No. 02-1672

IN THE

Supreme Court of the United States

RODERICK JACKSON,
Petitioner,

v.

BIRMINGHAM BOARD OF EDUCATION,
Respondent.

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

BRIEF *AMICUS CURIAE* OF THE NATIONAL EDUCATION ASSOCIATION, AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, AMERICAN VOLLEYBALL COACHES ASSOCIATION, NATIONAL FASTPITCH COACHES ASSOCIATION, INTERCOLLEGIATE WOMEN'S LACROSSE COACHES ASSOCIATION, AND WOMEN'S BASKETBALL COACHES ASSOCIATION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE* [1]

This brief *amicus curiae* is submitted, with the consent of the parties, on behalf of the National Education Association

[1] Letters of consent are on file with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici curiae* made a monetary contribution to the preparation or submission of this brief.

(NEA), a nationwide organization with more than 2.7 million members, almost 2.5 million of whom work as teachers, professors, coaches or administrators in our nation's schools and universities; the American Association of University Professors, a higher education organization made up of approximately 45,000 faculty members in all academic disciplines; the American Volleyball Coaches Association, a national organization of approximately 3,200 high school, college and club coaches; the National Fastpitch Coaches Association, a national organization of approximately 4,200 club, secondary and higher education coaches; the Intercollegiate Women's Lacrosse Coaches Association, a nationwide coaches' organization with approximately 250 institutional members, primarily employed at the university level; and the Women's Basketball Coaches Association, a national organization of approximately 4,500 high school, youth sport, and college professional coaches. All of these organizations are committed to ensuring that Title IX of the Education Amendments of 1972 is fully enforced, and they submit this brief to show why that enforcement depends on ensuring that teachers, professors, coaches, school administrators and students are protected from retaliation for reporting Title IX violations or for supporting Title IX claims.

SUMMARY OF ARGUMENT

Title IX's protections are broad, providing 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." 20 U.S.C. § 1681(a). Those broad protections long have been interpreted by the relevant administrative authorities, with Congress' approval, to prohibit retaliation against persons who

object to sex discrimination in educational programs receiving Federal financial assistance.[2]

Proceeding from an analysis of the kinds of evidence that must be adduced to establish a Title IX violation, and of the realities of Title IX enforcement, this brief will show that, if Congress' prohibition against sex discrimination in federally-supported educational programs is not to be reduced to an empty promise, the longstanding interpretation of the statute as forbidding retaliation against those who make complaints or who otherwise assist in enforcement must be upheld. And we will show that this is particularly true in the case of teachers, professors, coaches and school administrators who are at risk of retaliation when they expose violations of Title IX.

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[2] Title IX has been interpreted to reach discrimination against individuals who raise or support Title IX complaints since 1975, 34 C.F.R. 106.71 (incorporating 34 C.F.R. 100.7(e)) (current codification of Title IX regulation first appearing in Nondiscrimination on the Basis of Sex in Education Programs and Activities, 44 Fed. Reg. 24127, 24144 (June 4, 1975)), and Congress has been fully apprised of that interpretation by virtue of the fact that that regulation was lodged with Congress for 45 days time prior to taking effect. *See* 44 Fed. Reg. at 24128. That Congress did not take any action to prevent the regulation from taking effect, and has taken no action to remove retaliation as an action prohibited by Title IX, makes this case an appropriate one in which to invoke the rule that where "an agency's statutory construction has been 'fully brought to the attention of the public and the Congress,' and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned." *United States v. Rutherford*, 442 U.S. 544, 554, n.10 (1979) (quoting *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 489 (1940)). *See also Cannon v. University of Chicago*, 441 U.S. 677, 702-03 (1979); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 274-75 (1974).

ARGUMENT

I. EDUCATORS PLAY AN ESSENTIAL ROLE IN THE ENFORCEMENT OF TITLE IX, WHICH WOULD BE STIFLED IF EDUCATORS COULD BE SUBJECTED TO RETALIATION WITHOUT REDRESS WHEN THEY SEEK TO CORRECT VIOLATIONS OF THE STATUTE

A. The Athletics Arena

The importance of protecting educators from retaliation when they take steps to expose and correct violations of Title IX is readily apparent in the athletic arena in which this case arose. That is so because the enforcement of Title IX in athletics at the collegiate level, and increasingly at the elementary and secondary school levels as well, depends on specific and detailed knowledge regarding a school's athletic program that generally is available to educators—in particular coaches and athletic administrators—but not to students. Consequently, in most situations, if coaches and administrators do not take steps to insist that violations of Title IX be corrected, the violations will go undetected and unremedied.

i. There are three main varieties of Title IX claims in the athletics arena—claims of unequal treatment of female teams and/or athletes, claims of unequal accommodation of female students' athletic interests and abilities, and claims of unequal financial support (*i.e.*, scholarships) for female athletes. *See* Title IX of the Education Amendments of 1972; a Policy Interpretation, 44 Fed. Reg. 71413, 71414 (Dec. 11, 1979). Proof of all three types of claims depends on a wealth of information about the athletic program of a school that coaches and athletic administrators are uniquely situated to possess and comprehend.

For example, the type of claim that Petitioner Jackson attempted to raise below was a claim of unequal treatment of a girls' basketball team. Specifically, Jackson claimed "that the girls' [basketball] team was denied equal funding and

equal access to sports facilities and equipment" (Cert. Pet. at 3a). In particular, Jackson was aware that the girls were "forced to practice in an older, unheated gym or wait until after the boys were done practicing in the newer gym," and that "boys got a share of concessions and ticket money while girls did not."[3] Although the timing and location of the two teams' practice sessions might be readily apparent to students, the unequal manner in which financial support was divided between the teams is something that Jackson, as a member of the school athletics staff, was uniquely situated to know and to bring to light. Had he not come forward, in all likelihood the issue would not have been raised and the alleged inequality in funding for the girls and boys teams would have gone unremarked and unaddressed.

In this respect the claim in this case is typical of Title IX unequal treatment claims. Proof of such a Title IX claim usually requires a wealth of factual detail regarding the entire scope and nature of support a school provides to its teams and athletes. Since 1979, the enforcement agencies have taken the position that Title IX does not require exact equality in the treatment of male and female athletes, but rather "equivalence" in the opportunities and support that are provided to male and female athletes across the entire athletic program of a school. *See* 44 Fed. Reg. at 71415-17.[4] Determining whether such "equivalence" exists is an extremely fact-intensive inquiry that requires, under the governing policy guidance, consideration of no less than 55 different factors, *id.*, including a comparison of such matters as the compensation, qualifications, and working conditions of the

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[3] John Zenor, *Alabama Title IX Retaliation Case Goes to Supreme Court*, Associated Press State & Local Wire (June 12, 2004).

[4] This 1979 Policy Guidance on Athletics was promulgated by the former Department of Health, Education and Welfare but has since been followed by Department of Education, and has been treated by courts as an agency interpretation of the statute entitled to great deference. *See, e.g., Cohen v. Brown University*, 991 F.2d 888, 896-97 (1st Cir. 1993).

coaches provided to the various teams, *id*. at 71416, the quality, amount, suitability and maintenance of the equipment so provided, *id.*, the number and scheduling of games and practice seasons for the various teams, *id.*, the travel accommodations, transport and meals provided to teams while away from home, *id.*, the quality, availability, maintenance and exclusivity of locker rooms, practice and competitive facilities, *id.* at 71417, the medical personnel, assistance and insurance coverage available to team members, *id.*, the availability and quality of conditioning and weight training facilities as well as athletic trainers, *id.*, the availability and quality of public relations spokespeople for the teams and the quantity and quality of promotional materials about the teams, *id.*, the financial and other resources made available to coaches for recruitment purposes, and the amount of administrative, secretarial and clerical assistance provided to the men's and women's athletic programs, *id.* Although this fact-specific inquiry was promulgated specifically to address Title IX compliance at the collegiate level, a similar program-wide inquiry is used to evaluate equity in sports at the elementary and secondary school level. *See*, *e.g*., Letter of J. Palomino, Regional Civil Rights Director, to K. Gilyard, Counsel for Jurupa Unified Sch. Dist. at 3 (dated Feb. 7, 1995) (*available at* http://www.ed.gov.about/offices/list/ocr/letters/jurupa.html); *McCormick v. School Dist. of Mamaroneck*, 370 F.3d 275, 289-93 (2d Cir. 2004).[5]

[5] The only circumstances in which such a multifaceted program-wide inquiry is not required are where the disparities in the support provided to male and female athletes "are substantial enough in and of themselves to deny equality of athletic opportunity" regardless of the nature of the school's overall athletic program. 44 Fed. Reg. at 71418. *See*, *e.g*., *Communities for Equity v. Michigan High Sch. Athletic Ass'n*, 178 F. Supp. 2d 805, 856 (W.D. Mich. 2001) (requiring girls' basketball, soccer, volleyball, swimming and diving, and tennis teams to play off-season resulted in such significant harms to girls' teams and athletes as to violate Title IX in itself), *aff'd on other grounds*, No. 02-1127, 2004 U.S. App.

Claims of unequal accommodation of female students' athletic interests and abilities, and claims of unequal financial support for female athletes, are similarly dependent on facts uniquely within the purview of athletic program staff. An unequal accommodation claim depends in most instances on evidence that there is sufficient interest and ability among female students to support additional teams and that there is a reasonable expectation of competitive opportunities for such new teams, 44 Fed. Reg. at 71417-18—all points on which the views of athletic staff, and information that is uniquely available to them, are crucial.[6] An unequal financial support claim typically depends on evidence that female athletes in the school receive less of the available scholarship dollars

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LEXIS 15437 (6th Cir. July 27, 2004), *petition for rehearing en banc filed* (6th Cir. Aug. 9, 2004).

[6] The Education Department has stated that a school can avoid detailed consideration of whether it "fully and effectively accommodates the interests and abilities of the underrepresented sex" by showing either (i) that "intercollegiate level participation opportunities [in sports] for male and female students are provided in numbers substantially proportionate to their respective enrollments," or (ii) that the school "can show a history and continuing practice of [athletic] program expansion which is demonstrably responsive to the developing interests and abilities of the members of [the sex that is underrepresented among intercollegiate athletes]." Education Department, *Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test* at 1, 9 (Jan. 16, 1996) (*available at* http://www.ed.gov/about/offices/list/ocr/docs/clarific.html). *See also* 44 Fed. Reg. at 71418. As a practical matter, however, most schools cannot make out either showing and therefore must make the more detailed showing set forth above to comply with Title IX. Catherine Pieronek, *Title IX and Intercollegiate Athletics in the Federal Appellate Courts: Myth v. Reality*, 27 J.C. & U.L. 447, 459-60 (Fall 2000) (explaining that neither prong of the test is a realistic possibility for most institutions to meet). And, in any event, the alternative tests that are theoretically available also involve factual matters—such as how the athletic program has expanded over time in response to the interests and abilities of female students—which are much more likely to be known to coaches and administrators than to students.

than do male athletes—again, a factual matter about which staff are much more likely to have information than are students. *See* 34 C.F.R. 106.37(c). *See also* 44 Fed. Reg. at 71415.

ii. From what we have shown to this point, it is clear that coaches and administrators, with their unique access to relevant information concerning their schools' athletic programs—coupled with experience and training which enables them to synthesize such information and to put it in context—are in a position to identify Title IX violations that may go unperceived by students. In addition, when students do perceive a violation, they may choose not to challenge it, either because they cannot expect to receive any direct benefit from a challenge, or because of fear that they will suffer retaliation that will harm their athletic aspirations, or both.[7] Coaches and administrators, with their longer-term involvement in a school's athletic program, often have a greater willingness to insist that violations not be ignored. It therefore comes as no surprise that athletic program staff are often the impetus for, or provide key evidence in, administrative efforts to enforce Title IX.

The reported cases indicate that athletic program staff often initiate such administrative complaints themselves.[8] More-

[7] Consider, for example, a female student who is selected for a high school varsity team as a junior or senior, and who learns that the team is not treated equally with the boys' team. If the student were to complain, it is likely that she would have graduated before the complaint was resolved. In the meantime, if the student's complaint were to cause school authorities to give her worse recommendations for college, or to reduce her playing time or to retaliate in other ways, the student's college aspirations might be set back in a way that could never be remedied. With so much to lose and so little to gain, it is only to be expected that many students will choose not to speak out against Title IX violations.

[8] *See, e.g., Lendo v. Garrett County Bd. of Educ.*, 820 F.2d 1365, 1366 n.5 (4th Cir. 1987); *Brusseau v. Iona College*, No. 02 Civ. 1372, 2002 U.S. Dist. LEXIS 15413, *5 (S.D.N.Y. Aug. 21, 2002); *Bowers v. Baylor*

over, once a complaint is brought, appropriate investigation of the claim, the nature of which is detailed at length in the Education Department's 125 page *Title IX Athletics Investigator's Manual* (1990) ("Manual"), is heavily dependent upon the participation of athletic program staff in the process.[9]

For example, an agency investigation of a complaint of unequal treatment involves interviews of the relevant athletic administrators and coaches to determine, *inter alia*, precisely what equipment and supplies are provided to each team and in what respects, if any, those items fall short (*e.g.*, is the equipment "regulation"), Manual at 30-31; which teams have priority for scheduling purposes, what competitive opportunities are provided, whether sufficient practice time is provided, whether practices and games are scheduled at convenient times and whether the teams are given the opportunity to compete at regional and state levels, Manual at 36-37; what travel, housing and meal arrangements are made for teams while they are playing away from home, Manual at 44-45; the background and experience of each coach, his or her duties, responsibilities and compensation, the number of athletes each coaches, and the number of student assistant coaches each is provided, Manual at 57-58; the facilities and locker room used by each team, how well those facilities are maintained, whether the facilities are regulation and whether the teams have exclusive or non-exclusive use of the particu-

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University, 862 F. Supp. 142, 143 (W.D. Tex. 1994); *O'Connor v. Peru State College*, 605 F. Supp. 753, 758 (D. Neb. 1985), *aff'd*, 781 F.2d 632 (8th Cir. 1986).

[9] The manual is available at http://www1.ncaa.org/membership/ed_outreach/gender_equity/index.html and is relied upon not just by the Department of Education's Office of Civil Rights in conducting Title IX investigations but by courts adjudicating Title IX enforcement actions brought by private parties. *See, e.g.*, *McCormick v. School Dist. of Mamaroneck*, 370 F.3d 275, 293 n.14 (2d Cir. 2004).

lar facility or locker-room, Manual at 65-66, 74-75; the number and identity of sports public relations personnel assigned to each team and the extent to which such personnel are available to promote the team (*e.g.*, do they travel with the team, do they keep statistics on the team and/or individual players and what steps do they take to promote the team and/or its members), Manual at 87; and (where applicable) the recruitment budget for each team including the number of subsidized visits to campus for which each team pays, the number of recruiters for each team, the recruitment area covered for each team, the number of recruitment trips made, and the methods of recruitment used, Manual at 98-99.

Similarly, an investigation of a claim that a school is not effectively accommodating the interests and abilities of female or male students depends on interviewing coaches and athletic administrators to determine whether they believe the interests and abilities of both sexes are being fully and effectively accommodated, including whether existing teams are provided with the opportunity to compete at an appropriate level as well as whether students have expressed an interest in participating in other sports not offered by the school. Manual at 23-24. So too, the investigation of a claim of unequal provision of athletic scholarships requires interviewing coaches and athletic administrators to determine what funds are actually used to provide scholarships to participants on their teams, whether their teams expend more or less than the amount budgeted for financial assistance for athletes, and whether their teams expend up to the maximum scholarship amount allowed by their regional conference or national athletics organization. Manual at 16-17.

The key role athletic program staff play in Title IX enforcement is evidenced not only at the administrative level but in judicial proceedings as well. Successful challenges to a school's failure to accommodate the athletic interests and abilities of female students invariably have depended on

testimony by coaches and/or athletic directors that female students at the school have the ability and interest to compete at a certain level in a particular sport yet are not being provided with the opportunity to do so. For example, in a leading Title IX accommodation case, the lower court granted a preliminary injunction mandating that Brown University not downgrade its women's varsity volleyball and gymnastics teams from university-funded status to donor-funded status based in critical part on the testimony of a former athletic director, two current coaches and two current associate athletic directors that the change in team status would eliminate the ability of the teams to recruit talented players and compete at the varsity level. *Cohen v. Brown University*, 809 F. Supp. 978, 992-93, 997-98 (D.R.I. 1992), *aff'd*, 991 F.2d 888 (1st Cir. 1993). And, in subsequently granting judgment to the plaintiffs after a bench trial, the district court gave particular weight to the testimony of current coaches and the former athletic director that the levels of support Brown provided to its female teams were inadequate to maintain those teams' competitiveness and to allow one of the teams to compete up to the level of its ability. *Cohen v. Brown University*, 879 F. Supp. 185, 190, 201-02, 211-12 (D.R.I. 1995), *aff'd in relevant part*, 101 F.3d 155 (1st Cir. 1996).[10] Similar testimony has played a pivotal role in other successful challenges to a college's failure to accommodate the sports interests and abilities of its female students.[11]

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[10] As the first major decision by an appellate court regarding a Title IX challenge to a college athletic program, the reasoning and analysis employed in the *Brown* case has proven to be extremely influential in the development of Title IX law. *See* Pieronek, *supra* at 514-15 (describing the decision as a "watershed case" of "seminal" importance).

[11] *See, e.g., Pederson v. Louisiana State University*, 912 F. Supp. 892, 902 (M.D. La. 1996) (ruling for plaintiffs on Title IX failure to accommodate claim based in part on assistant athletic director's testimony that university knew female students were interested in more sports opportunities than were offered), *aff'd in relevant part*, 213 F.3d 858 (5th

In lawsuits raising unequal treatment claims, the role played by coaches is, if anything, even more pronounced. Most of those cases are brought by coaches themselves, to protect not only the coaches' interests but the interests of the members of the teams they coach. *See, e.g., Arceneaux v. Vanderbilt University*, 25 Fed. Appx. 345, No. 00-5691, 2001 U.S. App. LEXIS 27598 (6th Cir. Dec. 28, 2001) (women's track and cross country coach alleged that he was paid less than similarly situated coaches of men's teams and that the women's teams he coached were provided with inadequate resources, equipment and uniforms); *Blalock v. Dale County Bd. of Educ.*, 84 F. Supp. 2d 1291, 1295-96 (M.D. Ala. 1999) (teacher and coach brought suit claiming she was paid less to coach girls' teams and that "[she] and her teams were treated as inferior to the male teams with respect to sports equipment, locker rooms, restroom facilities, uniforms, food allowances, and hotel accommodations at away games"); *Price v. Wilton Public Sch. Dist.*, No. 3:97 CV 02218, 1998 U.S. Dist. LEXIS 23138 (D. Conn. Sept. 23, 1998) (coach brought suit on behalf of himself, his minor daughter and her teammates alleging that girls teams had "poorer quality uniforms," an "inferior locker room and other facilities," "less access to coaches," and "less practice space and practice time"); *Tyler v. Howard Univ*., No. 91-CA-11239 (D.C. Sup. Ct. June 24, 1993) (women's basketball coach sued under Title IX based on fact she was paid half what the men's basketball coach was paid and that her team was staffed inadequately and given inadequate locker and office space) (described in Pieronek, *supra* at n.26).

Cir. 2000); *Favia v. Indiana University of Pennsylvania*., 812 F. Supp. 578, 581-82 (W.D. Pa.) (relying on testimony of coach and former associate athletic director regarding significant inequities in support for female teams and athletes to hold that that the university had failed to accommodate the interests and abilities of women students), *aff'd*, 7 F.3d 332 (3d Cir. 1993).

These unequal treatment cases reflect the reality that coaches are closely identified with their teams, and view their teams' successes and failures as their own (a view shared by the educational institutions for which they work, which often make retention and salary decisions based on a coach's win/loss record). As one coach put it when confronted with a question at her deposition as to whether inequities in how her team was treated affected her; "How can you separate the two? The program is me. . . . [H]ow can you separate them to say what actually happened to me as opposed to what happened to them? I am them. They are me." *Lamb-Bowman v. Delaware State University*, 152 F. Supp. 2d 553, 557 (D. Del. 2001), *aff'd*, 39 Fed. Appx. 748 (3d Cir. 2002). The inextricable relationship between how coaches are treated and how their teams are treated means, as a practical matter, that when coaches raise Title IX claims they often are able to secure significant relief not just for themselves but for their teams and athletes. *See, e.g., Goins v. Hitchcock I.S.D.*, 191 F. Supp. 2d 860, 865 nn.2-3 (S.D. Tex. 2002) (explaining that initial Title IX suit by women's basketball and volleyball coach was settled in a manner that addressed her complaints of significant inequities in funding and support for high school female athletes and teams and created a Title IX committee to consider and resolve such matters on an ongoing basis), *aff'd*, 65 Fed. Appx. 508 (5th Cir. 2003).[12]

Finally, even where no administrative complaint has been lodged or lawsuit filed—which is the case with the vast majority of efforts to correct violations of Title IX—coaches

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[12] *See also O'Connor*, 605 F. Supp. at 757, 761 (female coach's complaints that equipment and uniform for women's teams "were in very poor condition, both in quality and quantity," that men's visiting teams were allowed to use women's locker-room often resulting in conflicts, and that women's basketball team practiced on a "hazardous" court ringed tightly with bleachers, prompted subsequent administrative investigation and correction of those inequities).

play a central role in spurring voluntary efforts to bring athletic programs into compliance with the statute. Several Title IX retaliation cases reflect efforts by coaches or other athletic program staff to bring their school's athletic program into compliance with Title IX either by way of their participation on committees or task forces,[13] or by advocating increased funding for female athletes and/or teams during the annual budget process,[14] or by protesting gender inequities as they encounter them over the course of their careers.[15]

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[13] *See, e.g., Lowrey v. Texas A & M University Sys.*, 117 F.3d 242, 244 (5th Cir. 1997) (former women's basketball coach served as member of special task force on gender equity that identified violations of Title VI and XI by the university); *Oregon Employee Cannot Sue Under Federal Education Act*, Oregon Employment Law Letter, Feb. 1997 (reporting that assistant director of athletics was terminated after initiating a review of Linfield College's compliance with Title IX that found Title IX violations).

[14] *See Atkinson v. Lafayette College*, No. 01-CV-2141, 2002 U.S. Dist. LEXIS 1432, ** 2-3 (E.D. Pa. Jan. 30, 2002), *appeal docketed*, 03-3426 (3d Cir. Aug. 20, 2003), *stayed*, (June 22, 2004) (pending decision in this case).

[15] *See Lowrey v. Texas A & M University Sys.*, 11 F. Supp. 2d 895, 900 (S.D. Tex. 1998) (former women's basketball coach complained throughout her career about inadequate facilities for her team including the fact that her team had to share its locker-room with visiting men's team and the fact that the locker room consisted of one toilet, one sink, no dressing tables, no outlets, no storage, inadequate lockers and, at least initially, four urinals); *Clay v. Neosho County Cmty. College*, 905 F. Supp. 1488, 1492-93 (D. Kan. 1995) (basketball coach raised gender equity issues with Dean of Student Activities, at NCAA scholarship meeting, in discussions with college Athletic Director and other coaches, and in complaint to college Title IX coordinator about budget issues); *Lamb-Bowman*, 152 F. Supp. 2d at 554-55 (women's basketball coach complained over course of eight years about inequities in treatment of women's teams and athletes); *Blalock*, 84 F. Supp. 2d at 1296 (coach raised gender equity issues so many times over the course of her twenty years of employment with school that athletic director complained "he

B. Beyond Athletics in the Academy

Educators play an indispensable role in enforcing the mandates of Title IX not only in the athletics arena, but in all facets of our schools' and universities' educational programs including admissions, testing, career education, math and science. Beyond the role educators play in ensuring that these programs do not discriminate based on sex, educators in all fields and at all levels of instruction play a critical role in ensuring that when students are harassed by another student or faculty member in a manner prohibited by Title IX, such harassment comes to the attention of the appropriate authorities and is suitably addressed.

That role is particularly apparent in cases where the victims of harassment or abuse are young students who cannot reasonably be expected to know that what is happening to them is unlawful and can and should be stopped. In such cases, teachers are often the only adult witnesses to the offensive conduct, and it is only through their actions that the conduct is brought to light and addressed. For example, in *Wilson v. Beaumont Independent School District*, 144 F. Supp. 2d 690, 691 (E.D. Tex. 2001), the teacher of two mentally retarded twelve year old boys raised a concern as to whether one had sexually assaulted the other based on her personal observation of their interaction; as a result of the teacher's action, and her action alone, the incident was brought to light and addressed. So too in *Phillips v. Hood River School District*, No. CV 98-1161-AS, 1999 WL 562682, at *1 (D. Ore. Apr. 22, 1999), a teacher was the sole person who brought to light the fact "that a group of three boys were sexually harassing a female student during the school day."

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was sick and tired of [her] comparing everything that . . . the boys had to what the girls had") (ellipsis in original).

If teachers are not encouraged to report harassment of young students when they observe it, not only will the harassment continue, but other students may be led to think that such conduct is acceptable. *See* HOSTILE HALLWAYS: THE AAUW SURVEY ON SEXUAL HARASSMENT IN AMERICA'S SCHOOLS at 12 (1993) (reporting that 37% of students who admitted engaging in harassment gave as a reason "It's just part of school life/a lot of people do it/it's no big deal").

Even in the case of more mature students, teachers and professors continue to play an invaluable role in ensuring that incidents of sexual harassment are brought forward and dealt with appropriately. Students often refrain from reporting harassment they experience due to both "embarrassment and fear." Andrea Giampetro-Meyer *et al.*, *Sexual Harassment in Schools*, 12 Wis. Women's L.J. 301, 304 (1997). A study by the American Association of University Women Educational Foundation found that fewer than one in four students who have been harassed told a parent or other family member and that fewer than one in ten students told a teacher. HOSTILE HALLWAYS at 24.[16]

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[16] Even many adults refrain from reporting harassment due to similar concerns. *See* GAO Report to Congressional Requesters, *Gender Issues—Women's Participation in the Sciences Has Increased, But Agencies Need to Do More to Ensure Compliance with Title IX* (July 2004, GAO-04-639) at 11 (Scientists and students "suggested they would be unlikely to file a complaint for fear of retribution from supervisors or colleagues. For example, some women faculty members we spoke with said that although they perceive that discrimination exists in their department, filing a complaint could hinder their ability to attain tenure."); *Sex Discrimination: DEA's Handling of Sexual Harassment and Other Complaints* (Letter Report, March 4, 1994, GAO/OSI-94-10) ("Employees at the Drug Enforcement Administration (DEA) are reluctant to use the agency's complaint process to deal with sexual harassment because they fear reprisal from managers and because they believe that investigators lack objectivity, sensitivity, and confidence."); *Equal Employment Opportunity: NIH's Handling of Alleged Sexual Harassment and Sex Discrimination Matters* (GAO Letter Report, Sept. 29, 1995, GAO/GGD-95-192) at

Given the reality that victims of sexual harassment are unlikely to report the harassment, it is particularly important that teachers and professors be encouraged to voice such complaints on behalf of their students. As the Education Department has recognized, teachers and professors are "in the best position to prevent harassment and to lessen the harm to students, if, despite their best efforts, harassment occurs." Revised Sexual Harassment Guidance, 65 Fed. Reg. 66091, 66098 (Nov. 2, 2000); *see also* 65 Fed. Reg. at 66098 ("school personnel are in the best position to ensure a safe and nondiscriminatory learning environment for every student.").

C. The Importance of Protecting from Retaliation Educators Who Step Forward to Enforce Title IX

The crucial role played by educators in enforcing Title IX as set forth above would be significantly dampened if educators were not assured that they are protected against retaliation for bringing such concerns to light, whether by speaking out to school officials, by reporting violations to enforcement authorities, by participating in administrative investigations, or by participating in court proceedings as a party or witness. The unique ability of educators to witness and report Title IX violations is potentially countered by a unique vulnerability to retaliation by the educational institutions for which they work, which have the authority

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4 ("[S]ome of the employees who chose not to file complaints believed the situation would not be kept confidential, the harasser would not be punished, filing a complaint would not be worth the time or cost, and/or that they would be retaliated against."); *DOD Service Academies: Update on Extent of Sexual Harassment* (Letter Report Mar. 31, 1995, GAO/ NSIAD-95-58) at Appendix I:5 ("Given that there has been no apparent change in the perceptions of women regarding the negative consequences of reporting harassment, it is likely that sexual harassment will continue to be underreported.").

and ability not only to dismiss an educator from employment but to effectively end his or her career by doing so.

That reality is demonstrated most concretely by the fact that educators bring the vast majority of Title IX retaliation cases: a full 70% of the reported federal cases raising such claims are brought by educators themselves rather than by students.[17] These cases prove the point that educators put their very livelihoods at risk by standing up for Title IX enforcement. Educators have been fired for challenging the unequal treatment of women and girl athletes[18] and for pursuing sexual harassment complaints on behalf of their students;[19] educators report being physically threatened for

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[17] As determined by a review of federal court Title IX retaliation cases reported by LEXIS as of August 14, 2004.

[18] *See Kemether v. Pennsylvania Interscholastic Athletic Ass'n*, No. 96-6986, 1999 U.S. Dist. LEXIS 17326, at **70-71 (E.D. Pa. Nov. 8, 1999) (interscholastic athletic association refused to employ referee because she had complained about the fact that women were not allowed to referee boy's games); *Clay*, 905 F. Supp. at 1494-96 (denying defendant's motion for summary judgment on claim that plaintiff women's basketball coach's contract was not renewed because he complained about inequitable support for female athletes and teams); *Bowers*, 862 F. Supp. at 143-44 (denying motion to dismiss claim that women's basketball coach was dismissed for complaining about the disparate treatment of the men's and women's basketball teams). *See also* NCAA, *A Guide to Recent Developments in Title IX Litigation* (Feb. 15, 2000) at 18 (reporting that former women's volleyball coach at California State University, Fullerton prevailed at trial on his claim that he was terminated in retaliation for his support of a successful Title IX case against the university, and reporting that the former women's volleyball coach at San Diego State University prevailed on a similar claim).

[19] *See Holt v. Lewis*, 955 F. Supp. 1385, 1386 (N.D. Ala. 1995) (professor allegedly forced to resign because he had gone to a university trustee about a student's discrimination complaint), *aff'd*, 109 F.3d 771 (11th Cir. 1997) (unpublished table decision); *Nelson v. University of Me. Sys.*, 923 F. Supp. 275, 284 (D. Me. 1996) (professor came forward with sufficient evidence to withstand summary judgment on claim that he was

raising concerns about gender inequities in their school's sports program,[20] being told they will "never work" again if they persist in raising such complaints,[21] and having their team eliminated altogether after they extended a scholarship offer to a female athlete.[22] In light of that record, there can be no doubt that concerns about retaliation for raising Title IX issues are real and well-grounded among educators and that the Title IX anti-retaliation protections serve an important purpose in protecting educators who step forward to enforce Title IX.

II. CONGRESS' INTENT THAT TITLE IX "PROVIDE INDIVIDUAL CITIZENS EFFECTIVE PROTECTION" WOULD BE UNDERMINED IF EDUCATORS WERE NOT PROTECTED FROM RETALIATION FOR RAISING TITLE IX CONCERNS

There is a suggestion in the opinion below that even if Title IX might be construed in some circumstances to provide a right of action to recover for retaliation, it cannot be construed to confer that right upon educators, such as Petitioner Jackson, who are not—at least in the view of the Eleventh Circuit—the "direct" victims of the challenged Title IX violation. (Cert. Pet. 23a-26a.)

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denied tenure due to concerns he had raised "about the behavior of faculty members pertaining to sexual harassment").

[20] *See Atkinson*, No. 01-CV-2141, 2002 U.S. Dist. LEXIS 1432, at ** 2-3 (former athletic director alleged that she was physically threatened by the Dean of Students and then fired after raising issues of gender equity in athletic program during the budget process).

[21] *Legoff v. Trustees of Boston Univ.*, 23 F. Supp. 2d 120, 124 (D. Mass. 1998).

[22] *Moe v. University of North Dakota*, No. Civ. A2-98-123, 1999 WL 33283358 (D.N.D. May 7, 1999) (wrestling team was eliminated after coach extended scholarship to female wrestler).

That suggestion is not well-considered in this particular case given the close identification between a coach and the team he or she coaches, *see supra* at 13, which renders it artificial to maintain that discrimination against the team only "indirectly" affects the coach. Modern conceptions of the harm that flows from discrimination are not so constricted. *See generally Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 111-15 (1979); *Trafficante v. Metropolitan Life Ins.*, 409 U.S. 205, 211-12 (1972).

More fundamentally, the suggestion that the statute should be interpreted to permit retaliation against an individual for acting to enforce the mandates of Title IX unless that individual is the "direct" victim of the Title IX violation in question should be rejected because it would allow schools and universities to accomplish by indirection what they cannot do directly. *Cf. Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 237 (1969). There is perhaps no more potent way for a school or a university to squelch a complaint of unlawful sex discrimination in the distribution of athletic or educational opportunities, or to squelch a complaint of unlawful sexual harassment of a student, than to dismiss the coach, teacher, professor, or administrator who raised the matter with the school authorities or who cooperated in the investigation of a claim. Such retaliatory action not only effectively ends the ability of that particular educator to advocate for an end to the discrimination in question (as the individual is eliminated from the school environment) but sends students the entirely wrong message that the current practices—even though unlawful—cannot be questioned even by their role models without devastating consequences. Such acts do as much, if not more, to undermine the enforcement of Title IX, and to defy Congress' intent that the statute "provide individual citizens effective protection against" unlawful sex discrimination, *Cannon*, 441 U.S. at 704, as any "direct" violation of the statute.

CONCLUSION

The judgment of the court of appeals below should be reversed and this Court should uphold the long-settled interpretation of Title IX to protect from retaliation those individuals who raise or support Title IX complaints.

Respectfully submitted,

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