No. 24-6060

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Elizabeth Niblock, et al.,

Plaintiffs – Appellants,

vs.

University of Kentucky, et al.,

Defendants – Appellees.

Appeal from the United States District Court
for the Eastern District of Kentucky
No. 5:19-CV-00394 (Hon. Karen K. Caldwell)

BRIEF AMICUS CURIAE OF AMERICAN SPORTS COUNCIL AND PACIFIC LEGAL FOUNDATION IN SUPPORT OF DEFENDANTS-APPELLEES AND AFFIRMANCE

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 24-6060 Case Name: Niblock v. Univ. of Kentucky

Name of counsel: Caleb R. Trotter, Alison Somin

Pursuant to 6th Cir. R. 26.1, Amici Curiae American Sports Council and Pacific Legal Found.
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

Neither of the nonprofit amici are subsidiaries or affiliates.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

Not to the knowledge of Amici's counsel.

CERTIFICATE OF SERVICE

I certify that on May 1, 2025 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

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This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

American Sports Council (ASC) is a national coalition of coaches, athletes, parents, alumni, and fans who are devoted to preserving and promoting the student athlete experience. Founded in 2002, ASC has comprehensive, hands-on experience working with sports programs threatened with termination. ASC is also the leading national, multi-sport coalition devoted to the preservation of collegiate and scholastic athletic teams.

Pacific Legal Foundation (PLF) is the nation's oldest public interest legal foundation that seeks to vindicate the principles of individualism, property rights, and separation of powers. Consistent with these goals, PLF attorneys have litigated multiple cases involving the right to equal protection under the law in school athletics. *See*, *e.g.*, *D.M. by Bao Xiong v. Minn. State High Sch. League*, 917 F.3d 994 (8th Cir. 2019); *Ng v. Bd.*

[1] Pursuant to Federal Rule of Appellate Procedure 29, all parties to this appeal have consented to the filing of this amicus curiae brief, no party's counsel authored this brief in whole or in part, no party or party's counsel contributed money intended to fund preparation or submission of the brief, and no person or entity—other than Amici Curiae American Sports Council or Pacific Legal Foundation, their donors, or their counsel—contributed money intended to fund preparation or submission of the brief.

of Regents of Univ. of Minn., 64 F.4th 992 (8th Cir. 2023); *F.L. v. South Dakota High Sch. Activities Ass'n*, No. 18-4038-KES (D.S.D. 2018) (case dismissed following favorable settlement); *American Sports Council v. U.S. Dep't of Educ.*, 850 F.Supp.2d 288 (D.D.C. 2012).

INTRODUCTION AND SUMMARY OF ARGUMENT

In spring 2021, the University of Minnesota discontinued its longstanding men's gymnastics, tennis, and indoor track and field teams. *Ng*, 64 F.4th at 995. At the same time, it chose not to fill roster spots left vacant by graduating students on various women's teams. *Id.* The primary rationale for the University of Minnesota's opportunity-eliminating decisions was an effort to balance its proportion of male and female athletes with the sex-based proportion of its student body. *Id.* Similarly, in 2018, two Minnesota high school boys were denied the opportunity to try out for their respective schools' competitive dance teams because boys were historically overrepresented in athletics. *D.M. by Bao Xiong*, 917 F.3d at 998, 1001. Neither are isolated events. *See, e.g.*, Nick Dugan, *ETSU Athletics to make additional changes to comply*

with Title IX, WJHL (June 28, 2023);[2] Diego Romo, *Utah teen pushes for boys to be allowed in drill competitions*, Fox 13 Salt Lake City (Jan. 15, 2021).[3]

In the district court, Plaintiffs-Appellants Elizabeth Niblock, *et al.* (Students) alleged that Defendants-Appellees University of Kentucky, *et al.* (collectively "University") violated Title IX by failing to comply with the three-part test articulated in the Department of Education's non-binding 1979 Policy Interpretation of Title IX, 44 Fed. Reg. 71,413, 71,418 (Dec. 11, 1979). Third Amend. Compl., R.72, PageID.1807. In particular, the Students alleged that the University failed to establish that its ratio of female to male athletes is "substantially proportional" to the sex-based proportion of its student enrollment and thus could not comply with prong one of the three-part test as a result. Third Amend. Compl., R.72, PageID.1806–07. They repeat this allegation on appeal. Appellants' Brief, Doc. 21, at 44–45.

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[2] *Available at* https://www.wjhl.com/sports/college-sports-2/etsu-bucs/etsu-athletics-to-make-additional-changes-to-comply-with-title-ix/.

[3] *Available at* https://www.fox13now.com/news/local-news/utah-teen-pushes-for-boys-to-be-allowed-in-drill-competitions.

As demonstrated above, equating substantial proportionality to equal opportunity can lead to perverse results. Rather than serving as a tool to prevent and remedy sex-based discrimination in education, the proportionality prong often functions as a sex-based quota which results in athletic opportunities being limited for all students.

The district court below correctly held that the three-part test "does not *require* preferential or disparate treatment for either gender," Findings of Fact and Conclusions of Law, R.170, PageID.3890 (quoting *Cohen v. Brown Univ.*, 101 F.3d 155, 175 (1st Cir. 1996)) (emphasis added by district court), and "does not . . . mandate statistical balancing," R.170, PageID.3890 (quoting *Kelley v. Bd. of Tr., Univ. of Ill.*, 35 F.3d 265, 271 (7th Cir. 1994)). Thus, the University's concession that it could not satisfy that prong of the three-part test did not result in a finding that the University failed to comply with Title IX. R.170, PageID.3898. However, the court still upheld the validity of the three-part test and applied it to this case. R.170, PageID.3889–92.

This Court should affirm that Title IX does not require the University to satisfy the substantial proportionality prong of the three-part test. A contrary holding would effectively require the University to

maintain sex-based quotas for its athletics teams in contravention of Title IX. *See* 20 U.S.C. § 1681(b). The use of such quotas would also have serious equal protection implications under the Fourteenth Amendment to the U.S. Constitution and should not be endorsed by this Court.

If the 1979 Policy Interpretation's three-part test is interpreted to require the University to maintain sex quotas for its athletics teams, then it was unlawfully promulgated as a mere guidance document. Agencies like the Department of Education may promulgate interpretative rules and general statements of policy to explain how the agency will apply its enforcement discretion. But such documents may not impose requirements beyond those set forth by the statute itself. The Title IX statute merely requires non-discrimination with regard to sex; it does not require proportionality in athletic participation. And as the recent examples noted above show, efforts to attain proportionality often result in unlawful sex discrimination themselves. As a result, this Court should affirm.

ARGUMENT

I. USING PROPORTIONALITY TO GUIDE DECISIONS IS NOT REQUIRED BY TITLE IX AND RESULTS IN SEX-BASED QUOTAS THAT VIOLATE THE EQUAL PROTECTION CLAUSE

A. Title IX Does Not Mandate Substantial Proportionality

Congress enacted Title IX of the Education Amendments of 1972 to prohibit sex discrimination in any educational program or activity that receives federal financial assistance. 20 U.S.C. § 1681(a). That prohibition applies to intercollegiate athletics by preventing institutions from excluding individuals from athletics on the basis of sex. 34 C.F.R. § 106.41(a). Thus, the rule under Title IX is that opportunities to participate in intercollegiate athletics cannot be denied to someone due to his or her sex.

Of course, Title IX's rule does not categorically bar recipients of federal funding from considering sex in making athletics decisions. To assist schools with determining whether their students enjoy equal opportunity to participate in athletics, federal regulations enumerate ten factors to consider, including "[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). To assess compliance with this factor, schools frequently look to the Department of Education's nonbinding 1979 Policy Interpretation guidance, which includes what is known as the "three-part test." *See* 44 Fed. Reg. 71,413. The first prong of the test considers "whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments." *Id.* at 71,418. Under the guidance, only one prong of the test need be met.

In considering the three-part test, the district court correctly held that Title IX does not require compliance with the three-part test's proportionality prong. Opinion & Order, R.134, PageID 2638–39. To hold otherwise would perversely turn the anti-discrimination statute into one mandating sex-based quotas. Such an application of Title IX would also require ignoring the statute's express language that its demand for equal opportunity does not

> 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 or percentage of persons of that sex participating in [athletics], in comparison with the total number or percentage of persons of that sex [enrolled in the institution.]

20 U.S.C. § 1681(b). *See also Chalenor v. Univ. of N.D.*, 291 F.3d 1042, 1047 (8th Cir. 2002) ("Title IX does not require proportionality"); *Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824, 831 (10th Cir. 1993) ("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 . . ."); *Cohen v. Brown Univ.*, 991 F.2d 888, 895 (1st Cir. 1993) (*Cohen I*) (being out of proportion is not a per se violation of Title IX's prohibition against sex discrimination); *Cohen*, 101 F.3d at 175–76 (*Cohen II*) (rejecting university's view that proportionality prong of three-part test creates quotas); *Kelley*, 35 F.3d at 271 (Policy Interpretation does not "mandate statistical balancing."). Therefore, notwithstanding the three-part test, proportionality is not a legal requirement for institutions receiving federal funding. *See Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 383 F.3d 1047, 1048 (D.C. Cir. 2004) (Department "policy interpretations are not binding regulations. They do not carry the force of law, and [institutions] are not bound to follow the policy interpretations.").

In contrast, the main thrust of the Students' argument in this case is that the failure of the University to achieve substantial proportionality

violates Title IX—with or without any allegations of discrimination. *See*, *e.g.*, Third Amend. Compl., R.72, PageID.1787; Appellants' Brief, Doc. 21, at 19–20, 34–37. But the Supreme Court and numerous other courts have consistently held that a lack of proportionality is insufficient to demonstrate actionable discrimination under the civil rights laws. *See Washington v. Davis*, 426 U.S. 229, 240–41 (1976) (noting the Court's rejection of allegations of racial discrimination when allegations only based on lack of statistical proportionality); *Main Line Paving Co., Inc. v. Bd. of Educ., Sch. Dist. of Philadelphia*, 725 F. Supp. 1349, 1363 (E.D. Pa. 1989) (government must "detail the cause of th[e] disparity" or "say for certain that it was caused by gender discrimination, rather than other conditions in the general economy"); *Saunders v. White*, 191 F.Supp.2d 95, 132 (D.D.C. 2002) (government must articulate how "raw data should be interpreted and the reasons why it supports" a classification); *Mallory v. Harkness*, 895 F. Supp. 1556, 1559 (S.D. Fla. 1995) (invalidating sex-based quota where government "did not positively identify any discriminatory policy or practices" and pointed solely to disparities). Indeed, statistical disparities may result from any number of factors, including the individual preferences, needs, and choices of the students

involved. *Cf. City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507 (1989) (race-based contracting quota "rests upon the 'completely unrealistic' assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population") (citing *Local 28 of Sheet Metal Workers Int'l Ass'n v. EEOC*, 478 U.S. 421, 494 (1986) (O'Connor, J., concurring in part and dissenting in part)). This Court should join the other courts of appeals noted above and expressly affirm that the University is not required to achieve sex-based proportionality with its athletics programs.

B. Using Proportionality to Create Sex-Based Quotas Violates the Equal Protection Clause

Should this Court countenance the use of proportionality, as discussed above and recently demonstrated in Minnesota, the door is opened for universities to single out the overrepresented sex and reduce opportunities for members of that group—rather than increase opportunities for the underrepresented sex—to come into compliance with Title IX. But such sex-based actions cause institutions to "expressly discriminate[] . . . on the basis of gender, [and are] subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment." *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 723 (1982) (citing *Reed v. Reed*,

404 U.S. 71, 75 (1971)); *see also Craig v. Boren*, 429 U.S. 190, 197 (1976) (applying intermediate scrutiny).

The most likely justifications to be offered by an institution for reducing opportunities for an "overrepresented" group are complying with Title IX and remedying past discrimination against members of the other sex. Neither would withstand scrutiny.

First, as noted, Title IX's rule is that opportunities to participate in intercollegiate athletics cannot be denied on the basis of sex. 20 U.S.C. § 1681(a); 34 C.F.R. § 106.41(a). And any suggestion that Title IX requires universities to single out a particular sex for more (or less) opportunities, contradicts Title IX's express text that it not "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 or percentage of persons of that sex participating in [athletics] . . . ." 20 U.S.C. § 1681(b). The unequivocal language of Title IX forecloses sex-based proportionality.

The U.S. Department of Education's 1979 Policy Interpretation, including the three-part test, does not require a contrary conclusion. *See*

44 Fed. Reg. 71,413. In addition to the questions surrounding the three-part test's general validity discussed below and in the University's brief, *see* Appellee Br., Doc. 25, at 31–39, an agency guidance document cannot be read to contradict the express text of the statute it purports to interpret. Further, more recent agency clarifications of the test, as well as case law interpreting the test, outweigh any interpretation that statistical proportionality is required. *See*, *e.g.*, Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance (July 11, 2003) ("[I]t is contrary to the spirit of Title IX for the government to require or encourage an institution to eliminate athletic teams."); *see also Kelley*, 35 F.3d at 271 (Policy Interpretation does not "mandate statistical balancing."); *Cohen II*, 101 F.3d at 175–76 (rejecting university's view that proportionality prong of three-part test creates quotas).

Second, singling out members of one sex and limiting their opportunities does not remedy discrimination against members of the opposite sex; it is in no way even related to that interest. Simply, denying one sex the opportunity to compete due to a lack of proportionality does nothing to increase opportunities for the other sex.

Fundamentally, denying individuals the opportunity to compete so that statistical proportionality is achieved creates impermissible sex-based quotas. Thus, decisions that deny athletic opportunity to members of one sex in order to achieve statistical proportionality are unlikely to survive scrutiny under the Equal Protection Clause. For these additional reasons, the Court should expressly affirm that the University is not required to achieve sex-based proportionality.

II. IF THE 1979 POLICY INTERPRETATION REQUIRES UNIVERSITIES TO USE SEX QUOTAS, THEN IT IS AN INVALID AGENCY GUIDANCE DOCUMENT

Section 1 of Article I of the U.S. Constitution states, "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." That is, it is Congress's duty to legislate, and it is the executive branch's duty to enforce the laws passed by Congress. Congress may nonetheless delegate some of its legislative authority to executive branch agencies to issue rules. When issuing such valid and binding rules pursuant to Title IX, the Department of Education must follow both the Administrative Procedure Act (APA) and the procedural requirements of Title IX. 5 U.S.C. § 553(b); 20 U.S.C. § 1682.

To issue rules binding on private parties, the APA generally requires federal agencies to follow notice and comment rulemaking procedures: "General notice of proposed rule making shall be published in the Federal Register," 5 U.S.C. § 553(b), and the agency must "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments." *Id.* § 553(c). Notice and comment rulemaking serves to ensure transparency and due deliberation before an agency issues a final rule that binds the public. As a Brookings Institution report said:

> The basic premise of notice-and-comment requirements is that even though the Executive Branch employs specialists with deep and specific knowledge, those specialists are not experts in how a given policy may affect a specific market, industry, activity, or person. Comments help make sure that the government is getting it right—or alert it when it's not—by providing information that challenges the government's assumptions where they're inaccurate and to help the government understand what the right assumption would be. As former OIRA administrator Cass Sunstein wrote, "Democratization of the regulatory process, through public comment, has an epistemic value. It helps to collect dispersed knowledge and to bring it to bear on official choices."

Adam Looney, "How to effectively comment on regulations," Brookings Institution, August 2018.[4]

The APA nonetheless contains exceptions to the general notice and comment requirement for "interpretative rules" and "general statements for policy." 5 U.S.C. § 553(b)(3)(A). Because an interpretative rule is an interpretation of an existing statute, it cannot create new duties or rights not specified in the statute itself. "[A]n agency can declare its understanding of what a statute requires without providing notice and comment, but an agency cannot go beyond the text of a statute and exercise its delegated powers without first providing adequate notice and comment." *Fertilizer Institute v. EPA*, 935 F.2d 1303, 1308 (D.C. Cir. 1991).

The Department of Education identifies the 1979 Policy Interpretation as a guidance document rather than a binding rule. As former EPA General Counsel E. Donald Elliot has put it, administrative law proceeds from the premise that "an agency's action is what it says it is." *Re-Inventing Rulemaking*, 41 Duke L.J. 1490, 1490 (1993).

[4] *Available at* https://www.brookings.edu/wp-content/uploads/2018/08/20221130_CRM_Looney_RegComments1.pdf.

Accordingly, if an agency labels a document a general statement of policy—or, presumably, an interpretative rule—courts should treat it as such. The Department of Education in fact identifies the 1979 Policy Interpretation on its Policy Guidance Portal website as one of many "guidance documents" that "lack the force and effect of law, unless expressly authorized by law or as incorporated into a contract."[5]

But if the 1979 Policy Interpretation is interpreted to require proportional sex balance, then it has gone beyond Title IX's express text and cannot be a mere interpretative rule. Yet to be a binding rule instead, the 1979 Policy Interpretation would have to be signed by the President or a valid designee. Because it was not, the 1979 Policy Guidance is not a binding rule either.

When the Department of Education issued a 1996 Policy Clarification reaffirming the validity of the three-part test while elaborating on its proper application, it arguably could have cured the signature problem and made the three-part test a binding rule. But, as is explained further below, because the 1996 Clarification is not

[5] *Available at* https://tile.loc.gov/storage-services/service/ll/fedreg/fr044/fr044239/fr044239.pdf (last accessed April 28, 2025).

presidentially signed nor promulgated pursuant to notice and comment rulemaking procedures, it is not a binding rule either. The 1996 reissuance therefore cannot transform the 1979 Policy Interpretation into a validly issued binding rule.

Because Congress understood that rules interpreting civil rights statutes could prove particularly controversial, it added two unusual procedural safeguards to ensure that Title IX rulemakers would be held democratically accountable. The first—a legislative veto—is almost certainly unconstitutional under *INS v. Chadha*, 462 U.S. 919 (1983). But the second—a requirement that any rules an agency promulgates under Title IX must be personally signed by the President—remains in force: "No such rule, regulation or order shall become effective unless signed by the President." 20 U.S.C. § 1682. Title IX's drafters copied the language of this requirement near-verbatim from Title VI, 42 U.S.C. § 2000d, Title IX's twin statute that prohibits race, color, and national origin discrimination by federal funding recipients.

While Title VI's text speaks for itself, statements made during the floor debate confirm that ensuring democratic accountability was the purpose of this section. Rep. Basil Lee Whitener lamented the power

Title VI gave to a "faceless bureaucrat in the multitude of agencies downtown" and feared it would "place unbridled discretion" in the hands of "some functionary in an agency." *See* Alison Somin, *Presidential Signature Requirements as a Tool for Enforcing Democratic Accountability*, 21 Geo. J.L. & Pub. Pol'y 463, 465–67 (2023) (summarizing legislative history). In response, Rep. John Lindsay introduced an amendment because "the rulemaking power is so important . . . that the Chief Executive should be required to put his stamp of approval on such rules and regulations." 110 Cong. Rec. 2499 (1964). This authority was later delegated to the Attorney General—a legally questionable move given Title IX's text and the emphasis Congress put on making sure that the President personally sign rules to ensure democratic accountability. *See generally* Somin, *supra*; Presidential Succession and Delegation in Case of Disability, 5 U.S. Op. Off. Legal Counsel 91 (O.L.C.), 1981 WL 30883 (Apr. 3, 1981).

Setting aside for the moment the lawfulness of the delegation generally, neither the President nor the Attorney General ever signed the 1979 Policy Interpretation. Because the 1979 Policy Interpretation was not signed, it cannot be a binding rule. *See also Nat'l Wrestling Coaches*,

383 F.3d at 1048 (1979 Policy Interpretation is non-binding). The 1996 Clarification, which repromulgated the three-part test, cannot be a binding rule either because it also was not signed by either the President or the Attorney General.

CONCLUSION

This Court should affirm the district court's decision below that the University did not violate Title IX despite not demonstrating sex-based proportionality. The three-part test is not binding on the University, and even if it was, it does not—and cannot—require proportionality.

DATED: May 1, 2025.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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1. This brief complies with the type-volume limitations of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B), because this brief contains 3,518 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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DATED: May 1, 2025.

s/ Caleb R. Trotter
CALEB R. TROTTER

CERTIFICATE OF SERVICE

I hereby certify that on May 1, 2025, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Caleb R. Trotter
CALEB R. TROTTER

DESIGNATION OF RELEVANT DOCUMENTS

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