

SUPREME COURT OF THE STATE OF WASHINGTON

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KAREN BLAIR, et al.,

Appellants,

v.

WASHINGTON STATE UNIVERSITY, et al.,

Respondents.

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BRIEF OF THE AMERICAN ASSOCIATION OF  
UNIVERSITY WOMEN, THE AMERICAN CIVIL  
LIBERTIES UNION OF WASHINGTON, THE AMERICAN  
CIVIL LIBERTIES UNION WOMEN'S RIGHTS PROJECT,  
BPW/USA (THE NATIONAL FEDERATION OF BUSINESS AND  
PROFESSIONAL WOMEN'S CLUBS, INC.), EQUAL RIGHTS  
ADVOCATES, THE NATIONAL ASSOCIATION OF NEGRO  
BUSINESS AND PROFESSIONAL WOMEN'S CLUBS, THE NATIONAL  
HOOK UP OF BLACK WOMEN, NOW LEGAL DEFENSE AND  
EDUCATION FUND, THE NATIONAL WOMEN'S POLITICAL  
CAUCUS, THE SOUTHERN COALITION FOR EDUCATIONAL  
EQUITY, THE WOMEN'S EQUITY ACTION LEAGUE, AND  
THE WOMEN'S LEGAL DEFENSE FUND

AS AMICI CURIAE IN SUPPORT OF APPELLANTS

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## TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES .....	ii
INTRODUCTION AND SUMMARY OF ARGUMENT .....	1
ARGUMENT .....	3
I.    THE DISCRIMINATION PRACTICED BY WASHINGTON STATE UNIVERSITY IS BUT ONE EXAMPLE OF THE LONG-STANDING AND PERVASIVE DISCRIMINATION AGAINST WOMEN IN SPORTS .....	3
II.   SEX DISCRIMINATION IN ATHLETICS HAS HAD A PROFOUND DETRIMENTAL IMPACT UPON WOMEN .....	19
III.  DISCRIMINATION IN INTERCOLLEGIATE ATHLETICS IS DISCRIMINATION IN EDUCATION AND CANNOT BE TOLERATED UNDER THE ERA .....	25
CONCLUSION .....	29

## TABLE OF AUTHORITIES

<u>CASES:</u>	<u>Page</u>
<u>Brenden v. Independent School Dist. 742,</u> <u>477 F.2d 1292 (8th Cir. 1973) .....</u>	26, 27
<u>Brown v. Board of Education of Topeka,</u> <u>347 U.S. 483, 74 S. Ct. 686, 98 L. Ed.</u> <u>873 (1954) .....</u>	27
<u>Darrin v. Gould, 85 Wash. 2d 859,</u> <u>540 P.2d 882 (1975) .....</u>	26
<u>Hoover v. Meiklejohn, 430 F. Supp. 164</u> <u>(D. Colo. 1977) .....</u>	29
<u>S.W. Washington Chapter, Nat'l Electrical</u> <u>Contractors Ass'n v. Pierce County,</u> <u>100 Wash. 2d 109, 667 P.2d 1092 (1983) .....</u>	25
<u>CONSTITUTIONAL PROVISIONS:</u>	
<u>Washington Constitution, Art. 31, §1</u> <u>(Equal Rights Amendment) .....</u>	2, 25 26, 27
<u>STATUTES:</u>	
<u>Title IX of the Education Amendments of 1972,</u> <u>20 U.S.C. §1681 et seq. ....</u>	passim
<u>LEGISLATIVE AND REGULATORY MATERIALS:</u>	
<u>HEW Policy Interpretation, 44 Fed. Reg. 71413</u> <u>(12/11/79) .....</u>	7, 14
<u>Sex Discrimination Regulations: Hearings</u> <u>Before the Subcomm. on Postsecondary Educ.</u> <u>of the House Comm. on Educ. and Labor,</u> <u>94th Cong., 1st Sess. (1975) .....</u>	7, 11

OTHER AUTHORITIES:

"A Matter of Simple Justice," The Report of the President's Task Force on Women's Rights and Responsibilities (April 1970) .....	27
Auchincloss, "Title IX Helped Win the Olympics," <u>USA Today</u> (10/2/84) .....	18
Barnes & Scannell, "No Sporting Chance," <u>Washington Post</u> A1 (5/12/74) .....	9, 12 13
J. Bartlett, <u>Familiar Quotations</u> (14th ed. 1968) .....	19
Bastian, "Thank Title IX For Some of That Gold," <u>Washington Post</u> (8/5/84) .....	9, 18 21
Beck, "How Women Athletes Are Gaining on the Men," <u>Chicago Tribune</u> (10/29/79) .....	4
Bronson, "Hitting Stride -- Women, Long Ignored As College Athletes, Move Into 'Big Time,'" <u>Wall Street Journal</u> 1 (6/4/75) .....	5, 8 10, 11
Citizens' Advisory Council on the Status of Women, <u>Women</u> (1973) .....	20, 25
Clary, "The Big Blue \$\$\$ Machine," <u>Monthly</u> <u>Detroit</u> 51 (Nov. 1979) .....	11
"Comes the Revolution," <u>Time</u> 54 (6/26/78) .....	16, 22 23, 24
<u>The Final Report of the President's</u> <u>Commission on Olympic Sports</u> (1977) .....	17, 18
E. Gerber, J. Felshin, P. Berlin, & W. Wyrick, <u>The American Woman in Sport</u> (1974) .....	4
Gilbert & Williamson, "Sport is Unfair to Women," <u>Sports Illustrated</u> 88 (5/28/73) .....	6, 8, 11, 13 23

	<u>Page</u>
Gilbert & Williamson, "Programmed to be Losers," <u>Sports Illustrated</u> 60 (6/11/73) .....	7, 12
B. Harragan, <u>Games Mother Never Taught You</u> (1977) .....	24
M. Hennig & A. Jardim, <u>The Managerial Woman</u> (1976) .....	24
Hogan, "Revolutionizing Schools and Sports: 10 Years of Title IX," <u>Ms.</u> 25 (May 1982) .....	10, 14 15, 16
Knox, "Growing Pain for Women Cadets," <u>Boston Globe</u> (6/19/78) .....	21
Martin, "Title IX and Intercollegiate Athletics: Scoring Points for Women," .....	28
8 <u>Ohio Northern L. Rev.</u> 481 (1981)	
Nat'l Advisory Council on Women's Educational Programs, <u>Title IX: The Half Full, Half Empty Glass</u> (1981) .....	9, 14 16
Nat'l Collegiate Athletic Ass'n, <u>NCAA Manual</u> (1982-83) .....	26
Nat'l Federation of State High School Associations, <u>1984-1985 Handbook</u> .....	26
Northrop, "A New Generation of Athletes: Winning with Title IX," <u>Ms.</u> 56 (Sept. 1979) ..	10, 16
Northwest Ass'n of Schools and Colleges, Commission on Colleges, <u>Accreditation Handbook</u> (1982) .....	27
Note, "Sex Discrimination and Inter-collegiate Athletics," 61 <u>Iowa L. Rev.</u> 420 (1975) .....	26
Note, "Sex Discrimination in High School Athletics: An Examination of Applicable Legal Doctrines," 66 <u>Minn. L. Rev.</u> 1115 (1982) .....	4, 6, 20

	<u>Page</u>
O'Reilly, "Out of the Tunnel into History," <u>Time</u> 73 (8/20/84) .....	7, 9, 18
Phillips & Schafer, "Consequences of Parti- cipation in Interscholastic Sports: A Review and Prospectus," <u>in Sport and American Society: Selected Readings</u> 467 (G. Sage 2d ed. 1976) .....	22
Scanlan & Cleveland, "The Past as Prelude: The Early Origins of Modern American Sports Law," 8 <u>Ohio Northern L. Rev.</u> 433 (1981) .....	1, 12
Scannell & Barnes, "Two Schools of Thought on Title 9," <u>Washington Post</u> A1 (5/13/74) .....	8
Scannell & Barnes, "An 'Unfeminine' Stigma," <u>Washington Post</u> A1 (5/15/74) .....	1, 3, 5
Seligmann, "New Comforts for Old Bones," <u>Newsweek</u> 79 (9/17/84) .....	20
United States Commission on Civil Rights, <u>More Hurdles To Clear -- Women and Girls in Competitive Athletics</u> (July 1980) ...	14, 15
Weber, "The Long March," <u>WomenSports</u> (Sept. 1974) .....	11
Wilkerson & Dodder, "What Does Sport Do for People?", 50 <u>Journal of Physical Education and Recreation</u> 50 (1979) .....	21, 22

## INTRODUCTION AND SUMMARY OF ARGUMENT

In ancient Greece, women were put to death if they so much as watched the Olympic games; participation was unthinkable.<sup>1/</sup> Male athletes, on the other hand, were revered as national heroes and demigods.<sup>2/</sup> "The American sports ethic descends directly from that Greek tradition."<sup>3/</sup> The history of American women and girls in sports is a history of unequal treatment and unequal opportunity in every aspect of athletics, from participation opportunities and funding to the allocation of scholarships, facilities, equipment, practice times, uniforms, and coaching. The pervasiveness of this discrimination has had significant detrimental effects upon women and girls beyond the obvious physical ramifications of a sedentary existence. Although participation in sports, and team sports in particular, is generally regarded by experts as important preparation for success in other aspects of life,

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1/ Scanlan & Cleveland, "The Past as Prelude: The Early Origins of Modern American Sports Law," 8 Ohio Northern L. Rev. 433, 436 (1981) (hereafter "The Past as Prelude").

2/ Scannell & Barnes, "An 'Unfeminine' Stigma," Washington Post A1 (5/15/74) (last of a four-part series on women and sports) (hereafter "Scannell & Barnes, Part IV").

3/ Id.

these socially significant experiences have routinely been denied to women and girls.

In the instant case, the trial court found that Washington State University ("WSU") has discriminated against its women students in the operation of its intercollegiate athletics program. Nonetheless, as explained in Appellants' Brief, the court's injunctive decree will permit this discrimination to continue, simply because equality for women may be too costly. Amici respectfully submit that this state's Equal Rights Amendment permits no gender-based discrimination by the state, whatever the state's rationale, and that the injunctive decree is particularly inappropriate and untenable in light of the fact that women have been the victims of discrimination in athletics for so long and at such a great social cost.

Amici are 12 of the nation's leading women's organizations and organizations with a strong commitment to equal opportunity in education. They are concerned that women achieve equality in all aspects of education, including intercollegiate athletics, and that equality be achieved in practice as well as in theory. They are submitting this Brief in order to describe the nature, extent, and impact of the discrimination against women in athletics so that



the Court may better understand the critical need for an injunction in this case which will in fact eliminate rather than exacerbate such discrimination.

#### ARGUMENT

##### I. THE DISCRIMINATION PRACTICED BY WASHINGTON STATE UNIVERSITY IS BUT ONE EXAMPLE OF THE LONG-STANDING AND PERVASIVE DISCRIMINATION AGAINST WOMEN IN SPORTS

"Excellence in sport has been regarded as an exclusively masculine virtue through nearly all of recorded time."<sup>4/</sup> The discrimination against women in sports is pervasive and well-documented and reflects deeply rooted societal attitudes and prejudices that place women in the role of spectator and cheerleader rather than participant. The exclusion of women from the ancient Olympic Games, and the glorification of the male athlete, have already been noted. Even in the modern era, however, efforts were made to continue the exclusion of women from the Games. "[T]he founder of the modern Olympics, Baron Pierre de Coubertin, was vehemently opposed to women competing in the Olympics," and described the Games as "the solemn and periodic exaltation of male athleticism with internationalism as a base, loyalty

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<sup>4/</sup> Scannell & Barnes, Part IV, at A1.

as a means, art for its setting, and female applause as reward."<sup>5/</sup>

Although the Baron was overruled and women have participated in the modern Games,<sup>6/</sup> the commonly-held philosophy of man as participant and woman as spectator has limited the development of athletic programs for women and girls. Women have been perceived as "too weak, fragile, and passive for rigorous exercise."<sup>7/</sup> Moreover, "[i]n the early 1900s, many physical educators were convinced that the enthusiasm of college women for competitive sports was both dangerous and unwomanly."<sup>8/</sup> In the 1930s, for example, "a national association of physical education teachers, with the blessing of Mrs. Herbert Hoover, condemned intercollegiate competition for women as 'uneducational.' The group defended

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5/ E. Gerber, J. Felshin, P. Berlin, & W. Wyrick, The American Woman in Sport 136-38 (1974) (footnote omitted, emphasis in original).

6/ Id. at 138. It should be noted, however, that the opportunities for women to participate in the Olympics are still limited. For example, prior to 1984, when the women's marathon was added, the longest running event for women was the 1500 meter race -- less than a mile. Beck, "How Women Athletes Are Gaining on the Men," Chicago Tribune (10/29/79).

7/ Note, "Sex Discrimination in High School Athletics: An Examination of Applicable Legal Doctrines," 66 Minn. L. Rev. 1115, n.2 (1982) (hereafter "Sex Discrimination in High School Athletics").

8/ Id.

its attitude by claiming that young ladies might harm their reproductive organs."<sup>9/</sup>

Thus, only a decade ago it was reported that "[f]or the most part American women, from girlhood on, have been discouraged if not barred outright from participation in the major sports. If they persist in developing their athletic abilities they commonly are stigmatized as 'unfeminine' and 'overly aggressive.'"<sup>10/</sup> So bleak was the situation of women and girls in athletics that the authors of a now classic three-part study of women and sports published in 1973 stated that:

[T]here is no sharper example of discrimination today than that which operates against girls and women who take part in competitive sports, wish to take part, or might wish to if society did not scorn such endeavors. No matter what her age, education, race, talent, residence or riches, the female's right to play is severely restricted. The funds, facilities, coaching, rewards and honors allotted women are grossly inferior to those granted men. In many places absolutely no support is given to women's athletics, and females are barred by law, regulation, tradition or the hostility of males from sharing athletic resources and pleasures. A female who persists in her athletic interests, despite the handicaps and discouragements, is not likely to be congratulated on her sporting desire or

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<sup>9/</sup> Bronson, "Hitting Stride -- Women, Long Ignored As College Athletes, Move Into 'Big Time,'" Wall Street Journal 1 (6/4/75) (hereafter "Bronson, 'Hitting Stride'").

<sup>10/</sup> Scannell & Barnes, Part IV, at A1.

grit. She is more apt to be subjected to social and psychological pressures, the effect of which is to cast doubt on her morals, sanity and womanhood.

Gilbert & Williamson, "Sport is Unfair to Women," Sports Illustrated 88-90 (5/28/73) (hereafter "Gilbert & Williamson, Part I").

Our schools and universities have contributed to this history of discrimination. "In recent years the major obstacle to female participation in inter-scholastic athletics has been inequality between female and male athletic programs in the allocation of facilities, equipment, practice schedules, and funding."<sup>11/</sup> In 1979, the Department of Health, Education and Welfare described the treatment of women in intercollegiate athletics as follows:

Participation in intercollegiate sports has historically been emphasized for men but not women. Partially as a consequence of this, participation rates of women are far below those of men. . . . The historic emphasis on men's intercollegiate athletic programs has also contributed to existing differences in the number of sports and scope of competition offered men and women. One source indicates that, on the average, colleges and universities are providing twice the number of sports for men as they are for women. . . . On most campuses, the primary problem confronting women athletes is the absence of a fair and adequate level of resources,

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<sup>11/</sup> "Sex Discrimination in High School Athletics," at 1115, n.2.

services, and benefits. For example, disproportionately more financial aid has been made available for male athletes than for female athletes. . . [D]iscrepancies also exist in the opportunity to receive coaching and in other benefits and opportunities, such as the quality and amount of equipment, access to facilities and practice times, publicity, medical and training facilities, and housing and dining facilities.

HEW Policy Interpretation, 44 Fed. Reg. 71413, 71419 (12/11/79) (footnotes omitted).

Specific examples from the pre-Title IX era underscore the nature and extent of the discrimination.<sup>12/</sup> In 1972, the year in which Title IX was passed, women athletes received approximately one percent of the total intercollegiate athletic budget.<sup>13/</sup> Women regularly had to make do without, or find ways to support themselves. Thus, the women rowers at the University of Washington "washed cars and sold buttons to pay for the plane fare to the National

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<sup>12/</sup> "Title IX" refers to Title IX of the Education Amendments of 1972, 20 U.S.C. §1681 et seq., which prohibits sex-based discrimination in education programs and activities receiving federal financial assistance.

<sup>13/</sup> Sex Discrimination Regulations: Hearings Before the Subcomm. on Postsecondary Educ. of the House Comm. on Educ. and Labor, 94th Cong., 1st Sess. 123 (1975) (hereafter "1975 House Hearings") (statement of L. Mabry, Pres., AIAW); O'Reilly, "Out of the Tunnel into History," Time 73 (8/20/84). See also Gilbert & Williamson, "Programmed to be Losers," Sports Illustrated 60, 62 (6/11/73) (hereafter "Gilbert & Williamson, Part III").

Women's Rowing Championships in Connecticut. And the University of Maryland women's track team had to sell cookies and even make its own uniforms."<sup>14/</sup> In 1974, the athletic budget of Ohio State University was \$6 million, of which the women's sports program received only \$37,000, or six-tenths of one percent.<sup>15/</sup> (Even that meager sum was a vast improvement over the women's 1969 allocation, which was \$3,000.<sup>16/</sup>) In 1973, it was reported that at the University of Washington, where 41.4 percent of the undergraduates were women, women received only nine-tenths of one percent of the \$2 million the University spent annually on sports.<sup>17/</sup> And in 1974, the University of Maryland's athletic budget of \$2,015,000 included 100 football and 9 men's basketball scholarships,

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<sup>14/</sup> Bronson, "Hitting Stride," at 19.

<sup>15/</sup> Scannell & Barnes, "Two Schools of Thought on Title 9," Washington Post A1 (5/13/74).

<sup>16/</sup> Id.

<sup>17/</sup> Gilbert & Williamson, Part I, at 91. It is a rather emphatic illustration of the extent of the discrimination against women that this vast disparity could be reported as a sign of a "markedly improved" situation. The authors stated, "In 1957 there were no women's intercollegiate athletics at the university [of Washington]. Dr. Joseph Kearney, director of sports at Washington, says, 'We want to develop the women's programs that are now in an evolutionary state.' Evolutionary is a clinically accurate term. If the current rate of progress were maintained, women would reach financial parity with men in the year 2320." Id.

at a cost of \$2,840 each, while the entire women's athletics program received a total of \$19,000.<sup>18/</sup>

As of 1973, women effectively had no college scholarships available to them, while male athletes regularly received such aid and thus an opportunity they might otherwise not have had to attend college.<sup>19/</sup> Moreover, such scholarships enabled talented male high school athletes to continue their amateur athletic careers, while their female counterparts were often forced into early retirement. For example, after Donna de Varona won two gold medals in swimming for the United States in the 1964 Olympics at the age of 17, she had to give up her sport because there were no college athletic scholarships available to her, and no real opportunities to train in college. In contrast, her teammate, gold medalist Don Schollander, received a full scholarship to Yale.<sup>20/</sup>

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<sup>18/</sup> Barnes & Scannell, "No Sporting Chance," Washington Post A1, A14 (5/12/74) (hereafter "Barnes & Scannell, Part I").

<sup>19/</sup> See Nat'l Advisory Council on Women's Educational Programs, Title IX: The Half Full, Half Empty Glass 46 (1981) (hereafter "The Half Full, Half Empty Glass").

<sup>20/</sup> O'Reilly, "Out of the Tunnel into History," Time 73 (8/20/84); Bastian, "Thank Title IX for Some of That Gold," Washington Post (8/5/84).

Participation opportunities for women were also severely restricted. "[I]n 1974, a woman could choose between two sports for every seven offered a man." Hogan, "Revolutionizing Schools and Sports: 10 Years of Title IX," Ms. 25, 27 (May 1982) (hereafter "Hogan, '10 Years of Title IX'").

Athletic programs for women were -- and still are, as the instant case demonstrates -- perceived to be and treated as less important than programs for men. While men had uniforms, women had none<sup>21/</sup> or had to share them with other teams. Men were given the most opportune and convenient practice times, game times, and facilities. College sports for women "were largely restricted to intramural encounters . . . . The games were usually informal and often played with borrowed equipment and with little or no funding from the physical education department." Bronson, "Hitting Stride," at 1. In 1971, women wanting to row at Princeton University had to practice clandestinely at six in the morning, "[w]earing discarded men's T-shirts and using a borrowed shell (and even denied the use of the boat-house)." Id. At the University of Maryland, women's basketball was often played as a preliminary to the

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<sup>21/</sup> See, e.g., Northrop, "A New Generation of Athletes: Winning with Title IX," Ms. 56 (Sept. 1979).



men's game, creating the "belittling" situation in which women had to "stop overtime play to allow them (the men) to begin." Id. at 19.<sup>22/</sup>

At Trenton State College in New Jersey, the men had a trainer who traveled with the team, while the women had no trainer at all. Gilbert & Williamson, Part I, at 94. In 1973, the very limited \$9,000 budget for women's athletics at the University of Kansas "made it necessary for female athletes to drive 24 hours straight to get to track meets or, if they arrived early, to sleep on wrestling mats the night before competition. The men, traveling in style at university expense, also received goodies like blazers and suitcases."<sup>23/</sup>

The situation in the nation's elementary and secondary schools -- the training ground for inter-collegiate athletes -- was no better. To the contrary, these schools reinforced society's stereotypes as well as the notion of women as second-class citizens. Prior to the passage of Title IX, "public schools generally manifested no intention to provide the athletic facilities, coaching, and equipment to

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22/ See also Clary, "The Big Blue \$\$\$ Machine," Monthly Detroit 51, 55 (Nov. 1979).

23/ Weber, "The Long March," WomenSports (Sept. 1974), reprinted in 1975 House Hearings, at 71, 74.

undeniably interested -- and talented -- young women in any way resembling the willingness they showed in providing it to young men. Boys played football; girls, with the full approval of the law, waved pompoms."<sup>24/</sup>

In the state of Washington, for example, a survey of 60 junior and senior high schools "found not one where the physical education budget for girls was even 50 per cent of that for boys." Barnes & Scannell, Part I, at A14. In Waco, Texas, "the public schools operated a \$250,000 athletic program for boys in seven sports but spent only \$970 on girls' athletics. . . [O]f \$1 million in athletic facilities and equipment only tennis balls could be used by girls on a regular basis." Id.

The attitudes prevailing amongst those who controlled the pursestrings and participation opportunities are also worth noting. For example, the Director of Physical Education for the school system of the state of Georgia was quoted in 1973 as saying, "I don't think the idea is to get girls interested in interscholastic competition. I don't think the phys ed program on any level should be directed

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<sup>24/</sup> "The Past as Prelude," at 448 (emphasis added). In 1973, it was reported that "[i]n junior and senior high schools, girls get perhaps 5% of the funds and facilities." Gilbert & Williamson, Part III, at 62.

toward making an athlete of a girl." Gilbert & Williamson, Part I, at 94. A year later, the chairman of the Save the Little League of New Jersey Committee reacted to an order of that state's Civil Rights Commission barring the Little League from discriminating against girls while using public parks and playgrounds by stating that many leagues across the state would close rather than admit girls. According to the chairman, the Little League was "going right down the sewer." Barnes & Scannell, Part I, at A14.

Against this background of unequal treatment and unequal opportunity, Congress, through Title IX, and various state legislatures, through equal rights amendments to their constitutions as well as through statutes, began to correct sex-based discrimination generally, and in education particularly. These measures are critically important to the attainment of an educational system that provides equal opportunity to all, and have resulted in vastly improved intercollegiate and interscholastic athletic programs for women and girls.

For example, a 1977 survey conducted by the NCAA of its member institutions showed that in 1976-77, 170,384 men (72.6 percent of all athletes) and 64,375

women (27.4 percent) participated in intercollegiate sports.<sup>25/</sup> The number of women athletes had increased 102.1 percent since 1971-72, and was four times the number 10 years earlier.<sup>26/</sup> In 1982, approximately 30 percent of intercollegiate athletes were women.<sup>27/</sup> Budgets for women in intercollegiate athletics also increased; by 1982, the average allocation to women ranged between 16 and 24 percent of the budget.<sup>28/</sup> Moreover, by the fall of 1981, women were receiving 22% of college athletic scholarships.<sup>29/</sup> Figures for the nation's high schools reflected similar growth. In 1970-71, only about 7.4 percent

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<sup>25/</sup> As reported in United States Commission on Civil Rights, More Hurdles to Clear -- Women and Girls in Competitive Athletics 21 (July 1980) (hereafter "More Hurdles to Clear").

<sup>26/</sup> Id.

<sup>27/</sup> Hogan, "10 Years of Title IX," at 26.

<sup>28/</sup> Id.

<sup>29/</sup> The Half Full, Half Empty Glass, at 46. It is important to note, particularly in a case such as this in which a university is attempting to gain special treatment for its men's athletic program, that women's gains in intercollegiate athletics have not been at the expense of men. Id. at 46-47. ("The increased opportunity provided to women under Title IX has not been at the expense of men's intercollegiate athletic programs. The number of men's teams has not decreased. Furthermore, two-thirds of all budget increases for athletic programs have been allocated to men's programs.") (emphasis in original). Accord HEW Policy Interpretation, 44 Fed. Reg. 71419 (12/11/79).

of the participants in interscholastic athletics were girls;<sup>30/</sup> by 1978-79, this figure had increased to 31.9 percent,<sup>31/</sup> and by 1982, to approximately 35 percent.<sup>32/</sup>

While the above statistics reflect a significant improvement in the status of women in sports, they also demonstrate -- as do the findings of discrimination in this case -- that equality for women has yet to be achieved.<sup>33/</sup> As the United States Commission on Civil Rights stated in 1980, "the number of female athletes is larger than ever before, but there are considerably fewer female athletes than male athletes. Although there are many factors contributing to lower female participation rates, one factor that may limit the number of female athletes is relatively less money allocated to women's programs." More Hurdles to Clear, at 26 (emphasis added). Indeed, the typical college athletic budget

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<sup>30/</sup> More Hurdles to Clear, at 11.

<sup>31/</sup> Id.

<sup>32/</sup> Hogan, "10 Years of Title IX," at 26.

<sup>33/</sup> As evidenced by the trial court's Findings of Fact in this case entered in January 1983, WSU has engaged in, and continued even after suit was filed to engage in, the same types of discriminatory practices discussed herein. See Appellants' Brief, at 22-23, n.15.

has not reflected the proportion of women participants. In the fall of 1981, almost one-third of college athletes were women, yet they received only approximately one-sixth of college athletic budgets.<sup>34/</sup>

Even after Title IX was enacted, more money was spent at Western Michigan University on men's hockey sticks than on any one women's sport.<sup>35/</sup> In 1978, Time reported that while the athletic budget for women at the University of Georgia was \$120,000 (up from \$1,000 in 1973), men received \$2.5 million.<sup>36/</sup> In 1982 it was reported that "in many schools women's sports still get lower budget allocations, the worst practice times, inadequate competitive schedules, and less promotional support. . . . Schools still have a long way to go before they can claim full compliance with [Title IX]."<sup>37/</sup>

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<sup>34/</sup> The Half Full, Half Empty Glass, at 44.

<sup>35/</sup> Northrop, "A New Generation of Athletes," Ms. 56 (Sept. 1979). At the same university, women athletes each got one pair of sneakers, while the men received three. Even this was an improvement, since women had not previously even had uniforms. Id.

<sup>36/</sup> "Comes the Revolution," Time 54, 58 (6/26/78) (hereafter "Comes the Revolution"). And male golfers at the same university received an unlimited supply of balls, while women were given one per competitive round. Id.

<sup>37/</sup> Hogan, "10 Years of Title IX," at 26.

Continuing disparate treatment of women was found to exist by the President's Commission on Olympic Sports, which had been established "to determine what factors impede or tend to impede the United States from fielding its best teams in international competition."<sup>38/</sup> Among the factors identified by the Commission in its 1977 Final Report was the treatment of women in intercollegiate athletics. According to the Commission, "[f]east and famine exist side by side. Men's college athletic opportunities are extensive and rewarding, while those for women . . . are sparse and the experiences often embittering."<sup>39/</sup> The Commission further noted that "[d]espite improvements being made in all areas of sport, opportunities for women still fall short of what is wanted and needed. Women continue to suffer from a lack of well-structured, varied programs. Also badly lacking are funds for those programs [and] access to facilities. . . ."<sup>40/</sup>

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<sup>38/</sup> The Final Report of the President's Commission on Olympic Sports, Executive Summary, at ix (1977).

<sup>39/</sup> Id. at 1.

<sup>40/</sup> Id. at 5. See also id., Vol I at 109 ("The inequities and discrimination so long unchallenged continue to retard the country's athletic efforts and to damage the sports environment. Barriers in organization, financial support, facilities, training and coaching combine in any number of ways to prohibit the optimum development of women  
(footnote continued)

The Commission recommended a national policy regarding women in sports in which "all athletic planning and policy decisions . . . are consistent with the ultimate objective of assuring that discrimination is eliminated in the treatment of women's programs."<sup>41/</sup> The Commission did note that progress was being made, however, and credited Title IX as being particularly responsible for increasing the opportunities for women athletes.<sup>42/</sup> Indeed, recent statements by our 1984 women Olympians confirm that anti-discrimination laws such as Title IX have markedly influenced their lives and athletic careers.<sup>43/</sup> As discussed below, discrimination in athletics extends beyond the playing fields into all aspects of life.

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(footnote continued)  
in sports."). The Commission's findings as to particular sports underscored the depth of the problem. See, e.g., id., Vol II at 221 ("women's track programs are only just emerging from the Middle Ages in terms of breadth, quality, and financial support.").

<sup>41/</sup> Id., Vol I at 111 (emphasis added).

<sup>42/</sup> Id., Executive Summary at 5.

<sup>43/</sup> For example, basketball star Cheryl Miller has stated bluntly that "Without Title IX, I'd be nowhere." O'Reilly, "Out of the Tunnel into History," Time 73 (8/20/84). And commentators nationwide attributed much of our success in the 1984 Olympics -- Americans won 44 percent of the gold medals in women's events -- to Title IX. See, e.g., id.; Auchincloss, "Title IX Helped Win the Olympics," USA Today (10/2/84); Bastian, "Thank Title IX for Some of That Gold," Washington Post (8/5/84).



## II. SEX DISCRIMINATION IN ATHLETICS HAS HAD A PROFOUND DETRIMENTAL IMPACT UPON WOMEN

The discrimination against women and girls in sports has had profound effects, not only physically, but also culturally and sociologically. The Duke of Wellington's famous remark that "the battle of Waterloo was won on the playing fields of Eton"<sup>44/</sup> epitomizes the importance of sports as an educational experience applicable to other aspects of life. As discussed below, researchers have concluded that athletes are more dominant, independent, and better adjusted than non-athletes, and that participation in team sports enables an athlete to learn skills that are necessary for success in later life, such as team play, cooperation and the ability to lose as well as to win. Women, however, have been excluded from these beneficial experiences, with serious consequences.

The fact that women and girls have been channelled into the role of spectator has had the obvious physical effects of inactivity. In 1973, even before the current emphasis on physical fitness, the Citizens' Advisory Council on the Status of Women said that "[s]hortchanging of girls in physical education and

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<sup>44/</sup> J. Bartlett, Familiar Quotations 506 (14th ed. 1968).

sports deprives them of the opportunity to establish lifetime habits of exercise which lead to a high level of continuing good health in adult life."<sup>45/</sup> Moreover, recent studies on aging reveal the very serious longterm effects of leading a life in which athletic activity has not been encouraged. For example, it has now been concluded that osteoporosis -- a thinning of the bones that cripples and kills the elderly, particularly the female elderly -- may be prevented or halted by exercise earlier in life.<sup>46/</sup>

Significantly, "[r]ecent studies reveal that an undetermined percentage of physical inequalities between men and women results from the social or cultural restrictions imposed on the female."<sup>47/</sup> Indeed, after two years' experience with coeducation at the nation's three military academies, it was reported that "a large part of the 'sex gap' in physical strength and endurance is due to social conditioning rather than inherent physical

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<sup>45/</sup> Citizens' Advisory Council on the Status of Women, Women 54 (1973).

<sup>46/</sup> See generally Seligmann, "New Comforts for Old Bones," Newsweek 79 (9/17/84).

<sup>47/</sup> "Sex Discrimination in High School Athletics," at 1124, n.39.

inferiority."<sup>48/</sup> Representatives from all three academies agreed that "pervasive cultural conditioning . . . has held women back from maximum performance levels."<sup>49/</sup>

The sociological consequences of non-participation in sports, while perhaps not as obvious as the physical consequences, are just as important. Studies have shown that participation in sports is associated with good overall social adjustment and with success in other aspects of life. While a comprehensive review of the literature of sports sociology is beyond the scope of this Brief, certain representative examples illustrate the point. For instance, in Wilkerson & Dodder, "What Does Sport Do for People?", 50 Journal of Physical Education and Recreation 50 (1979), the authors review a number of studies that conclude that participation in sports produces such qualities as emotional maturity, moral values,

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<sup>48/</sup> Knox, "Growing Pains for Women Cadets," Boston Globe (6/19/78).

<sup>49/</sup> Id. Indeed, the increased opportunities for women in sports have resulted in a significant improvement in the quality of women's athletic performances. "For example, men have taken only seven minutes off their best record marathon running time in the past 10 years. Women, many training seriously for the first time thanks to new women's professional coaches in school programs, have taken an hour and five minutes off their 1964 record." Bastian, "Thank Title IX for Some of That Gold," Washington Post (8/5/84).

self-reliance, self-sacrifice, effective citizenry, respect for authority, mental health, and competitive spirit.<sup>50/</sup>

In an article reviewing the consequences of sports participation by high school students, the authors found that high school athletes generally receive better grades and are more likely to aspire to and succeed in attending college than comparable non-athletes.<sup>51/</sup> The authors note that "[v]alues of hard work, excellence, and persistence may be developed in sports activities and applied to academic and other activities."<sup>52/</sup>

Such studies focus on and confirm the benefits of sports participation generally, without regard to the sex of the participants.<sup>53/</sup> However, since males have been afforded opportunities for sports

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50/ That the authors also included in this list "manliness, and, of course, Godliness" (*id.*) further evidences the sex-stereotyping that pervades sports.

51/ See Phillips & Schafer, "Consequences of Participation in Interscholastic Sports: A Review and Prospectus," in Sport and American Society: Selected Readings 467 (G. Sage 2d ed. 1976).

52/ *Id.* at 470.

53/ Indeed, "[r]esearchers have found that the virtues of sport, when equally shared, equally benefit both sexes. 'Comes the Revolution,' at 59. According to one expert, '[a]thletes are less depressed, more stable and have higher psychological vigor than the general public. This is true of both men and women athletes.'" *Id.*

participation while females have been discouraged in this regard, males have obtained these benefits to a far greater extent than have females. As Time magazine reported in a 1978 cover story on women in sports:

The lessons learned on the playing field are among the most basic: the setting of goals and joining with others to achieve them; an understanding of and respect for rules; the persistence to hone ability into skill, prowess into perfection. In games, children learn that success is possible and that failure can be overcome. Championships may be won: when lost, wait till next year. In practicing such skills as fielding a grounder and hitting a tennis ball, young athletes develop work patterns and attitudes that carry over into college, the marketplace and all of life. Yet in America's past this opportunity has been largely limited to males.

"Comes the Revolution," at 55. (emphasis added).<sup>54/</sup>

Recent literature has focused on the consequences of excluding women and girls from sports. Harvard sociologist David Riesman is "one of a group of scholars who believe women have had trouble rising to high managerial positions in part because they never learned the lessons taught so well by competitive sports."<sup>55/</sup> According to Riesman, "'The road to the board room leads through the locker room.'

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<sup>54/</sup> See also Gilbert & Williamson, Part I, at 90.

<sup>55/</sup> "Comes the Revolution," at 59.

He explains that American business has been 'socialized' by sport. 'Teamwork provides us with a kind of social cement: loyalty, brotherhood, persistence.'"<sup>56/</sup>

Management experts have also concluded that women are disadvantaged in the business world because they did not grow up experiencing the benefits of team sports. For example, in Games Mother Never Taught You (1977), management consultant Betty Lehan Harragan discusses the sociological differences in the childhood development of males and females and the effects of this development on the ability to succeed in the business world. Harragan contends that team sports are a training ground for life and that men, as boys, learn about team play, cooperation, group relationships, authority, competition, and winning and losing (including disappointment, discouragement, embarrassment, misfortune and criticism). Because women, as girls, have not been taught the same skills and concepts, they are at a disadvantage in the business world.<sup>57/</sup>

Twelve years ago, the Citizens' Advisory Council on the Status of Women recommended that "[t]he opportunity for achievement in sports. . . and for develop-

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<sup>56/</sup> Id.

<sup>57/</sup> See also M. Hennig & A. Jardim, The Managerial Woman (1976).

ing a competitive spirit within a framework of team cooperation should be available to girls."<sup>58/</sup> We should be striving to make that opportunity available. Women's exclusion from sports has affected them beyond the playing fields, and true equality in our society will not be achieved as long as women athletes remain second class citizens.

III. DISCRIMINATION IN INTERCOLLEGIATE ATHLETICS  
IS DISCRIMINATION IN EDUCATION AND CANNOT BE  
TOLERATED UNDER THE ERA

As discussed in Appellants' Brief, at 36-38, the trial court's injunctive decree is inconsistent with Title IX, a federal statute. This is reason alone for modifying the decree. An additional reason, of course, is that the state of Washington has more than a statute prohibiting sex-based discrimination -- it has a constitutional provision mandating equal rights for its female citizens. Wash. Const., Art. 31, §1. This Court has strictly construed the ERA and has permitted no state interest, no matter how compelling, to justify the sacrifice of equality. See S.W. Washington Chapter, Nat'l Electrical Contractors Ass'n v. Pierce County, 100 Wash. 2d. 109, 667 P.2d 1092, 1102 (1983). Moreover, this Court has been in the judicial forefront in guaranteeing equal oppor-

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<sup>58/</sup> Citizens' Advisory Council on the Status of Women, Women 55 (1973).

tunity for females in sports. See Darrin v. Gould, 85 Wash. 2d 859, 540 P.2d 882 (1975). Given this Court's construction of the ERA as well as the history of discrimination against women in intercollegiate athletics, it would be particularly unwarranted for the Court to let stand an injunction that would allow such discrimination to continue.

Moreover, at issue in the instant case is not simply discrimination in athletics, but discrimination in education, since intercollegiate athletics are unquestionably "an integral part" of a university's educational program.<sup>59/</sup> Indeed, WSU's effort in this case to carve out a portion of its athletic program from its overall educational program may

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<sup>59/</sup> See, e.g., Art. Two, §2 of the NCAA Constitution, which provides that "[t]he competitive athletic programs of the colleges are designed to be a vital part of the educational system. A basic purpose of this Association is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between college athletics and professional sports." NCAA Manual 7-8 (1982-83) (emphasis added). A similar proviso exists at the high school level. See Nat'l Federation of State High School Associations, 1984-1985 Handbook 15 ("Interscholastic activities shall be an integral part of the total secondary school educational program"). Moreover, "athletics . . . have been recognized by the judiciary as a part of the total educational process." Note, "Sex Discrimination and Intercollegiate Athletics," 61 Iowa L. Rev. 420, 469 (1975) (citing, inter alia, Brenden v. Independent School Dist. 742, 477 F.2d 1292, 1298 (8th Cir. 1973)).



place its accreditation in jeopardy, for the Association that accredits WSU requires that "[i]nter-collegiate and intramural athletic programs, if offered by the institution, shall be a part of the total educational program."<sup>60/</sup>

This state's ERA mandates equal opportunity and equality of treatment in all aspects and programs of every state educational institution. The importance of an educational system free of bias and discrimination cannot be overemphasized. "Discrimination in education is one of the most damaging injustices women suffer. It denies them equal education and equal employment opportunity, contributing to a second class self image."<sup>61/</sup> And as the United States Supreme Court stated in Brown v. Board of Education of Topeka, 347 U.S. 483, 493, 74 S. Ct. 686, 98 L. Ed. 873 (1954):

Today, education is perhaps the most important function of state and local governments. . . In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state

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<sup>60/</sup> Northwest Ass'n of Schools and Colleges, Commission on Colleges, Accreditation Handbook 66 (1982) (emphasis added).

<sup>61/</sup> Brenden v. Independent School Dist. 742, 477 F.2d 1292, 1298 (8th Cir. 1973) (quoting "A Matter of Simple Justice," The Report of the President's Task Force on Women's Rights and Responsibilities, 7 (April 1970)).

has undertaken to provide it, is a right which must be made available to all on equal terms.

(Emphasis added.)

Although WSU is not required to provide an intercollegiate athletics program, having chosen to provide one, it must make that program available to its male and female students on equal terms. In the instant case, however, the trial court has exempted a portion of WSU's educational program from the constitutional and statutory requirements of equality. The court's injunctive decree will, for example, allow a disproportionate number of males to attend college through scholarships, and will allow a disproportionate number of males the opportunity to become intercollegiate athletes. No legal basis exists for this disparity of treatment and opportunity in a state educational institution. Indeed, it has been said of Title IX that ["t]here can be no exceptions, such as for revenue-producing sports. If so, there will always be exceptions and reasons for not providing equal opportunity."<sup>62/</sup> A fortiori there can be no such exceptions when a state's constitution is involved. Moreover, ["w]omen and

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<sup>62/</sup> Martin, "Title IX and Intercollegiate Athletics: Scoring Points for Women," 8 Ohio Northern L. Rev. 481, 495 (1981).

girls constitute a majority of the people in this country. To be effective citizens, they must be permitted full participation in the educational programs designed for that purpose. To deny females equal access to athletics supported by public funds is to permit manipulation of governmental power for a masculine advantage." Hoover v. Meiklejohn, 430 F. Supp. 164, 169 (D. Colo. 1977).

Although the trial court recognized that WSU's women students are entitled to equality in athletics, the court carved out exceptions to its injunction that will perpetuate rather than cure the proven discrimination. If women are ever to achieve true equality in society, this Court must ensure that discrimination against women is banned not only in theory but also in practice.

#### CONCLUSION

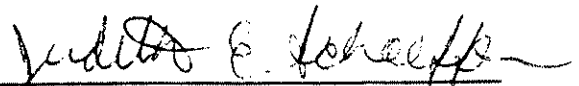
The trial court's injunctive decree excludes football and the revenues of revenue-producing sports from the total athletic program of Washington State University, a program in which women are entitled to equal participation opportunities and equality of treatment. To that extent the decree has no lawful rationale or tenable basis and should be modified accordingly.

Dated: February 1985

Respectfully submitted,

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