner to publish regulations, Senator Tower stated that it was "not intended to confer on HEW[3] any authority it does not already have" under Title IX. *Id*.

Eventually, the Tower Amendment was itself amended, to require "reasonable provisions considering the nature of particular sports"—a vague nod to Tower's concern over revenue-producing sports—and to give the Secretary of the Department of Health, Education, and Welfare (HEW) rather than the Education Commissioner, the responsibility for publishing the collegiate Title IX regulations. Renamed the Javits Amendment, the law as enacted made no other changes to Tower's proposal. Pub. L. No. 93-380, § 844 (1974). Thus, it conferred no new regulatory authority on any agency. *See* 20 U.S.C. § 1682. Above all else, it unquestionably did not authorize the promulgation of any rule or regulation that went beyond, let alone contradicted, the plain language of Title IX or Congress's intentions in passing it. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984) (agency may not interpret statute in manner that conflicts with Congress's unambiguously expressed intent).

Nevertheless, in 1975 HEW issued regulations to "require institutions to take the interests of both sexes

[3] The Department of Education became the successor to HEW's education functions and now is charged with implementing Title IX.

into account in determining what sports to offer." 40 Fed. Reg. 24,128, 24,134 (June 4, 1975). To comply with this regulatory standard, HEW authorized institutions to assess students' athletic interests "by a reasonable method [the school] deems appropriate." 40 Fed. Reg. at 24,134; *see Letter to Chief State School Officers, Title IX Obligations in Athletics*, 40 Fed. Reg. 52,655, 52,656 (Nov. 11, 1975) ("[e]ffort should be made to obtain the participation of all segments of the educational community affected by the athletics program, and any reasonable method adopted by the institution to obtain such participation will be acceptable."). In the most prominent explanation of schools' requirements, HEW's Secretary testified to Congress that gauging the interest and abilities of both sexes necessarily required an inquiry into males' and females' different levels of desired athletic participation. *Sex Discrimination Regulations: Hearings Before the Subcommittee on Postsecondary Education of the House Committee on Education and Labor*, 94th Cong., at 440 (1975) (Testimony of Secretary Caspar Weinberger).[4]

While the 1975 Regulations deviated from Title IX's plain language, HEW's 1979 "Policy Interpretation" ignored that language, in effect rewriting the law via agency action. The "Three-Part Test" issued therein purports to narrow schools' options for Title IX compliance to but three: (1) a quota whereby male and female athletic participation is proportionate to male and female enrollment rates; (2) progress toward instituting such a quota; or (3)

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[4] This Court has looked to this testimony to interpret the scope of the HEW regulations. *See North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 532-33 (1982).

fully accommodating the underrepresented gender's interest in athletics. *A Policy Interpretation: Title IX and Intercollegiate Athletics*, 44 Fed. Reg. 71,413, *et seq*. (Dec. 11, 1979). The 1979 Three-Part Test now governs Title IX's enforcement regarding athletics, ignoring the 1975 Regulation's endorsement of a flexible and rational relative-interests-and-abilities approach to Title IX implementation.

Still, as evidenced by HEW communications of the time, including the contemporaneous investigator's manual, the third prong of the test originally was interpreted to incorporate the 1975 Regulation's focus on relative interests, thus defining "full accommodation" to mean accommodation to the same relative extent for each gender. *See* 43 Fed. Reg. 58,070, 58,072 (Dec. 11, 1978) ("Intercollegiate athletic programs that provide equal opportunities for both sexes may . . . have different participation rates."); *see also Memorandum from Joan Bernstein, HEW General Counsel, to Patricia Roberts Harris, HEW Secretary* (Nov. 19, 1979) ("The regulation and the policy require schools to be as responsive to the athletic interests and abilities of their women students as of their men students."); *Title IX Intercollegiate Athletics Investigator's Manual* at 122 (1980) (institutions must "meet the interests and abilities of women to the same degree as they meet the interests and abilities of men," but "[d]ifferences between men's and women's programs are justifiable if they are attributable to demonstrated differences in the interests and abilities of the members of each sex," because "Title IX does not require institutions to offer the identical sports, a proportional number of intercollegiate participation opportunities").

Three times since the implementation of the Three-Part Test the Department of Education has issued "policy clarifications" aimed at adjusting the methods institutions may use to comply with the Test. The Department of Education issued the earliest and most notable of these clarifications in 1996. *Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test* (Jan. 16, 1996). Therein, the Education Department took two steps that, like the 1979 Interpretation that gave rise to the Test itself, fundamentally altered the practical administration of Title IX. The first step was to declare the first prong of the Test–authorizing a quota system as a method for compliance–as a "safe harbor," compliance with which would ensure no action taken against the institution by the federal government. Of course, the obvious implication of declaring one prong a safe harbor is that the other prongs are "unsafe." Thus, by 1996, Title IX's effect on athletic programs had been reduced to a blunt quota system that contradicted the plain language of the law itself. Similarly, the Education Department further endorsed arbitrarily capping men's participation in athletics, or cutting men's sports teams and programs altogether, as a way of complying with the newly dominant quota requirement. *Id.*

The Department's subsequent clarification took steps to cabin the effect of the 1996 clarification. In 2003, the Department of Education established the second and third prongs of the test as safe harbors, thus turning the Three-Part Test back into a test with three functional parts. *Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance* (July 11, 2003). Unfortunately, however, the Education Department still endorsed

cutting and capping of men's teams as a valid method of compliance. The 2005 clarification focused more on the "full accommodation" prong of the Test, stating expressly–and in direct contradiction with the 1975 Regulations on the matter–that institutions need not assess the interests of both genders in order to assess "full accommodation." *Additional Clarification of Intercollegiate Athletics Policy: Three-Part Test—Part Three* (Mar. 17, 2005).[5]

B. The Government Has Imposed Athletic Quotas on High Schools in Direct Conflict with Title IX's Text

The negative real-world impacts of the government's failure to interpret Title IX in a manner consistent with its text have been recounted at length. *See* Jessica Gavora, *Tilting the Playing Field: Schools, Sports, Sex, and Title IX* (2001); Jennifer R. Capasso, *Structure Versus Effect: Revealing the Unconstitutional Operation of Title IX's Athletics Provisions*, 46 B.C. L. Rev. 825 (2005); Eric Bentley, *Title IX: The Technical Knockout for Men's Non-Revenue Sports*, 33 J.L. & Educ. 139 (2004). These impacts are beginning to be realized in another realm—high school sports—where tens of thousands of male athletic opportunities are endangered by Title IX's quota system. This reality makes the need all the more urgent for this Court to reattach Title IX's interpretation to its text.

The very Policy Interpretation that gave rise to the Three-Part Test itself makes clear that it was not to govern high school sports. Indeed, its complete title is "*A Policy Interpretation: Title IX and Intercollegiate*

[5] The 2005 clarification does encourage the surveying of both men and women, but it does not mandate such an effort.

Athletics." Regarding any application to high schools, it includes only vague, aspirational language:

> This Policy Interpretation is designed specifically for intercollegiate athletics. However, its general principles will often apply to club, intramural, and interscholastic athletic programs, which are also covered by regulation. Accordingly, the Policy Interpretation *may* be used for guidance by the administrators of such programs when appropriate.

44 Fed. Reg. at 71,413-14 (emphasis added, footnote omitted). While this language leaves open the question of what constitutes a "general principle" and when applying general principles is "appropriate," it is expressed in precatory terms ("may be used . . . when appropriate") obviously and facially less absolute than the remainder of the Interpretation.

Subsequent actions taken by HEW officials, and later by the Department of Education, reflect an intent to regulate only collegiate sports via the Three-Part Test. For example, an affidavit sworn to by HEW's Principal Deputy Director indicated that the agency would stay all intercollegiate athletic enforcement pending issuance of its 1979 Policy Interpretation, but made no similar provision for high schools. *Affidavit of Cynthia G. Brown, Principal Deputy Director, HEW Office of Civil Rights, in the matter of WEAL v. Harris*, No. 74-1720 (D.D.C.). This business-as-usual approach is the one expected when an agency's governing rules, here with respect to high schools, haven't changed. And in a memorandum written by HEW's Office of Civil Rights director to the department's secretary, for the purpose of formally identifying the parties affected

by the 1979 Policy Interpretation, relevant entities included women's groups, colleges and universities, and Congress; high schools were conspicuously absent from the list. *Memorandum from David Tatel, Director, HEW Office of Civil Rights, to HEW Secretary* (Sept. 27, 1979) (also referring specifically to the Policy Interpretation as the "Title IX Intercollegiate Athletics Policy Interpretation").

In issuing its final Annual Operating Plan for fiscal year 1980, HEW referenced the affidavit and the recent completion of the Policy Interpretation as addressing previously unresolved issues pertaining to intercollegiate athletics. At the same time, HEW declined to treat high school athletics as a distinct issue, apart from other high school issues, for enforcement purposes. 44 Fed. Reg. 76,864 (Dec. 28, 1979). Instead, the Annual Operating Plan situated high school athletics as a part of its "Within-School Discrimination" subject matter, making no reference to the Three-Part Test. *Id*. The Department of Education then continued HEW's different treatments of college and high school sports. The 1980 Title IX manual—which HEW and, later, the Department of Education developed to interpret and implement the 1979 Policy Interpretation—does not mention the Test's application to high school athletics.

Perhaps most fundamentally, the professed legislative authority for the Test is without reference to high school sports. In issuing the 1979 Policy Interpretation that established the Three-Part Test, HEW cited as its authority to do so the Javits Amendment, discussed *supra*. *See* 44 Fed. Reg. at 71,413. Yet the Javits Amendment directs HEW only to propose rules relating to intercollegiate athletics, a

fact acknowledged by the 1979 Interpretation itself. *Id*. at 71,415 ("[t]he 'Javits Amendment' . . . instructed HEW to make 'reasonable (regulatory) provisions considering the nature of particular sports' in intercollegiate athletics."). As the Javits Amendment by its very language does not apply to high school sports, neither does the Interpretation putatively issued under its authority.

The cumulative result of this labyrinth of regulatory misinterpretation is so far removed from Title IX's text, and is in such direct conflict with the law's text and intent, that it likely violates step one of this Court's *Chevron* test. 467 U.S. at 842-43. This Court should take this opportunity, then, to affirm that all Title IX interpretations, governmental and judicial, must conform with the law's text and legislative history.

CONCLUSION

For the reasons stated above, the judgment of the First Circuit should be reversed.

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Respectfully submitted,

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