Title IX vs. NCAA: A Gameplan for Championship Equity

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ABSTRACT

In 1972, Congress enacted Title IX of the Education Amendments Act (Title IX) to prohibit sex-based discrimination in "any education program or activity receiving federal financial assistance." While the original legislation did not stipulate "athletics," Title IX has had a profound impact on intercollegiate sports by expanding the athletic opportunities for women as a covered "program or activity." However, fifty years after the enactment of Title IX, there are still significant disparities between men's and women's intercollegiate athletics, most notably at the high-profile National College Athletics Association (NCAA or Association) Championships.

In 2021, the NCAA hosted the men's and women's Division I Basketball Championship tournaments. A viral video featuring inferior weight rooms for women served as a catalyst to address longstanding gender equity issues in intercollegiate athletics. In response to the widely publicized inequities, the NCAA commissioned an independent gender equity review of all NCAA Championships. The external review confirmed gender inequities in ten women's intercollegiate sports and raised the issue of whether the NCAA should be subject to Title IX.

Educational institutions are subject to Title IX as "recipients" of federal financial assistance, and courts have found violations when institutions fail to provide female student-athletes with equal opportunities to participate or equitable benefits and services. In contrast to its member institutions, the NCAA has avoided compliance with Title IX on the basis that the Association is not a "recipient" of federal financial assistance. In 1999, the US Supreme Court ruled in NCAA v. Smith *that the NCAA's receipt of membership dues from*

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educational institutions did not constitute the "receipt" of federal aid. Based on this narrow ruling, the NCAA was not subject to Title IX.

The Smith *decision exposed the "recipient" loophole in Title IX legislation, which has enabled the NCAA to operate above the law for decades, resulting in significant gender disparities at NCAA Championships. However, Justice Ginsburg's decision in* Smith *left open an alternative legal theory to potentially bring the NCAA under the scope of Title IX. The NCAA's "controlling authority" over federally funded educational institutions' athletic programs could trigger Title IX coverage, irrespective of whether the NCAA itself is a "recipient" of federal aid. Analyzed within the context of NCAA Championships, where the NCAA controls the postseason intercollegiate tournaments, a court could find that the NCAA is a "controlling authority" over its member institutions and liable for gender inequities.*

To the extent courts are unable to bring the NCAA under the scope of Title IX, Congress recently introduced two bills that address gender equity in intercollegiate athletics. In June 2021, Congress passed a concurrent resolution that stipulates Title IX applies to the NCAA; in August 2022, the Senate reintroduced the College Athletes Bill of Rights, which includes a Title IX section that mandates intercollegiate athletic associations shall not discriminate based on sex. While these bills do not have the full force of law, they clearly indicate Congress' intent to prevent sex-based discrimination in intercollegiate athletics and require the NCAA to comply with Title IX.

This Article asserts that the NCAA should be covered by Title IX, and the Association should comply with the federal law's mandate to prohibit sex-based discrimination in "any education program or activity." To achieve gender equity at NCAA Championships, there are three pathways to bring the NCAA under Title IX coverage: the existing federal law could be interpreted to cover the NCAA, Congress could pass a new statute to cover the NCAA, or the NCAA could voluntarily comply with Title IX. This article analyzes these three alternatives and concludes that the NCAA should voluntarily comply with Title IX and uphold the Association's stated commitment to gender equity.

TABLE OF CONTENTS

I. INTRODUCTION

On June 23, 1972, President Richard Nixon signed into law Title IX to prohibit sex-based discrimination in "any education program or activity receiving [f]ederal financial assistance."[1] While the original law did not stipulate athletics,[2] Title IX has had a profound impact on intercollegiate sports by expanding athletic opportunities for women.[3] However, fifty years after the enactment of Title IX, there are still significant disparities between men's and women's intercollegiate athletics, most notably at the high-profile NCAA Championships.[4]

Founded in 1906, the NCAA is a not-for-profit educational organization comprised of over 1,200 public and private colleges and

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1. An amendment to the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a) states, "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

2. *See* 20 U.S.C. § 1681; *see also* AMY WILSON, THE STATE OF WOMEN IN COLLEGE SPORTS 6 (2022) ("Title IX's original text does not specifically address athletics, nor did the members of Congress who supported its passage envision it as a sports law."); Paul M. Anderson, *Title IX at Forty: An Introduction and Historical Review of Forty Legal Developments that Shaped Gender Equity Law*, 22 MARQ. SPORTS L. REV. 325, 327 (2012) ("None of this language provides a direct connection to the application of Title IX to athletics. Instead, this legislative history demonstrates that Title IX was specifically enacted to prohibit discrimination within the educational setting.").

3. WILSON, *supra* note 2, at 3 (Dr. Christine Grant, former president of the Association for Intercollegiate Athletics for Women, "described Title IX as the most important piece of federal legislation that was passed for women in the 20th century"), at 17 (women's participation opportunities in NCAA championship sports (all divisions) increased from 64,390 (27.8%) in 1982 to 221,212 (43.9%) in 2020); *see also* NAT'L COLLEGIATE ATHLETIC ASS'N, NCAA SPORTS SPONSORSHIP AND PARTICIPATION REPORT (1956–57 THROUGH 2020–21) 227 (2021) (15,182 female intercollegiate participants in 1966–67; after Title IX, female intercollegiate participants increased to 29,977 in 1971–72; doubled again to 62,886 by 1976–77); WALTER BYERS, UNSPORTSMANLIKE CONDUCT 241 (1995) (women represented 57 percent of the increase in athletic participation from 1971–73); 44 Fed. Reg 71.413, 71.419 (1979).

4. WILSON, *supra* note 2, at 1 ("The NCAA national office strives to model gender equity across its championships and other significant functions. Recently, those efforts fell short when inequities at the 2021 women's and men's Division I basketball tournaments were identified and widely publicized."), at 5 ("Title IX's 50th anniversary provides a significant moment to reflect on progress that has been made in many areas of education, to call attention to inequities and discrimination that continue to exist, and to issue a call to action to fulfill the promise of the 37 words of Title IX."); *see also* KAPLAN HECKER & FINK LLP, NCAA EXTERNAL GENDER EQUITY REVIEW – PHASE I: BASKETBALL CHAMPIONSHIPS 1 (2021) ("Although the disparities at this year's Division I Men's and Women's Basketball Championships sparked a wide-ranging public discourse about gender equity within the NCAA, college sports, and sports in general, gender disparity is not something new to any of these areas.") [hereinafter KAPLAN, PHASE I]; KAPLAN HECKER & FINK LLP, NCAA EXTERNAL GENDER EQUITY REVIEW – PHASE II 1 (2021) [hereinafter KAPLAN, PHASE II].

universities across the United States.[5] The voluntary Association administers intercollegiate athletics and serves as the national governing agency for its members.[6] The Association conducts ninety NCAA Championships in twenty-four sports across three divisions at the conclusion of the regular season for each sport.[7] More than half a million male and female student-athletes from over 19,000 teams compete in the postseason NCAA Championship tournaments each year.[8]

While member educational institutions are subject to Title IX as "recipients" of federal financial assistance,[9] the NCAA has challenged the application of and avoided compliance with Title IX on the basis that the Association is not a "recipient" of federal aid.[10] In 1999, the US Supreme Court ruled in *NCAA v. Smith* that the NCAA's receipt of membership dues from educational institutions did not constitute the "receipt" of federal aid.[11] Based on this narrow ruling, the NCAA was not subject to Title IX.[12] However, Justice Ginsburg's decision in *Smith* left open an alternative legal theory to bring the NCAA within the scope of Title IX.[13] The NCAA's "controlling authority" over federally funded educational institutions' athletic programs could bring the NCAA under

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5. NAT'L COLLEGIATE ATHLETIC ASS'N, CONSOLIDATED FINANCIAL STATEMENTS (AUG. 31, 2020–21) 7 (2021) [hereinafter CONSOLIDATED FINANCIAL STATEMENTS], https://ncaaorg.s3.amazonaws.com/ncaa/finance/2020-21NCAAFIN_FinancialStatement.pdf [https://perma.cc/8DV8-ZQF9] (NCAA is a voluntary not-for-profit association of more than 1,200 public and private educational institutions.).

6. *Id.* (The NCAA is "devoted to the sound *administration of intercollegiate athletics in all its phases*. . . . The NCAA strives for integrity in intercollegiate athletics and serves as the *colleges' national governance agency*.") (emphasis added).

7. *Championships*, NAT'L COLLEGIATE ATHLETIC ASS'N, https://www.ncaa.org/sports/2021/5/4/championships.aspx?path=championships [https://perma.cc/44VQ-JWN5] (last visited Jan. 29, 2023).

8. *Id.*

9. *See* Cohen v. Brown Univ. (*Cohen I*), 991 F.2d 888, 893, 896–97 (1st Cir. 1993)*;* Cohen v. Brown Univ. (*Cohen II*), 101 F.3d 155, 164, 173 (1st Cir. 1996); Roberts v. Colo. State Univ., 998 F.2d 824, 828 (10th Cir. 1993).

10. *See* Nat'l Collegiate Athletic Ass'n v. Smith, 525 U.S. 459, 462 (1999) (holding that the NCAA is not subject to Title IX via membership dues it receives from federally funded member schools). However, Justice Ginsburg left open the question of whether the NCAA could be subject to Title IX based on two alternative legal theories. *Id.* at 469–70.

11. *Id.* at 462 ("Dues payments from recipients of federal funds, we hold, do not suffice to render dues recipient subject to Title IX.").

12. *Id.*

13. *Id.* at 469–70 ("Smith argues that when a recipient cedes controlling authority over a federally funded program to another entity, the controlling entity is covered by Title IX regardless when it is itself a recipient."), 469 n.6 (citing Smith's brief to the Third Circuit, which argued that an organization that assumes control over a federally funded program is subject to Title IX); *see also* Brief for Appellant at 22, Smith v. Nat'l Collegiate Athletic Ass'n, 266 F.3d 152 (3d Cir. 2001) (Nos. 97-3346 & 97-3347) [hereinafter Brief for Appellant].

the purview of Title IX, irrespective of whether the NCAA itself is a "recipient" of federal aid.[14]

This Article asserts that the NCAA should be covered by Title IX, and the Association should comply with the federal law's mandate to prohibit sex-based discrimination in "any education program or activity." Part II details gender inequity at NCAA Championships and articulates a need for the NCAA to be covered under Title IX. Part III details historical legal challenges by the NCAA against Title IX. Part IV analyzes three pathways to achieve NCAA compliance with Title IX: (1) the existing law could be interpreted to cover the NCAA, (2) Congress could pass a new statute to cover the NCAA, or (3) the NCAA could voluntarily comply with Title IX pursuant to the Association's stated commitment to gender equity. Part V concludes with a proposed vision of championship equity at NCAA tournaments.

II. THE NATURE OF THE PROBLEM

A. Gender Inequity at NCAA Championships

In the spring of 2021, social media posts exposed decades of gender inequity at NCAA Championships.[15] On March 18, 2021, a

14. *See Smith*, 525 U.S. at 462, 469–70. Justice Ginsburg left open the question of whether the NCAA could be subject to Title IX based on two alternative legal theories based on the plaintiff's brief. *Id.* at 469–70; *see also* Brief for Appellant, *supra* note 13, at 11–12 (arguing that the NCAA receives federal financial assistance through the National Youth Sports Program and that an organization that assumes control over a federally funded program is subject to Title IX).

15. *See* KAPLAN, PHASE I, *supra* note 4, at 1 ("Although the disparities at this year's Division I Men's and Women's Basketball Championships sparked a wide range of public discourse about gender equity within the NCAA, college sports, and sports in general, gender disparity is not something new to any of these areas."); Dawn Staley, Head Women's Basketball Coach at University of South Carolina (@staley05), TWITTER (March 19, 2021, 7:09 PM), https://twitter.com/dawnstaley/status/1373064039211876358?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwterm%5E1373064039211876358%7Ctwgr%5E663b4d4b04aa42d64ced3d7a82ba7dd976cd2a80%7Ctwcon%5Es1_&ref_url=https%3A%2F%2Fwww.wltx.com%2Farticle%2Fsports%2Fncaa%2Fncaab%2Fmarch-madness%2Fdawn-staley-disparities-mens-womens-ncaa-tourney%2F101-b8c95e25-9f0d-49ce-b64b-e7b418a75126 [https://perma.cc/G24R-WS5B] ("In a season that has been focused on justice and equality it's disheartening that we are addressing the glaring deficiencies and inequities in the women's and men's NCAA Tournament experiences for the student-athletes. . . . There is no answer that the NCAA executive leadership led by Mark Emmert can give to explain the disparities. Mark Emmert and his team point blank chose to create them! The real issue is not the weights or the 'swag' bags; it's that they did not think or do not think that the women's players 'deserve' the same amenities as the men."); Muffet McGraw, former Head Women's Basketball Coach at University of Notre Dame (@MuffetMcGraw), TWITTER (March 20, 2021, 12:13 PM), https://twitter.com/MuffetMcGraw/status/1373321930485473287 [https://perma.cc/9GNC-HUYW] ("[T]he fact there's a huge disparity

University of Oregon female basketball forward, Sedona Prince, posted a video comparing the men's and women's weight room facilities at the Division I NCAA Basketball Championships.[16] The men's tournament in Indianapolis featured a spacious workout gym with heavy dumbbells, workout benches, weight racks, bars and plates, whereas the women's tournament in San Antonio featured a single rack of light hand weights and ten yoga mats.[17] Prince's video erupted on social media and exposed inequities that female student-athletes have experienced for decades in college sports.[18]

As a result of the viral video, the NCAA retained the law firm Kaplan Hecker & Fink LLP (Kaplan) to conduct an independent gender equity review of all NCAA Championships.[19] Detailed in two separate

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between men's and women's sports is hardly breaking news. We have been fighting this battle for years and frankly, I'm tired of it. . . . The fact that there are inequities in facilities, food, fan attendance, and swag bags is not what bothers me. What bothers me is that no one on the NCAA's leadership team even noticed. . . . To say they dropped the ball would be the understatement of the century. This is the issue that women have been battling for decades."); Ryan Morik, *Geno Auriemma Disappointed in Disparities for Men's and Women's Teams at NCAA Tournament: 'This Isn't Something New,'* SPORTSNET N.Y. (March 19, 2021, 1:22 PM), https://sny.tv/articles/uconn-s-geno-auriemma-disappointed-in-disparities-for-men-s-and-women-s-teams-at-ncaa-tournament-this-isn-t-something-new- [https://perma.cc/3DRQ-MH4C] ("[A] lifelong issue. 'This isn't something new that just kinda cropped up. You can make a case that it's never been fair, it's never been equitable.'").

16. Sedona Prince, University of Oregon Women's Basketball Forward (@sedonerrr), TIKTOK (Mar. 18, 2021), https://www.tiktok.com/@sedonerrr/video/6941180880127888646?is_from_webapp=v1&lang=en.

17. Ali Kershner, Stanford University Associate Olympic Sports Performance Coach (@kershner.ali), INSTAGRAM (Mar. 18, 2021), https://www.instagram.com/p/CMkRJ2LswFp/ [https://perma.cc/QD3D-FA3S]; *see also* Scott McDonald, *Stanford Coach Exposes Huge Disparity in Men's and Women's Workout Gyms at NCAA Tournaments*, NEWSWEEK (Mar. 18, 2021, 10:13 AM), https://www.newsweek.com/stanford-coach-exposes-huge-disparity-mens-womens-workout-gyms-ncaa-tournaments-1577254 [https://perma.cc/GM42-6GK7].

18. *See, e.g.*, Jason Gay, *A TikTok Video Says It All About the NCAA Tournaments*, WALL ST. J. (Mar. 21, 2021, 12:33 PM), https://www.wsj.com/articles/ncaa-tournament-womens-basketball-mens-basketball-11616344310 [https://perma.cc/5B4P-W82T]; Mike Brehm, *South Carolina Women's Basketball Coach Dawn Staley Criticizes NCAA's Mark Emmert Over Disparities Between Tournaments*, USA TODAY (Mar. 19, 2021, 10:27 PM), https://www.usatoday.com/story/sports/ncaaw/tourney/2021/03/19/dawn-staley-rips-mark-emmert-over-treatment-womens-tournament/4775906001/ [https://perma.cc/ZVC2-L8RQ]; Juliet Macur & Alan Blinder, *Anger Erupts Over Disparities at N.C.A.A. Tournaments*, N.Y. TIMES, https://www.nytimes.com/2021/03/19/sports/ncaabasketball/women-ncaa-tournament-weight-room.html [https://perma.cc/CJ3B-F9DW] (Aug. 3, 2021).

19. KAPLAN, PHASE I, *supra* note 4, at 4 (Phase I Kaplan conducted an in-depth gender equity review of NCAA basketball championships); KAPLAN, PHASE II, *supra* note 4, at 4 (Phase II Kaplan conducted an in-depth gender equity review of the NCAA's eighty-four other championships across twenty-three sports in three divisions); *see also* Alan Blinder, *N.C.A.A. Orders Review of Gender Inequity of Tournaments*, N.Y. TIMES, https://www.nytimes.com/2021/03/25/sports/ncaabasketball/ncaa-womens-tournament-gender-

reports, Kaplan's external review of eighty-five NCAA Championship tournaments in twenty-four sports across three divisions identified inequities in ten women's sports.[20] Focused on how the NCAA's policies, practices, and culture impact the student-athlete experience, Kaplan found that "the experience of the women's tournament participants was markedly different from and inferior to that of the men's participants."[21]

On August 2, 2021, Kaplan delivered Phase I of its gender equity review of the NCAA Division I Men's and Women's Basketball Championships to the NCAA Board of Governors.[22] The one-hundred-plus page report detailed significant disparities between the experiences of the male and female student-athletes.[23] The source of the disparities is the NCAA structure, which is designed to maximize revenues from the most lucrative source of funding for the Association and its membership—Division I Men's Basketball.[24] According to Kaplan, "[t]he NCAA's broadcast agreements, corporate sponsorship contracts, distribution of revenue, organizational structure, and culture all prioritize Division I men's basketball over everything else in ways that create, normalize, and perpetuate gender inequities."[25] Key findings from the Kaplan Phase I report on basketball include:

1. *NCAA Organizational Structure and Culture*: "The NCAA's current organizational structure and culture prioritizes men's

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equity.html#:~:text=Facing%20sustained%20furor%20over%20disparities,review%20of%20its%20championship%20events. [https://perma.cc/W27G-M5WH] (Aug. 3, 2021).

20. KAPLAN, PHASE II, *supra* note 4, at 1. Kaplan found that men's "revenue-producing" sports (basketball, baseball, ice hockey, lacrosse) with women's counterpart sports (basketball, softball, ice hockey, lacrosse) received the greatest resource disparities resulting in gender inequities. *Id.* at 7. Spending per Division I male athlete in 2018–19 was $4,285, compared to $2,588 per female athlete (excluding basketball). *Id.*

21. KAPLAN, PHASE I, *supra* note 4, at 7.

22. *See generally id.*

23. *Id.* at 7 ("It is beyond dispute that there were significant disparities between the 2021 Division I Men's and Women's Basketball Championships."). Disparities in the goods, services, and resources provided by the NCAA to female basketball players included inferior weight training facilities, COVID-19 tests, food, recreational facilities, gifts and mementos, branding, arenas, host cities, fan festivals, and sponsorship. *Id.*

24. *Id.* at 2 ("The primary reason, we believe, is that the gender inequities at the NCAA—and specifically within the NCAA Division I basketball championships—stem from the structure and systems of the NCAA itself, which are designed to maximize the value of and the support to Division I Men's Basketball Championship as the primary source of funding for the NCAA and its membership."); *see also* Rachel Bachman, *A Year Later, Women's NCAA Tournament Has More Teams, More Sponsors and 'March Madness*,*'* WALL ST. J. (Mar. 15, 2022, 7:00 AM), https://www.wsj.com/articles/womens-ncaa-tournament-march-madness-11647308282 [https://perma.cc/Y6AE-CJEU]; Alan Blinder, *Report: N.C.A.A. Prioritized Men's Basketball 'Over Everything Else'*, N.Y. TIMES (Aug. 3, 2021), https://www.nytimes.com/2021/08/03/sports/ncaabasketball/ncaa-gender-equity-investigation.html [https://perma.cc/9T28-JDDY].

25. KAPLAN, PHASE I, *supra* note 4, at 2; *see also* KAPLAN, PHASE II, *supra* note 4, at 2.

basketball over everything else, contributing to gender inequity."[26]

2. *Existing Media Agreements*: "The structure and terms of the NCAA's existing media agreements perpetuates gender inequity, leading to significant differences in the student-athlete experience for men and women at the Division I Men's and Women's Basketball Tournaments."[27]
3. *Revenue Distribution Model*: "The NCAA's current revenue distribution model prioritizes and rewards investment in men's basketball, but not women's basketball, by allocating revenue based on its members' relative performance at the Division I Men's Basketball Championship. As a result, NCAA member institutions are incentivized to invest in their men's basketball programs."[28]
4. *Participation Opportunities*: The NCAA provided more participation opportunities for Division I men's basketball players due to a larger bracket size of sixty-eight teams compared to only sixty-four teams for women.[29]
5. *Fewer Disparities in Division II and Division III*: Division II and Division III basketball do not have the same "systemic gender equity issues" found in Division I because neither men's nor women's basketball in Division II or III generate any meaningful

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26. *Kaplan Hecker & Fink Releases Independent Review and Recommendations Around Gender Issues in NCAA Championships*, KAPLAN HECKER & FINK (Aug. 3, 2021), https://ncaa-genderequityreview.com/phase-i-report-announcement/ ("Women's basketball essentially reports to and is subordinate to men's basketball. The NCAA resources allocated to men's and women's basketball differ significantly, even when taking into account the differences in the size of the tournaments. Men's basketball has substantially more full-time staff and contractor support, and there are material disparities between budgets for the men's and women's tournaments. The NCAA staff and committees for men's and women's basketball operate largely independently from each other in 'silos,' with little strategic coordination or common purpose. The NCAA lacks the infrastructure to review budgets, staffing, or any other aspect of the Division I Men's and Women's Basketball Championships in order to effectively monitor gender equity.").

27. *Id.* ("The NCAA's contract with ESPN significantly undervalues women's basketball. NCAA's contract with CBS/Turner is structured in a way that prioritizes support for men's basketball to the exclusion of women's basketball and other sports. The involvement of corporate sponsors at the men's tournament, and the synergies between corporate sponsors and CBS/Turner, mean that the men's championship has a meaningfully different 'look and feel', with professional quality events, venues, and broadcasts. The disparate financial investments made by both sponsors and the NCAA meant that NCAA women's basketball players do not currently have the same championship experience as their male counterparts.").

28. *Id.*

29. *Id.*

revenue for the NCAA, so there is no financial incentive to prioritize a gender.[30]

Kaplan concluded Phase I: "With respect to women's basketball, the NCAA has not lived up to its stated commitment to 'diversity, inclusion and gender equity among its student-athletes, coaches, and administrators.'"[31] Based on the findings in Phase I, NCAA President Mark Emmert directed Kaplan to conduct a second independent review of all NCAA Championships other than basketball.[32]

On October 25, 2021, Kaplan delivered Phase II of its gender equity review for all other NCAA Championships.[33] Consistent with the findings in Phase I,[34] the Phase II report confirmed that the NCAA's structure and culture prioritize men's "revenue-producing" sports, resulting in gender inequities at other NCAA Championships.[35] The Phase II report identified gender discrepancies in approximately nine out of the twenty-three women's sports investigated.[36] The greatest

30. KAPLAN, PHASE I, *supra* note 4, at 10. However, Kaplan noted that there were disparities with respect to the size and quality of venues for Division II and III basketball. *Id.* at 103. This Article focuses on gender equity issues at NCAA Division I Championships where there is an incentive to invest in revenue-producing sports.

31. *Id.* at 2.

32. KAPLAN, PHASE II, *supra* note 4, at 1 ("NCAA President Mark Emmert directed NCAA's Senior Vice President of Championships, Joni Comstock, who oversees all 84 of the NCAA's non basketball championships, to 'check everything.' For the first time, the NCAA's Championships staff undertook an expedited review of the supplies, services, and resources provided by the NCAA to student-athletes participating in all NCAA championships other than basketball.").

33. *See generally id.*

34. *Id.* at 37 ("Student-athletes, coaches, commissioners, and NCAA staff reported throughout our Phase II review that many of the same disparities in the student-athlete experience that we discussed in our Phase I report also present themselves in some of the other NCAA championships.").

35. *Id.* at 2 ("[W]oven into the fabric of the NCAA is a pressure to increase revenue to maximize funding distributions to the membership, which relies heavily on the NCAA's support. . . . [T]his same pressure has led the NCAA to invest more—and in some instances considerably more—in those championships that it views as already or potentially revenue-producing, while minimizing spending for other championships."); *id.* at 7 ("The NCAA's organizational structure and culture prioritize revenue-producing sports, contributing to gender inequity. . . . [T]he only championships that the NCAA considers revenue-producing are men's championships: Division I baseball, men's basketball, men's ice hockey, men's lacrosse and wrestling.").

36. *Id.* at 1 ("Looking at the men's and women's championships by sport, the Championships staff compared among other things, equipment and supplies, schedules, and athletic, medical and housing services. From that review, the NCAA was able to identify gender discrepancies in approximately nine out of 23 sports,"). Including basketball, gender discrepancies were found in ten out of twenty-four sports. *See id.* at 1; KAPLAN, PHASE I, *supra* note 4, at 7–10.

disparities were found between men's "revenue-producing" sports[37] (basketball, baseball, ice hockey, and lacrosse) and women's counterpart sports (basketball, softball, ice hockey, and lacrosse).[38]

The pressure to maximize revenues for the NCAA and its members caused the NCAA to invest more in men's championships, resulting in inequitable championship experiences for women.[39] According to Kaplan, previous efforts to address gender equity failed because the NCAA lacked the necessary infrastructure and systems to "effectively identify, prevent and assess gender inequities."[40] Since the release of the Kaplan reports, the NCAA has undertaken meaningful steps to improve gender equity at its Championship tournaments and is actively monitoring its progress on the NCAA website.[41] However, beyond implementing the Kaplan recommendations, the NCAA needs to be accountable under the law to ensure an equitable championship experience for all student-athletes.

B. The Need for NCAA Coverage Under Title IX

Accountability and transparency are essential to achieve gender equity at the NCAA Championships. The gender inequities revealed in the Kaplan reports exemplify the need for the NCAA to be covered under Title IX.[42] The inequities Kaplan cited at the NCAA

37. *Id.* at 2 n.4 ("The NCAA considers a 'revenue-producing' championship to be one in which gross revenue, excluding revenue from television and marketing fees, exceeds spending—in other words, one in which the NCAA nets a profit.").

38. *Id.* at 7 ("Today, the only championships that the NCAA considers revenue-producing are men's championships: Division I baseball, mem's basketball, men's ice hockey, men's lacrosse and wrestling. It is when those sports have women's counterparts that we observed the greatest resource disparities and resulting gender inequities. Similarly, the NCAA invests more in those women's championships that generate more revenue than their men's counterparts, such as Division I women's volleyball and women's gymnastics, as those women's championships are considered potentially revenue-producing while their men's counterparts are not.").

39. *Id.* at 13 ("The membership's heavy reliance on the monies it receives from the NCAA's revenue distributions has had a significant impact on the structure and culture of the NCAA. . . . Member institutions are dependent on the financial support they receive from the NCAA, and this, in turn, puts pressure on the NCAA to maximize revenue and minimize expenses for championships that do not produce revenue so that more funds can be distributed to the membership. This has led to the inequitable student-athlete experiences, particularly where one sport is viewed as significantly more revenue-producing than its gender counterpart.").

40. *Id.* at 2 ("The NCAA's simultaneous failure to put in place systems to identify, prevent and address gender inequities across its championships has allowed gender disparities in these and other sports to persist for too long.").

41. *Id.* at 3.

42. *See id.* at 23 ("[T]he NCAA's lack of infrastructure to monitor, assess, and ensure gender equity is in no way limited to basketball; rather, it impacts gender equity in the student-athlete experience in other sports as well.").

Championships included inferior scheduling, food, travel, housing, practice and competitive facilities, medical and training facilities, health and safety protocols, publicity, promotion, and media coverage for female student-athletes.[43]

While Title IX does not mandate equal budgets,[44] the Kaplan reports revealed multi-million-dollar budget gaps between the men's and women's Championships.[45] NCAA funding decisions are based on a sport's perceived ability to generate a profit.[46] Currently, the NCAA only considers five men's Championships (basketball, baseball, ice hockey, lacrosse, and wresting) as "revenue-producing."[47] Accordingly, the NCAA invests more in these men's Championships.[48] For the 2021–22 year, $161 million was allocated to fund all NCAA Championships across three divisions; $64 million funded the six Basketball Championships, and $97 million funded the remaining eighty-four Championships.[49] The greatest disparities in funding between men's and women's counterpart sports are summarized in the chart below:[50]

43. KAPLAN, PHASE I, *supra* note 4, at 7, 14–37.

44. *See* Education Amendments of 1974, Pub. L. No. 93-380, 88 Stat. 484 (1974); *see also* KAPLAN, PHASE I, *supra* note 4, at 58 ("[G]ender equity does not require equal budgets, as a tournament with greater fan attendance, corporate sponsorship, and media attention . . . naturally commands additional resources and support. However, the view that men's basketball is highly profitable and therefore worthy of increased investment has cultivated a culture within the NCAA in which men's basketball is not required to abide by many of the same budgetary constraints as women's basketball (or other sports)."); KAPLAN, PHASE II, *supra* note 4, at 19–20 ("[G]ender equity does not require perfect equivalence. But it does require that each gender's Championships and External Operations staff is able to provide NCAA student-athletes with a championship experience that is equitable to their gender counterpart's.").

45. KAPLAN, PHASE II, *supra* note 4, at 21; *see also* Blinder, *supra* note 24.

46. KAPLAN, PHASE II, *supra* note 4, at 21.

47. *Id.* ("[T]he NCAA currently considers only the following five championships to be revenue-producing, meaning they are considered to 'turn a profit from operations before considering media revenue and staffing costs': Division I men's basketball, men's ice hockey, men's lacrosse, baseball, and wrestling.").

48. *Id.*

49. *Id.* at 20.

50. *Id.* at 21 (Division I Baseball, Ice Hockey, and Lacrosse); KAPLAN, PHASE I, *supra* note 4, at 8, 57 (Division I Basketball). Note that there are Division I women's championships that generate greater revenues than men's and receive more investments from the NCAA: gymnastics, soccer, and volleyball. KAPLAN, PHASE II, *supra* note 4, at 21. For sports where men receive fewer resources than women due to a lower budget, it is possible that men may also have a Title IX claim against the NCAA for disparate treatment at NCAA Championships.

($ in millions)	**2019 NCAA Championship Expenses**			
Sport	**Men**	**Women**	**Difference**	**Ratio**
Basketball[51]	$53.2	$17.9	$35.3	3.0x
Baseball / Softball	16.0	6.3	9.7	2.5
Ice Hockey	4.2	0.7	3.6	6.5
Lacrosse	2.6	1.7	0.9	1.5

The multi-million-dollar budget gaps identified at NCAA Championships are consistent with recent NCAA research finding that Division I athletic departments spend approximately twice as much on their men's programs than their women's programs.[52] Unequal funding results in an unequal allocation of resources, producing inferior student-athlete experiences for women and violating the principles of gender equity set forth by the NCAA[53] and Title IX.[54]

51. KAPLAN, PHASE I, *supra* note 4, at 8 ("There are sizable disparities between the budgets for men's and women's tournaments; in 2019, the last year for which there are finalized financials, the difference in spending was approximately $35 million."), at 57 ("[M]any of the differences experienced and observed at the championships stem from significant disparities between the men's and women's tournament spending. . . . In 2019 . . . the men's basketball tournament cost $53.2 million, and the women's basketball tournament cost $17.9 million.").

52. WILSON, *supra* note 2, at 13 ("Division I continues to have the greatest gap in spending between men's and women's athletic programs. An analysis of total expenses indicates that Division I athletics departments are generally spending twice as much on their men's programs than on their women's programs. The largest gap in spending occurs at the Football Bowl Subdivision level."). Note, the NCAA does not host postseason Football Championships; therefore, football is not included in NCAA Championships expenditures. KAPLAN, PHASE II, *supra* note 4, at 21 n.40.

53. *See* KAPLAN, PHASE I, *supra* note 4, at 2 ("With respect to women's basketball, the NCAA has not lived up to its stated commitment to 'diversity, inclusion and gender equity among its student-athletes, coaches and administrators.'") (quoting NCAA Inclusion Statement as amended by the NCAA Board of Governors April 2017); *see also* Nat'l Collegiate Athletic Ass'n, 2022–23 NCAA Div. I Manual, arts. 1–6, at art. 1(G) (Aug. 1, 2021) [hereinafter NCAA Constitution] ("The Association is committed to gender equity. Activities of the Association, its divisions, conferences and member institutions shall be conducted in a manner free of gender [bias.] Divisions, conferences and member institutions shall commit to preventing gender bias in athletics activities and events, hiring practices, professional and coaching relationships, leadership and advancement opportunities."); *Gender Equity and Title IX*, Nat'l Collegiate Athletic Ass'n, https://www.ncaa.org/sports/2016/3/2/gender-equity-and-title-ix.aspx [https://perma.cc/KL6E-6SL9] (last visited Feb. 7, 2023) ("An athletics program can be considered gender equitable when the participants in both the men's and women's sports programs would accept as fair and equitable the overall program of the other gender.").

54. 34 C.F.R. §106.41(c) (2022) ("[E]qual athletics opportunities for members of both sexes."); Letter from Carolyn Maloney, Chairwoman, Comm. on Oversight & Reform, Jackie Speier, Member of Congress, & Mikie Sherrill, Member of Congress, to Mark Emmert, NCAA President (Mar. 14, 2022) (on file with the House Committee of Oversight and Reform) ("Congress enacted Title IX of the Education Amendments Act of 1972 to promote gender equity in educational settings, including athletics. In creating and perpetuating structural inequities between men's and

During the regular season, student-athletes are protected by Title IX because colleges and universities are "recipients" of federal financial assistance and athletics is a covered "program or activity" under the federal law.[55] Courts have upheld the validity of Title IX in college sports and found educational institutions liable for violations when such institutions fail to provide female student-athletes with equal opportunities to participate or with equitable benefits and services.[56] However, during the NCAA Championship tournaments, student-athletes are not afforded the same Title IX protection.[57] Unlike the regular season, when the universities and colleges control the student-athlete experience, the NCAA runs the postseason tournaments and controls the championship experience.[58] Student-athletes should be afforded the same Title IX protection during postseason tournaments to ensure an equitable championship and overall student-athlete experience.

III. THE NCAA'S LONG CAMPAIGN AGAINST TITLE IX

A. Decades of Resistance

Gender inequities at NCAA Championships are the result of decades of resistance against women's sports.[59] Title IX mandated change for educational institutions across the United States.[60] The prohibition against sex-based discrimination expanded the opportunities for women to participate and receive equal resources in

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women's [postseason] championships, and failing to implement substantive changes that would rectify these inequities, NCAA is violating the spirit of gender equity as codified in Title IX.").

55. *See Cohen I*, 991 F.2d at 894; *Cohen II*, 101 F.3d at 174; Roberts v. Colo. State Bd. of Agric., 998 F.2d 824, 827–28 (10th Cir. 1993); Horner v. Ky. High Sch. Athletic Ass'n, 43 F.3d 265, 271–72 (6th Cir. 1994); McCormick v. Sch. Dist. of Mamaroneck, 370 F.3d 275, 289–91 (2d Cir. 2004).

56. *See Cohen I*, 991 F.2d at 907; *Cohen II*, 101 F.3d at 187; *Roberts*, 998 F.2d at 834; *Horner*, 43 F.3d at 275.

57. *See* Nat'l Collegiate Athletic Ass'n v. Smith, 525 U.S. 459, 468–70 (1999).

58. *Compare McCormick*, 370 F.3d at 289–91 (recognizing that universities operate interscholastic athletic programs and are therefore bound by Title IX), *with* WILSON, *supra* note 2, at 1 ("The NCAA national office strives to model gender equity across its championships and other significant functions.").

59. WILSON, *supra* note 2, at 5 ("Title IX's 50th anniversary provides a significant moment to reflect on the progress that has been made in many areas of education, to call attention to inequities and discrimination that continue to exit, and to issue a call to action to fulfill the promise of the 37 words of Title IX.").

60. *Id.*

athletics.[61] Fearful that women's sports would threaten the male-dominated sports model supported by the NCAA and universities in the 1970s, the NCAA initiated a long campaign against Title IX.[62] At the time, men's and women's intercollegiate athletics operated under separate legal entities: the NCAA governed men's sports, and the Association for Intercollegiate Athletics for Women (AIAW) governed women's sports.[63] Recognizing that Title IX could have a profound impact on the landscape of college sports, the NCAA initiated a series of lobbying efforts and legal challenges to try to exclude athletics from Title IX coverage.[64]

1. Tower Amendment—"Revenue-Producing" Sports

Concerned that Title IX would destroy men's athletics programs, the NCAA and advocates for men's sports lobbied Congress to amend the federal law.[65] In May 1974, Texas Senator John Tower introduced a bill to exclude all intercollegiate athletics from Title IX.[66] After the initial bill failed, Tower introduced a modified bill on July 15, 1975, to exempt intercollegiate athletic activities that provided "*gross receipts or donations*."[67] The Tower Amendment tried to exclude men's

61. *Id.* ("Title IX, part of the Educational Amendments of 1972, mandated change across education in the United States declaring sex discrimination in educational settings illegal, thereby expanding access and opportunities for girls and women.").

62. *See* Ellen J. Staurowsky, *Title IX and College Sport: The Long Painful Path to Compliance and Reform*, 14 MARQ. SPORTS L. REV. 95, 101–02 (2003).

63. Ass'n for Intercollegiate Athletics for Women v. Nat'l Collegiate Athletic Ass'n, 735 F.2d 577, 579–80 (D.C. Cir. 1984) ("From 1906 to 1980, the NCAA sponsored programs only for men's intercollegiate athletics. In 1967, the Commission on Intercollegiate Athletics for Women (CIAW) was organized to provide a governing body for women's athletics. In 1971, CIAW was transformed into AIAW, an organization that throughout its existence governed only women's sports. In 1971–72, AIAW sponsored seven national championships for its 278 members.").

64. Welch Suggs, *Heroines as Well as Heroes*, *in* EQUAL PLAY: TITLE IX AND SOCIAL CHANGE 14, 30 (Nancy Hogshead-Makar & Andrew Zimbalist eds., 2007) ("The NCAA spent much of the 1970s trying to kill off Title IX in Congress and the courts."); *see also* Wilson, *supra* note 2, at 6 ("The 1970s also included attempts by lawmakers to amend the law to either exclude athletics altogether or at least to remove men's basketball and football from the law's jurisdictions.").

65. Bil Gilbert & Nancy Williamson, *Sport is Unfair to Women (Part 1)*, *in* EQUAL PLAY: TITLE IX AND SOCIAL CHANGE 35, 50 (Nancy Hogshead-Makar & Andrew Zimbalist eds., 2007) ("Shortly after its passage, the issue of Title IX's application to college sports emerged. The then-all-male [NCAA], through formal lobbying efforts, attempted to remove the application of Title IX to intercollegiate athletics. In May 1974, Senator John Tower (R-Tex) introduced legislation . . . attempting just that.").

66. 120 CONG. REC. 15322 (1974).

67. S. 2106, 94th Cong. (1975) ("[T]his section shall not apply to any intercollegiate athletic activity insofar as such activity provides to the institution gross receipts or donations required by such institution to support that activity.") (emphasis added).

"revenue-producing" sports, such as football and basketball, from Title IX coverage.[68]

However, the Tower Amendment was directly challenged by proponents of Title IX.[69] Senator Birch Bayh from Indiana argued that the proposed bill attempted "to fundamentally alter the original goals of Title IX, goals which included equal opportunity for women in athletics."[70] As an original drafter of Title IX, Bayh contested the assertion that men's sports were "suddenly going to disintegrate" or "be seriously damaged" by complying with Title IX and providing women "an equal opportunity to participate" in athletics.[71]

The Tower Amendment perpetuated the false narrative that men's college sports make money and therefore should be excluded from Title IX.[72] In fact, very few men's intercollegiate sports programs made money during the 1970s.[73] According to NCAA Executive Director Walter Byers, most Division I NCAA men's programs operated at a deficit.[74] The Tower Amendment, however, exempted sports with either "gross receipts" or "donations" and did not require a program to be profitable.[75] Under this broad definition, men's "revenue-producing" sports would be exempt from Title IX coverage based on any financial support generated for a program.[76]

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68. Gilbert & Williamson, *supra* note 65 ("After the amendment failed, Senator Tower tried a more limited exemption, one that would exclude from Title IX's purview so-called 'revenue-producing' sports, including sports that produced donations for the school.").

69. *Id.* at 50; *Statement of Hon. Birch Bayh, a U.S. Senator from the State of Indiana, on the Tower Amendment*, *in* EQUAL PLAY: TITLE IX AND SOCIAL CHANGE 35, 50, 60–63 (Nancy Hogshead-Makar & Andrew Zimbalist eds., 2007).

70. *Statement of Hon. Birch Bayh*, *supra* note 69, at 60.

71. *Id.* at 61, 63 ("It is unbelievable to me that sports programs so steeped in tradition as most of our big-ten schools are suddenly going to disintegrate or even be seriously damaged or even slightly damaged by permitting the women to attend these same fine institutions and have an equal opportunity to participate in athletic programs and programs of physical education.").

72. BYERS, *supra* note 3, at 11 ("Not that all big-time universities make a profit from collegiate sports. Far from it. Most of the Division I NCAA members run consistent sports deficits, which must be paid off by subsidies from state legislatures, booster donations, or fees levied on all their students.").

73. *Id.*

74. *Id.*

75. *Statement of Hon. Birch Bayh*, *supra* note 69, at 62. ("The only criteria necessary to achieve the exemption is the production of revenues or donations. The specific wording of the Tower bill is not directed to the moneys necessary to cover expense of a particular sport; rather it is directed at creating a total exemption for the sport itself from Title IX.").

76. *Id.*

2. Javits Amendment—"Nature of Particular Sports"

The Senate initially approved the Tower Amendment, but the House of Representatives defeated the legislation on May 20, 1974.[77] As an alternative to the Tower Amendment, Senator Jacob Javits of New York proposed the Javits Amendment, which required the Department of Health, Education and Welfare (HEW) to issue Title IX regulations for intercollegiate athletics that included "reasonable provisions considering the nature of particular sports."[78] On July 1, 1974, Congress passed the Javits Amendment, permitting discrepancies in spending based on the "nature of particular sports."[79]

The Javits Amendment, which remains in effect today, allows unequal budgets to accommodate a "particular sport," assuming there is a nondiscriminatory reason for the discrepancy in spending.[80] This unequal allocation based on the "nature of particular sports" enables universities to maintain larger budgets for men's programs, on the premise that these teams require additional resources.[81] For example, men's lacrosse is a contact sport that requires student-athletes to wear protective equipment, including an expensive helmet, shoulder pads, and gloves. Women's lacrosse is a non-contact sport, and female student-athletes are not required to wear the same protective equipment. Therefore, a larger budget for men's lacrosse to accommodate the more expensive protective equipment would be permissible under the Javits Amendment.[82] However, if a university provides free lacrosse sticks, cleats, and practice uniforms to the men's team as part of its larger budget, but does not provide the same

77. Jocelyn Samuels & Kristen Galles, *In Defense of Title IX: Why Current Policies Are Required to Ensure Equality of Opportunity*, 14 MARQ. SPORTS L. REV. 11, 40 (2003).

78. Gilbert & Williamson, *supra* note 65, at 50–51; Education Amendments of 1974, Pub. L. No. 93-380, 88 Stat. 484 (1974) ("PROPOSED REGULATIONS IMPLEMENTING THE PROVISIONS OF TITLE IX OF THE EDUCATION AMENDMENTS OF 1972 . . . RELATING TO THE PROHIBITION OF SEX DISCRIMINATION IN FEDERALLY ASSISTED EDUCATION PROGRAMS WHICH SHALL INCLUDE WITH RESPECT TO INTERCOLLEGIATE ATHLETIC ACTIVITIES REASONABLE PROVISIONS CONSIDERING THE NATURE OF PARTICULAR SPORTS.").

79. Samuels & Galles, *supra* note 77.

80. Gilbert & Williamson, *supra* note 65, at 50–51.

81. *Id.* at 51.

82. *See id.* ("This amendment allows different amounts of monies to be spent on different sports, depending on the distinct needs of the sport. . . . It is much easier to determine whether men and women are being provided equal resources for their sports departments than it is to determine whether both sexes were given equal educational opportunities, 'given the nature of the sports.' In this way, the NCAA's member schools successfully maintained the large budgets of two men's sports, football and men's basketball, arguing that the 'nature' of these sports requires the unequal investment of resources.").

additional equipment for the women's team, this disparity in financial resources and benefits provided would likely constitute a Title IX violation and would not fall within the Javits Amendment exception.[83]

Gender equity does not mandate identical budgets; differences are permitted to accommodate a nondiscriminatory need for additional resources.[84] However, Title IX does require an educational institution to "provide equal athletic opportunities for members of both sexes."[85] For example, men's basketball may require larger venues to accommodate more fans, but the roster size of fifteen players and equipment necessary to play the game is essentially the same as the women's game.[86] Therefore, a $13.5 million budget gap at the 2021 NCAA Division I Basketball Championships or a $35 million budget gap at the 2019 NCAA Basketball Championship that resulted in inequitable student-athlete experiences would not fall under the Javits

83. *See id.* ("In other words, if both genders are getting either the best equipment, or if both genders are getting average equipment, or if both genders are getting barely functional equipment, it is not a violation of Title IX despite rather large discrepancies in spending, because both genders are considered to be receiving the same educational experience. But a school cannot provide one gender with superior, state-of-the-art equipment and the other gender with lesser quality equipment and still be in compliance under the Javits Amendment.").

84. KAPLAN, PHASE I, *supra* note 4, at 5 ("[T]hat 'equitable' does not mean 'identical'. . . . Both men's and women's basketball should be permitted to make decisions that enhance the unique nature of their own sports, and those differences should be accepted so long as they exist for non-discriminatory, neutral reasons and their impact on the student-athlete experience has been taken into account."); KAPLAN, PHASE II, *supra* note 4, at 19 ("[G]ender equity does not require perfect equivalence. But does require that each gender's Championships and External Operations staff is able to provide NCAA student-athletes with a championship experience that is equitable to their gender counterpart's."), at 22 ("[G]ender equity does not require equal spending for men's and women's championships in the same sports, as championships with more fan attendance, corporate sponsorships, and media attention will necessarily require additional resources and support.").

85. 34 C.F.R. § 106.41(c) (2022) ("[E]qual athletics opportunities for members of both sexes.").

86. KAPLAN, PHASE I, *supra* note 4, at 8 ("[T]he resources allocated to men's and women's basketball differ significantly, even taking into account the differences in the size of the tournaments. Men's basketball has substantially more full-time staff and contractor support to plan their championship. There are sizeable disparities between the budgets for the men's and women's tournaments. . . . In some respects, these disparities are justifiable in that they result from objective differences in the tournament themselves, including, for example, the tournaments' respective fan attendance, media attention, and use of neutral sites. But differences in the tournaments do not fully account for the differences in spending. And the impact of these disparities on the student-athlete experience is exacerbated by the lack of communication and coordination between men's and women's basketball staffs and committees. The staffs and committees for men's and women's basketball operate largely in 'silos,' independently from each other, with little strategic coordination or common purpose. The 'silo-ing' of operations impedes the NCAA's ability to provide equitable championship experiences for student-athletes.").

Amendment exception[87] and violate the *"equal opportunity"* mandate established by the 1975 Regulations of Title IX.[88]

3. 1975 Regulations

The Javits Amendment required HEW to establish regulations to set forth guidance for athletic departments to comply with Title IX.[89] In 1974, HEW released a draft of proposed regulations (Regulations) and received over ten thousand comments during the review period.[90] HEW Secretary Caspar Weinberger testified that intercollegiate athletics was apparently the "most important issue in the United States,"[91] illustrating the prominent role Title IX was playing in college sports.

Fearing that the Regulations would "destroy" men's sports, NCAA President John Fuzak wrote a letter to President Gerald Ford in March 1975, warning that "the HEW concepts of Title IX as expressed could seriously damage if not destroy the major men's intercollegiate athletic programs."[92] President Ford, a former star football player on the two-time national championship team at the University of Michigan, was not persuaded by the NCAA's concerns and instead served as a strong advocate for women's sports.[93] On June 5, 1975, the day after the Regulations were released, President Ford delivered the commencement speech at his daughter's high school graduation, where

87. Blinder, *supra* note 24; *see also* KAPLAN, PHASE I, *supra* note 4, at 8 ("There are sizable disparities between the budgets for men's and women's tournaments; in 2019, the last year for which there are finalized financials, the difference is spending was approximately $35 million."), at 57 ("[M]any of the differences experienced and observed at the championship step from significant disparities between the men's and women's tournament spending. . . . In 2019 the men's basketball tournament cost $53.2 million, and the women's basketball tournament cost $17.9 million."), at 57–8 nn.182–83 (Comparison of Men's to Women's DI Basketball, FY 2019 and 2021 Actuals and Budget (Apr. 27, 2021).).

88. KAPLAN, PHASE I, *supra* note 4, at 1; *see also* § 106.41(c); Cannon v. Univ. of Chi., 441 U.S. 677, 704 (1979) (Title IX was passed "to avoid the use of federal resources to support discriminatory practices,"); *Cohen II*, 101 F.3d at 165 (quoting *Cannon*, 441 U.S. at 704).

89. WILSON, *supra* note 2, at 5–7. Congress delegated authority to the Department of Education to create regulations to determine an athletic program's compliance with Title IX. *See Cohen II*, 101 F.3d at 165 (1996).

90. Gilbert & Williamson, *supra* note 65, at 51.

91. *Sex Discrimination Regulations: Hearings Before the Subcomm. on Postsecondary Educ. of the Comm. on Educ. & Lab.*, 94th Cong. 439 (1975) (statement of Caspar W. Weinberger, Sec'y, Dep't of Health, Edu., & Welfare) ("I had not realized until the comment period closed that the most important issue in the United States today is intercollegiate athletics, because we have an enormous volume of comments about them.").

92. Staurowsky, *supra* note 62.

93. *Id.* at 102.

he highlighted the importance of equal rights for women in education and advocated for a "new era for women in America."[94]

Published on June 4, 1975, the final Regulations reflected many of the comments received by the HEW.[95] During the forty-five-day waiting period, the NCAA again tried to prevent the implementation of the Regulations by lobbying Congress.[96] Despite the NCAA's continued efforts to exclude athletics from Title IX, the Regulations went into effect on July 21, 1975.[97]

The 1975 Regulations prohibited sex-based discrimination in "athletics" using language identical to Title IX.[98] While "separate teams" were permissible, the Regulations stipulated that educational institutions must provide an "equal opportunity" to both sexes.[99] To determine "equal opportunity," the Regulations listed ten factors to evaluate compliance:

> 1. Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;

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94. Gerald R. Ford, President of the United States, Commencement Speech at the Holton-Arms School (June 5, 1975), *in* Gerald. R. Ford Presidential Library, Box 12 of White House Press Releases ("As young women, you are coming of age in an exciting time. You have options now open to you that until recently were closed. Several of you will attend formerly all-male universities. Some will choose careers once reserved for men only. . . . Before America completes its bicentennial celebration, I hope that Equal Rights Amendment will be part of the [US] Constitution. For E.R.A. also stand for a new era for women in America—an era of equal rights and responsibilities and rewards. The rough but rewarding task of your generation—of each of you—will be to see that recent progress in equal opportunity becomes a regular practice.").

95. *See* 34 C.F.R. § 106.41 (2022).

96. Deborah Brake & Elizabeth Catlin, *The Path of Most Resistance: The Long Road Toward Gender Equity in Intercollegiate Athletics*, 3 DUKE J. GENDER L. & POL'Y 51, 56 (1996). The bills introduced tried to prevent the implementation of Title IX Regulations and applicability to athletics. *See* S. 46, 94th Cong. (1975); H.R. 310, 94th Cong. (1975); S. 52, 94th Cong. (1975).

97. Brake & Catlin, *supra* note 96 ("The impetus behind these bills was the continued lobbying of the NCAA, football interests, and those who feared that giving women equal opportunities would work too great a change on the athletic system that men had traditionally enjoyed as theirs alone. Recognizing that this was their last chance to formally derail Title IX as a vehicle for equal athletic opportunity, these groups fought especially hard to defeat HEW's regulations.").

98. 34 C.F.R. § 106.41(a) (2022) ("No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person, or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.").

99. § 106.41(b) ("[A] recipient may operate or sponsor separate teams for members of each sex where selection of such teams is based upon competitive skill or activity involved is a contact sport."); § 106.41(c) ("A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes.").

2. The provision of equipment and supplies;
3. Scheduling of games and practice time;
4. Travel and per diem allowance;
5. Opportunity to receive coaching and academic tutoring;
6. Assignment and compensation of coaches and tutors;
7. Provision of locker rooms, practice and competitive facilities;
8. Provision of medical and training facilities and services;
9. Provision of housing and dining facilities and services; and
10. Publicity.[100]

Since the implementation of the 1975 Regulations, courts have upheld these ten factors as a basis to determine whether an educational institution is complying with the "equal opportunity" mandate of Title IX.[101]

4. *NCAA v. Califano*

Having failed to convince Congress and President Ford to exclude athletics from Title IX, the NCAA turned to the courts to defeat the new legislation. On February 17, 1976, the NCAA sued HEW Secretary Joseph Califano to invalidate the Regulations of Title IX.[102] In *NCAA v. Califano*, the NCAA argued that the Regulations should not apply to intercollegiate sports because athletic programs did not directly "receive" federal financial assistance.[103] Acting on behalf of itself and its member institutions, the NCAA sought declaratory and injunctive relief to invalidate the Regulations.[104] However, the NCAA failed to demonstrate that its compliance with the Regulations would result in an injury,[105] and absent an injury, the US District Court for

100. § 106.41(c); *see also Cohen II*, 101 F.3d at 165–66.

101. *Cohen II*, 101 F.3d at 165–66.

102. Nat'l Collegiate Athletic Ass'n v. Califano (*Califano I*), 444 F. Supp. 425, 428–29 (D. Kan. 1978). Defendants were Joseph A. Califano, Jr., Secretary of U.S. Dep't of Health, Education and Welfare; AIAW; and National Education Association & United States National Student Association.

103. *Id.* at 435 ("Count I basically alleges that HEW's Title IX regulations cannot be directly applied or enforced against intercollegiate programs because they do not receive federal financial assistance and they cannot be forced to comply on the ground that they merely 'benefit from' the provision of federal financial assistance to other educational programs and activities.").

104. *Id.* at 428–29 ("On February 17, 1976, the NCAA instituted the instant action seeking on behalf of itself and its member institutions, declaratory and injunctive relief that the regulations so promulgated are invalid.").

105. *Id.* at 431 ("If the HEW regulations impose upon the NCAA no duties of compliance, it necessarily follows that the NCAA cannot be injured by the allegedly vague and indefinite standards enunciated in 45 C.F.R. § 86.41(c).").

the Southern District of Kansas concluded that the NCAA did not have standing to sue on behalf of itself or its members.[106]

On appeal, the US Court of Appeals for the Tenth Circuit agreed that the NCAA itself did not have standing to sue[107] and then analyzed whether the NCAA had standing to sue on behalf of its members.[108] The NCAA argued that the Regulations unlawfully injured the NCAA and its members.[109] The Tenth Circuit reaffirmed that "education programs" under the Regulations include intercollegiate athletics,[110] but the NCAA was not a "recipient" of federal aid, was not required to comply with the Regulations, and therefore did not have standing to sue on its own behalf.[111] Member institutions, who were required to comply with the Regulations as "recipients" of federal aid, could show an injury in fact and had standing to sue.[112] The Tenth Circuit therefore overturned the district court and found that the NCAA had standing to sue on behalf of its members.[113]

Key to the Tenth Circuit's decision was the NCAA's stated purpose to "uphold the principle of *institutional control of,* and

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106. *Id.* at 439 ("[T]he court finds that Counts I-V of the plaintiff's amended complaint fail to allege any 'injuries in fact,' both causally related to actions of the defendant and for which the NCAA is an appropriate spokesman, to any of the members of the NCAA. Accordingly, the absence of any alleged injury to the NCAA itself, the NCAA must be denied standing to litigate Counts I-V in a purely representational capacity.").

107. Nat'l Collegiate Athletic Ass'n v. Califano (*Califano II*), 622 F.2d 1382, 1387 (10th Cir. 1980) ("We agree with the District Court that the NCAA does not have standing to sue in its own right. As the District Court noted, the challenged regulations can only be read to apply to member colleges and not the NCAA itself.").

108. *Id.* at 1385 ("The issue presented is whether the NCAA has standing to sue on the amended complaint.").

109. *Id.* ("Although the NCAA pled these legal theories as separate 'counts' of the amended complaint, the amended complaint presents but a single claim, i.e., that the unlawful regulations will injure the NCAA and its members and the enforcement of the regulations should be enjoined.").

110. *Id.* at 1389 ("The District Court reasoned that injury to 'education programs' generally does not necessarily mean injury to those intercollegiate sports programs that the NCAA is concerned about. Read in context, however, 'education programs' is clearly meant to include intercollegiate sports programs. Intercollegiate sports programs are 'education programs' under HEW's Title IX regulations (*see* 45 C.F.R. Part 86, Part D) and the District Court itself refers to men's intercollegiate sports as an 'education program'. *See* [*Califano I*,] 444 F. Supp. at 436.").

111. *Califano I*, 444 F. Supp. at 431 ("Said regulations apply only to 'recipients' of federal financial assistance. . . . Taking as true the NCAA's allegations that it receives no federal financial assistance . . . the court is obliged to conclude that the administrative provisions in question exert no direct regulatory effect upon the NCAA.").

112. *Califano II*, 622 F.2d at 1389 ("Without any doubt the members of the NCAA have sustained an injury in fact that the Constitution demands of a complaining litigant.").

113. *Id.* at 1385 ("We reverse the judgement of the District Court. We hold that the amended complaint alleges facts which, if true, confer standing on the NCAA to sue on behalf of its members.").

responsibility for, all intercollegiate sports."[114] In *Califano*, the NCAA successfully argued that its control and responsibility for intercollegiate athletics provided the NCAA standing to sue on behalf of its members.[115] Importantly for contemporary cases, *Califano* undermined the NCAA's ability to circumvent Title IX compliance by recognizing its "controlling authority" over member schools.[116]

B. NCAA Takes Control of Women's Championships

1. *AIAW v. NCAA*

During the 1970s, women's intercollegiate sports gained momentum, with AIAW membership increasing from 278 colleges (1971–72) to 961 colleges (1980–81).[117] By 1980, the AIAW was the largest governing sports association in the United States, with more members than the NCAA.[118] Increasingly threatened by the growth of women's athletics, the NCAA decided the best course of action was to take control of women's sports by hosting competing intercollegiate championships.[119]

During the 1981–82 season, the NCAA initiated a takeover of women's sports by hosting twenty-nine women's Championships in twelve sports.[120] Reluctant to relinquish control of the women's game to the NCAA, the AIAW filed an antitrust lawsuit on October 9, 1981 to prevent the takeover.[121] In *AIAW v. NCAA*, the AIAW alleged that the

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114. *Id.*

115. *Id.* at 1387.

116. *Id.* at 1391.

117. Ass'n for Intercollegiate Athletics for Women v. Nat'l Collegiate Athletic Ass'n, 735 F.2d 577, 580 (D.C. Cir. 1984) ("In 1971–72, AIAW governed seven national championships for its 278 members. By 1980–81, AIAW's membership had grown to 961 colleges and universities.").

118. WILSON, *supra* note 2, at 6 ("By 1980, the AIAW had become the largest sports governance association in the country, with nearly 1,000 members. According to the 1980 AIAW Member Directory, the AIAW provided participation opportunities for approximately 125,000 college women, offering 35 national championships in 17 sports.").

119. Suggs, *supra* note 64, at 30 ("The NCAA spent much of the 1970s trying to kill off Title IX in Congress and the courts. Once those efforts failed, the next best option was to acquire women's sports."); EQUAL PLAY: TITLE IX AND SOCIAL CHANGE 106 (Nancy Hogshead-Makar & Andrew Zimbalist eds., 2007) ("The NCAA having lost its legislative attempt to strike the 1975 Regulations and the 1979 Policy Interpretation in their entirety, and having lost its legal attempt to invalidate the law and regulations as they applied to its members in federal court, decided that women's sports had gained sufficient status to take control over them."); s*ee also* WILSON, *supra* note 2, at 6 ("After [*Califano*] failed, the NCAA intently pursued initiating national championships for women, and by 1982 was hosting women's championships in all three divisions.").

120. *Ass'n for Intercollegiate Athletics for Women*, 735 F.2d at 580.

121. *Id.*

NCAA used its "monopoly power in men's sports to facilitate its entry into women's college sports and force the AIAW out of existence."[122]

In its defense, the NCAA argued that its "nonprofit status and affiliation with higher education warrant special treatment under antitrust laws."[123] The NCAA convinced the district court that the NCAA's entrance into women's sports was not an attempt "to take over women's athletics,"[124] and that any anticompetitive actions by the NCAA should be justified as "legitimate nonprofit goals."[125] The Court of Appeals for the District of Columbia upheld the district court's finding that the NCAA's expansion of women's intercollegiate Championships did not constitute an antitrust violation.[126] Unable to prove an anticompetitive intent, the court of appeals ruled that the NCAA had not used its monopoly power in men's sports to unlawfully take over women's intercollegiate athletics.[127]

The NCAA's successful launch of competing women's Championships led to the AIAW's demise.[128] Faced with declining revenues due to decreased membership, the AIAW closed its operations on June 30, 1982.[129] Women's intercollegiate athletics continued to

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122. *Id.* ("On October 9, 1981, AIAW filed suit against NCAA in the US District Court for DC. AIAW alleged NCAA violated sections 1, 2, and 3 of the Sherman Act, 15 U.S.C. §§ 1, 2, 3 (1982), by using its monopoly power in men's college sports to facilitate its entry into women's college sports and to force AIAW out of existence.").

123. *Id.* at 582.

124. *Id.* at 585 (quoting Ass'n for Intercollegiate Athletics for Women v. Nat'l Collegiate Athletic Ass'n, 558 F. Supp. 487, 505–06 (D.D.C. 1983)).

125. *Id.* at 583 ("NCAA therefore suggests that even where its conduct has significant anticompetitive consequences, that conduct may be justified by a motive to accomplish the legitimate nonprofit goals of the association.").

126. *Id.* at 585–86 ("The district court's frequent reference to NCAA's contemplated co-existence with AIAW reflects the court's recognition that the relevant inquiry was whether the NCAA intended to destroy the AIAW. Furthermore, the court's conclusion that the NCAA's adopting a women's program did not represent an attempt 'to acquire surreptitious control of a market' indicates that it resolved the relevant inquiry in the negative. We accordingly affirm the district court's finding of no attempted monopolization.").

127. *Id.* at 585 ("After considering the district court's full discussion of AIAW's attempted monopolization claim, we conclude that the court properly applied the law of specific intent. The district court cited and found persuasive considerable record evidence indicating that NCAA viewed 'the continued existence of AIAW as a healthy alternative to the NCAA' . . . and that the NCAA's objective was not 'to take over women's athletics.'")

128. *Id.* at 580 ("AIAW's standing as the major governing body in women's sports ended, however, in the fall of 1981.").

129. *Id.* ("In the 1981–82 sports season, NCAA introduced twenty-nine women's championships in twelve sports. During the same season, AIAW suffered a significant drop in membership participation in its events. AIAW's loss of membership dues totaled $124,000, which represented approximately twenty-two percent of the dues collected the previous year. Forty-nine percent of those institutions leaving AIAW elected to place their women's sports programs under NCAA governance.").

operate under the NCAA, with participation levels increasing significantly from 64,390 women in 1982 (representing 28 percent of all participants) to 221,212 women in 2020 (representing 44 percent of all participants).[130] However, during this same time period, the overall undergraduate enrollment rate at all NCAA division schools was 45 percent men and 55 percent women.[131] The women's participation rate of 44 percent is 11 percent below the average percentage of female undergraduates, indicating the need for a continued expansion of opportunities for women to participate in intercollegiate athletics.[132]

2. Media Contracts & March Madness

In 1981, the NCAA initiated sponsorship of women's Championships and entered into a long-term contract with Columbia Broadcasting System (CBS) to televise intercollegiate athletics.[133] NCAA Executive Director Walter Byers led the negotiations bidding out the rights to televise the men's and women's Basketball Championships.[134] National Broadcasting Company (NBC) bid $45 million for the men's Basketball Championship and $525,000 for the women's; CBS bid $48 million for men's Basketball Championship and $225,000 for the women's.[135] The NCAA awarded the three-year contract to CBS and packaged both the men's and women's Championships together as part of the deal.[136]

In 1982, the NCAA also created the "March Madness" trademark to promote the men's Basketball Championship.[137] Despite being permitted to use the trademark for both men and women, it would be forty years before the NCAA would use the lucrative logo to support women's Championships.[138] The NCAA's reluctance to use the March

130. WILSON, *supra* note 2, at 17.

131. *Id.*

132. *Id.*

133. *Ass'n for Intercollegiate Athletics for Women*, 735 F.2d at 581.

134. *Id.* at 590 n.21.

135. *Id.* at 590 n.23.

136. *Id.* at 581.

137. KAPLAN, PHASE I, *supra* note 4, at 37; *see also* Daniel Wilco, *March Madness History – The Ultimate Guide*, NAT'L COLLEGIATE ATHLETIC ASS'N (Jan. 4, 2022), https://www.ncaa.com/news/basketball-men/article/2021-03-14/march-madness-history-ultimate-guide [https://perma.cc/4D67-XJWA].

138. KAPLAN, PHASE I, *supra* note 4, at 39 ("[T]here are no trademark limitations on the use of March Madness for women's basketball, and the NCAA's contracts with CBS/Turner, ESPN, and various corporate sponsors do not contain such a limitation either—in fact, they specifically note that March Madness may be used for 'Division I men's or women's basketball only.'"); *see also* Rachel Bachman, Louise Radnofsky & Laine Higgins, *NCAA Withheld Use of*

Madness brand for women drew attention at the 2021 Women's Basketball Championship.[139] Following the recommendation of Kaplan, the NCAA used March Madness to support women's basketball for the first time in 2022.[140]

The NCAA currently operates all of its Championships under a multi-year television and marketing agreement (Multimedia Agreement) with CBS and Turner Broadcasting System Inc. (CBS/Turner).[141] In 2010, the NCAA entered into the Multimedia Agreement to provide the exclusive television and other internet and multimedia broadcast rights for the Division I Men's Basketball Championships.[142] The NCAA also granted CBS/Turner the marketing rights to sell corporate sponsorships for all ninety NCAA Championships (Corporate Partner Program). These contracts provide the NCAA $10.8 billion over fourteen years and were scheduled to expire in 2024.[143] But in 2016, the NCAA extended its agreement with CBS/Turner for an additional eight years (2025 through 2032). Under this extended agreement, the NCAA will receive $8.8 billion, for an average annual payout of $1.1 billion by 2032.[144]

In addition to the CBS/Turner agreement, the NCAA entered into a multimedia agreement with ESPN Enterprises, Inc. (ESPN) in 2011.[145] This agreement provides ESPN the right to televise

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Powerful 'March Madness' Brand From Women's Basketball, WALL ST. J. (Mar. 22, 2021, 12:03 PM), https://www.wsj.com/articles/march-madness-ncaa-tournament-womens-basketball-11616428776 [https://perma.cc/JU9E-QUSK].

139. KAPLAN, PHASE I, *supra* note 4, at 37–40.

140. KAPLAN, PHASE II, *supra* note 4, at 3 ("Since our Phase I report was released in August 2021, the NCAA has taken a number of meaningful steps to achieve greater gender equity in its championships. . . . [I]n response to our Phase I recommendations, the NCAA has extended the use of the March Madness trademark to the Division I Women's Basketball Championship."); *see also* Bob Williams, *NCAA Women's Basketball Tournament Could Be Finally Given 'March Madness' Branding*, SPORTBUSINESS (June 8, 2021), https://www.sportbusiness.com/news/ncaa-womens-basketball-tournament-could-be-finally-given-march-madness-branding/ [https://perma.cc/7CS8-BP8E]; *see also* Charlie Henry, *Board Discusses Constitution Progress, Gender Equity Review*, NAT'L COLLEGIATE ATHLETIC ASS'N (Oct. 26, 2021, 7:05 PM), https://www.ncaa.org/news/2021/10/26/general-board-discusses-constitution-progress-gender-equity-review.aspx [https://perma.cc/CS5M-ES22] ("In the months since the first report, the NCAA has taken significant steps . . . to address gender equity concerns in the sport of basketball. These include using March Madness marketing at both the Division I Men's and Women's Basketball Championships.").

141. CONSOLIDATED FINANCIAL STATEMENTS, *supra* note 5, at 18 ("Note 11 – Television and Marketing Rights Fees" details the NCAA's long-term contracts with CBS, Turner, and ESPN).

142. *Id.*

143. *Id.*

144. *Id.*; *see also* KAPLAN, PHASE I, *supra* note 4, at 8–9; KAPLAN, PHASE II, *supra* note 4, at 28.

145. KAPLAN, PHASE I, *supra* note 4, at 70 n.196.

twenty-nine other NCAA Championships and the National Invitation Tournament (NIT) as well as international distribution rights for the Division I Men's Basketball Championship.[146] The ESPN contract provides $500 million to the NCAA over fourteen years for an average annual payout of $34 million and is set to expire in 2024.[147]

Underlying these media contracts is an inherent tension between the NCAA and Title IX. According to Kaplan, "the structure of the NCAA's media agreements perpetuates gender inequity"[148] and has had "a direct and inequitable impact on the student-athlete experience of women players."[149] Examples of inequity resulting from the existing media contracts include a different "look and feel" for the men's and women's Championships,[150] scheduling of women's games during off-peak times, and an inability for women's sports to monetize from different corporate sponsors or enter into separate media contracts.[151]

Gender inequities are limiting the growth of the women's game and falsely perpetuating the narrative that women's sports are destined to lose money.[152] An independent analysis conducted by expert Ed

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146. *Id.* at 69.

147. *Id.* at 70.

148. *Id.* at 8.

149. *Id.* at 9.

150. *Id.* ("Because CBS/Turner has the incentive to build up men's basketball at the expense of all other sports, the men's tournament has a different look and feel—drawing leading artists who perform at a concert during the Final Four, television advertisements that feature famous athletes and public figures, and programming that airs during the broadcast of the tournament covering players, their stories, and their families.").

151. *Id.* ("In addition to significantly undervaluing women's basketball as an asset, the structure of these contracts prioritizes support for men's basketball to the exclusion of women's basketball (and other sports). Because CBS/Turner controls the sponsorship rights for all NCAA championships, but the broadcast rights for men's basketball only, CBS/Turner is incentivized to create and encourage sponsorship opportunities for men's basketball above all other sports. And because CBS/Turner requires its Corporate Champions and Partners to purchase the sponsorship rights to all [ninety] championships and the media rights to the men's championship in order to participate as a sponsor, the cost of supporting women's championships is prohibitively expensive for many companies, shutting out sponsors who might otherwise be interested in supporting women's basketball, but cannot afford the more costly sponsorship of men's basketball.").

152. *See id.* at 2 ("[T]he NCAA does not have structures or systems in place to identify, prevent or address those inequities. The results have been cumulative, not only fostering skepticism and distrust about the sincerity of the NCAA's commitment to gender equity, but also limiting the growth of women's basketball and perpetuating a mistaken narrative that women's basketball is destined to be a 'money loser' year after year."); *see also* KAPLAN, PHASE II, *supra* note 4, at 2 ("The NCAA's simultaneous failure to put in place systems to identify, prevent, and address gender inequities across its championships has allowed gender disparities in these and other sports to persist for too long. . . . The result has been cumulative and is only compounded by the fact that the men's championships have a much longer history at the NCAA than the women's.").

Desser estimated that the Division I Women's Basketball Championship will be worth between $81 and $112 million annually by 2025.[153] Beyond basketball, the media agreements with CBS/Turner, ESPN, and other corporate partners are negatively impacting other women's Championships, indicating a need for the NCAA and its sponsors to restructure these contracts to achieve gender equity.[154]

IV. PATHWAYS TO TITLE IX COVERAGE

There are three pathways to bring the NCAA under the scope of Title IX. First, the existing federal law could be interpreted to cover the NCAA. Second, Congress could pass a new statute to bring the NCAA under the scope of Title IX. Third, the NCAA could voluntarily comply with Title IX pursuant to the Association's stated commitment to gender equity.

A. NCAA Covered by Current Law

The first pathway to bring the NCAA under the scope of IX is to interpret the existing statute to cover the NCAA. Based on the plain language meaning of Title IX, legislative history, and underlying intent of Congress, a court could find that the NCAA is an indirect "recipient" of federal financial assistance and subject to Title IX coverage. Title IX states 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 [f]ederal financial assistance."[155]

The key phrases to determine the scope of Title IX legislation are "any education program or activity" and "receiving [f]ederal financial assistance." Through an analysis of seminal Title IX cases, this subsection considers how a reviewing court should interpret the "program or activity" and "recipient" tests for the NCAA Championships.

For a court to conclude that the NCAA is covered by Title IX, both the "program or activity" and "recipient" tests need to be satisfied. The Regulations define "intercollegiate athletics" to be included under

153. *See* KAPLAN, PHASE I, *supra* note 4, at 3.

154. KAPLAN, PHASE II, *supra* note 4, at 28 ("Like Division I women's basketball, the NCAA's other championships are negatively impacted by the structure of these contracts and the resulting inequitable attention that they receive from the NCAA's corporate partners, which in turn results in significantly lower sponsorship support-and potentially unrealized value for the NCAA and its membership.").

155. 20 U.S.C. § 1681.

Title IX.[156] Pursuant to the Civil Rights Restoration Act (CRRA) the NCAA is a covered "program or activity" as either: (i) an entity "principally engaged in the business of providing education" services, or (ii) an entity "established by two or more" covered entities.[157] Under the "recipient" test, the NCAA is an indirect "recipient" of federal financial assistance as either: (i) a "controlling authority" over member schools' intercollegiate athletic programs or (ii) a direct beneficiary of student-athletes' participation at the NCAA Championships.[158]

1. "Program or Activity"

The scope of Title IX, as defined by the interpretation of "program or activity," has changed significantly over time and directly impacted the opportunities afforded to female student-athletes. During the 1970s, "program or activity" was interpreted broadly and participation opportunities for women in intercollegiate sports increased significantly.[159] However, the 1980s saw a new presidential administration and a landmark decision by the US Supreme Court in 1984, both of which derailed the progress of women's sports.[160] President Ronald Reagan advocated for a smaller federal government and cut the budgets of enforcement agencies, including the Department of Education.[161] Unlike previous administrations, which had advocated for a broad interpretation of Title IX to cover all aspects of an

156. 34 C.F.R. § 106.41(a) (2022) ("No person shall, on the basis of sex be excluded from participation in, be denied the benefits of, be treated differently from another person, or otherwise be discriminated against in any interscholastic, intercollegiate, club, or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.")

157. Civil Rights Restoration Act, Pub. L. No. 100-259, § 2(1), 102 Stat. 28, 28 (1988); *see also* Nat'l Collegiate Athletic Ass'n v. Smith, 525 U.S. 459, 466 (1999) ("Thus, if any part of the NCAA received federal financial assistance, all NCAA operations would be subject to Title IX.").

158. *See* 34 C.F.R. § 106.2(h) (2022); *see also* Cureton v. Nat'l Collegiate Athletic Ass'n (*Cureton I*), 37 F. Supp. 2d 687, 696 (E.D. Pa. 1999).

159. NAT'L COLLEGIATE ATHLETIC ASS'N, NCAA SPORTS SPONSORSHIP AND PARTICIPATION REPORT (1956–57 THROUGH 2020–21), *supra* note 3, at 227; Ass'n for Intercollegiate Athletics for Women v. Nat'l Collegiate Athletic Ass'n, 735 F.2d 577, 580 (D.C. Cir. 1984).

160. EQUAL PLAY: TITLE IX AND SOCIAL CHANGE, *supra* note 119, at 99–101 ("At first, the Reagan administration's beliefs translated into an attempt to abolish several agencies, including the Department of Education. Failing that, the administration accomplished as much by substantially cutting the Department of Education's budget. The result was that the Office for Civil Rights (the OCR), the administrative agency responsible for enforcing Title IX, dropped hundreds of complaints regarding discrimination in athletics. The effect was to send a signal to schools that the OCR would not pursue Title IX complaints seriously.").

161. *Id.* at 99–100.

educational institution, the Reagan administration advocated for a "program-specific" limitation to narrow the reach of Title IX.[162]

a. Grove City College v. Bell—*"Program-Specific"*

In 1984, the US Supreme Court endorsed the Reagan administration's "program-specific" interpretation of Title IX in the landmark case of *Grove City College v. Bell.*[163] The *Grove City* decision limited the scope of Title IX to programs or activities that directly received federal financial aid,[164] which effectively excluded athletics from coverage because athletic programs did not directly receive federal funding.[165]

In *Grove City*, the Supreme Court analyzed whether a private college that did not accept direct federal assistance was a "recipient" of federal financial assistance within the meaning of Title IX.[166] Based on the plain language meaning of the statute,[167] legislative history, and Congress' intent,[168] the Supreme Court found that Grove City College was an indirect "recipient" of federal aid through its enrolled students, who received federal grants earmarked for educational purposes.[169] On

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162. *Id.* at 100 ("In addition to slashing enforcement budgets, President Reagan's administration attempted to squelch Title IX's broader application with a new limiting interpretation of the law's reach. Whereas the Nixon, Ford, and Carter administrations had all interpreted Title IX to prohibit discrimination throughout any institution if it received federal funds, Reagan officials rewrote the administrative rules so that only the specific program that received the federal funds was covered by antidiscrimination laws."); *see also* Brake & Catlin, *supra* note 97, at 57–58.

163. Grove City Coll. v. Bell, 465 U.S. 555, 573–75 (1984) ("We conclude that the receipt of [Basic Educational Opportunity Grants (BEOGs)] by some of Grove City's students does not trigger institution wide coverage under Title IX. . . . [C]onsistent with the program-specific requirements of Title IX, the covered education program is the College's financial aid program.").

164. *Id.* at 569–70 ("With the benefit of clear statutory language, powerful evidence of Congress' intent, and a longstanding and coherent administrative construction of the phrase 'receiving Federal financial assistance,' we have little trouble concluding that Title IX coverage is not foreclosed because federal funds are granted to Grove City's students rather than directly to one of the College's educational programs.").

165. *Id.* at 595 n.9 (Brennan, J., concurring in part and dissenting in part) ("There is not a college athletic department anywhere in the country that receives Federal Funds.").

166. *Id.* at 557–59.

167. *See id.* at 569–70 ("With the benefit of clear statutory language, powerful evidence of Congress' intent, and a longstanding and coherent administrative construction of the phrase 'receiving Federal financial assistance,' we have little trouble concluding that Title IX coverage is not foreclosed because federal funds are granted to Grove City's students rather than directly to one of the College's educational programs.").

168. *See id.* at 564–66 (noting that in examining Congress' intent, there was no "substantive difference between institutional assistance and aid received by a school through its students").

169. *Id.* at 571.

its face, Title IX includes all forms of federal aid and makes no distinction between direct or indirect aid.[170] Modeled after Title VI of the Civil Rights Act, legislative history indicates that student aid should constitute receipt under Title IX.[171] Additionally, the Regulations illustrate Congress' intent for student scholarships, loans, and grants to meet the "recipient" requirement under Title IX legislation.[172]

Having established that Grove City was a "recipient," the Supreme Court moved to determine which "program or activity" at Grove City "received" the federal financial assistance.[173] The Supreme Court rejected the Court of Appeals' conclusion that the receipt of student aid grants triggered institution-wide coverage.[174] Instead, the Supreme Court limited the scope to only include the "program or activity" that received direct federal funding.[175] Therefore, only the financial aid program at Grove City College was subject to Title IX,

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170. *See id.* at 564 ("[T]he language of § 901(a) contains no hint that Congress perceived a substantive difference between direct institutional assistance and aid received by a school through its students. The linchpin of Grove City's argument that none of its programs receives any federal assistance is a perceived distinction between direct and indirect aid, a distinction that finds no support in the text of § 901(a). . . . As the Court of Appeals observed, 'by its all inclusive terminology [§ 901(a)] appears to encompass all forms of federal aid to education, direct or indirect.'").

171. *See id.* at 565 ("Congress' awareness of the purpose and effect of its student aid programs also is reflected in the sparse legislative history of Title IX itself. Title IX was patterned after Tile VI of the Civil Rights Act of 1964. . . . The drafters of Title VI envisioned the receipt of student aid funds would trigger coverage, and since they approved identical language, we discern no reason to believe that Congress who voted for Title IX intended a different result.").

172. *See id.* at 568 ("The regulations were clear, and Secretary Weinberger left no doubt concerning the Department's position that 'the furnishing of student assistance to a student who uses it at a particular institution . . . [is] Federal aid which is covered by the statute.'"); 45 C.F.R. § 86.2(g), (h) (2022).

173. *See Grove City*, 465 U.S. at 569–570.

174. *See id.* at 572–73 ("[T]he Court of Appeals' assumption that Title IX applies to programs receiving a larger share of a school's own limited resources as a result of federal financial assistance earmarked for use elsewhere within the institution is inconsistent with the program-specific nature of the statute. Most federal educational assistance has economic ripple effects throughout the aided institution, and it would be difficult, if not impossible, to determine which programs or activities derive such indirect benefits. Under the Court of Appeals' theory, an entire school would be subject to Title IX merely because one of its students received a small BEOG or because one of its departments received an earmarked federal grant. This result cannot be squared with Congress' intent.").

175. *See id.* at 573–74.

thereby excluding all other programs and activities (including athletics) from compliance with the antidiscrimination law.[176]

The *Grove City* "program-specific" limitation was a major departure from the Supreme Court's historical "institution-wide" interpretation of Title IX.[177] In *North Haven Board of Education v. Bell* (1982) and *Cannon v. University of Chicago* (1979), the Supreme Court ruled that if any "program or activity" were a "recipient" under Title IX, then coverage extended to the entire educational institution.[178] Fundamental to the Supreme Court's decisions in *North Haven* and *Cannon* was a belief that Congress intended civil rights laws to "prevent the use of federal resources to support discriminatory practices."[179] Contrary to legislative history, *Grove City* overturned *North Haven* and *Cannon* and stifled a decade of progress in women's sports by excluding athletic programs from Title IX coverage, leaving the viability and future of Title IX for athletics uncertain.[180]

b. Civil Rights Restoration Act—"Institution-Wide"

Congress reversed the Supreme Court's decision in *Grove City* by passing the CRRA in 1987.[181] Concerned that the Supreme Court had narrowed the scope of Title IX to a "program-specific" application,

176. *See id.* ("We conclude that the receipt of BEOG's by some of Grove City's students does not trigger institution wide coverage under Title IX. In purpose and effect, BEOG's represent federal financial assistance to the College's own financial aid program, and it is that program that may be properly regulated under Title IX.").

177. *See* N. Haven Bd. of Educ. v. Bell, 456 U.S. 512, 521 (1982); *see also* Cannon v. Univ. of Chi., 441 U.S. 677, 704–05 (1979).

178. *N. Haven Bd. of Educ.*, 456 U.S. at 521; *Cannon*, 441 U.S. at 704–05.

179. *See Cannon*, 441 U.S. at 704 (noting that Congress passed Title IX "to avoid the use of federal resources to support discriminatory practices"); *see also Grove City*, 465 U.S. at 582 (Brennan, J., concurring in part and dissenting in part) ("In both [*Cannon* and *North Haven*], the Court emphasized the broad congressional purposes underlying enactment of the statute. In *Cannon*, . . . we noted that the primary congressional purpose behind the statute was 'to avoid the use of federal resources to support discriminatory practices.'").

180. EQUAL PLAY: TITLE IX AND SOCIAL CHANGE, *supra* note 119, at 101 ("The impact of *Grove City* on athletic departments around the country was dramatic. The Department of Education dropped almost all of its complaints, as did the courts. The rapid growth of women's sports across the country came to an end.").

181. Civil Rights Restoration Act, Pub. L. No. 100-259, § 2(1), 102 Stat. 28, 28 (1988) ("Congress finds that certain aspects of recent decisions and opinions of the Supreme Court have unduly narrowed or cast doubt upon the broad application of Title IX of the Education Amendments of 1972, § 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and Title VI of the Civil Rights Act of 1964.").

Congress enacted the CRRA to reinstate "institution-wide" coverage of Title IX and other civil rights legislation.[182]

The CRRA amended Title IX of the Education Amendments of 1972 to expand the interpretation of "program or activity" to include "all of the operations of . . . a college, university, or other postsecondary institution, or a public system of higher education . . . any part of which is extended [f]ederal financial assistance."[183] The CRRA also provides institution-wide coverage for any entity "principally engaged in the business of providing education" services[184] and for "any other entity which is established by two or more" covered entities.[185]

Under the CRRA's expanded interpretation of "program or activity," a court should find that the NCAA is either an entity "principally engaged in the business of providing education" services or alternatively under the CRRA's "catch-all" provision as an entity "established by two or more covered entities."[186] Intercollegiate athletics is a covered educational "program or activity" under the Title IX Regulations.[187] The NCAA is an "educational organization" comprised of over 1,200 colleges and universities who are recipients of federal financial assistance.[188] Therefore, pursuant to the CRRA's "institution-wide" coverage, "if any part of the NCAA received federal assistance, then the entire Association would be subject to Title IX."[189]

Passing the CRRA was not an easy process; after years of congressional hearings, the Act finally passed in 1987.[190] Congress overturned the *Grove City* Supreme Court decision because it was "necessary to restore the prior consistent and long-standing executive branch interpretation and broad, institution-wide application of those laws previously administered."[191] Concerned that the bill "would vastly and unjustifiably expand the power of the federal government over the

182. *Id.* § 2(2) ("[L]egislative action is necessary to restore the prior consistent and long-standing executive branch interpretation and broad, institution-wide application of those laws as previously administered.").

183. 20 U.S.C. § 1687(2)(A); *see also* Nat'l Collegiate Athletic Ass'n v. Smith, 525 U.S. 459, 466 (1999).

184. § 1687(3)(A)(ii).

185. § 1687(4); *see also Smith*, 525 U.S. at 466.

186. *See Smith*, 525 U.S. at 465–66.

187. § 1687; 34 C.F.R. § 106.41(a), (c) (2022).

188. CONSOLIDATED FINANCIAL FORMS, *supra* note 5.

189. *Smith*, 525 U.S. at 466 ("Thus, if any part of the NCAA received federal financial assistance, all NCAA operations would be subject to Title IX.").

190. EQUAL PLAY: TITLE IX AND SOCIAL CHANGE, *supra* note 119, at 101–102.

191. 134 CONG. REC. S347 (daily ed. Jan. 28, 1988).

decisions and affairs of private organizations,"[192] President Reagan vetoed the CRRA on March 22, 1988.[193]

Focused on restoring broad civil rights laws which existed prior to *Grove City*, the Senate and House overrode President Reagan's veto with a two-thirds majority and reinstated the broad "institution-wide" interpretation of Title IX and other civil rights statutes.[194] The implications of the CRRA were far-reaching and extended beyond the scope of Title IX to include other civil rights laws: Title VI of the 1964 Civil Rights Act, the 1973 Rehabilitation Act, and the 1975 Age Discrimination Act.[195]

In 1992, the US Supreme Court in *Franklin v. Gwinnett County Public Schools* ruled that the CRRA properly overturned the *Grove City* decision.[196] Two years later, the Sixth Circuit in *Horner v. Kentucky High School Athletic Association* confirmed "the definitions of 'program or activity' make clear that discrimination is prohibited throughout the entire agencies or institutions if any part receives [f]ederal financial assistance."[197] And in 1999, the Supreme Court in *NCAA v. Smith* reaffirmed the broad definition of "program or activity"[198] and "institution-wide" coverage for entities "principally engaged in the business of providing education."[199]

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192. S. Doc. 100-28, at 1 (1988) (President Ronald Reagan's veto of S. 557).

193. EQUAL PLAY: TITLE IX AND SOCIAL CHANGE, *supra* note 119, at 102. On March 22, 1988, President Ronald Reagan stated that "this legislation isn't a civil-rights-bill. It's a power grab by Washington. . . . One dollar of federal aid, direct or indirect, would bring entire organizations under federal control." Ronald Reagan, President of the United States, Remarks to State and Local Republican Officials on Federalism and Aid to the Nicaraguan Democratic Resistance (Mar. 22, 1988), *in* PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: RONALD REAGAN, 1988, BOOK 1 (1990), at 364.

194. *Vetoes by President Ronald Reagan*, U.S. SENATE, https://www.senate.gov/legislative/vetoes/ReaganR.htm [https://perma.cc/4KD7-7QR4] (last visited Feb. 7, 2023).

195. Civil Rights Act of 1964, 42 U.S.C. § 2000d (prohibiting discrimination "on the ground of race, color, or national origin," in "any program or activity receiving Federal financial assistance"); Rehabilitation Act of 1973, 29 U.S.C. § 794(a) (prohibiting discrimination on the basis of disability in "any program or activity receiving Federal financial assistance"); Age Discrimination Act of 1975, 42 U.S.C. § 6102 (prohibiting discrimination on the basis of age in "any program or activity receiving Federal financial assistance").

196. Franklin v. Gwinnett Cnty. Pub. Schs., 503 U.S. 60, 73 (1992) (Congress used the CRRA "to correct what it considered to be an unacceptable decision on our part in *Grove City*.").

197. Horner v. Ky. High Sch. Athletic Ass'n, 43 F.3d 265, 271 (6th Cir. 1994) (quoting S. REP. NO. 100-64, at 4 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 3, 6); *see also* Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n (*Cmtys. for Equity IV*), 459 F.3d 676, 695 (6th Cir. 2006).

198. Nat'l Collegiate Athletic Ass'n v. Smith, 525 U.S. 459, 466 (1999) ("Thus, if any part of the NCAA received federal financial assistance, all NCAA operations would be subject to Title IX."); 20 U.S.C. § 1687.

199. §§ 1687(2)(A), (3)(A)(ii).

2. "Recipient"

a. NCAA v. Smith

In 1999, the Supreme Court ruled in *NCAA v. Smith* that the NCAA's receipt of membership dues from federally funded educational institutions was not sufficient by itself to bring the NCAA under the scope of Title IX.[200] Renee Smith, a graduate student volleyball player, sued the NCAA, alleging sex-based discrimination after she was denied eligibility to participate in intercollegiate athletics pursuant to an NCAA Bylaw.[201] The NCAA moved to dismiss the lawsuit on the grounds that the NCAA was not a "recipient" of federal financial assistance.[202] However, Smith argued that the NCAA governed the federally funded athletic programs of its member institutions through the enforcement of eligibility rules, and that the NCAA economically benefited from covered universities' membership dues.[203]

While the Third Circuit ruled that the NCAA's receipt of membership dues was sufficient to bring the NCAA within the scope of Title IX, the Supreme Court reversed this decision and concluded that the NCAA's receipt of membership dues did not constitute "receipt" of federal aid. Based on this narrow issue, the Court ruled that the NCAA was not subject to Title IX.[204] In reaching its decision, the Supreme

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200. *See Smith*, 525 U.S. at 462 ("Dues payments from recipients of federal funds, we hold, do not suffice to render dues recipient subject to Title IX.").

201. *See id.* at 462–464. Renee Smith played volleyball for two years at St. Bonaventure University. *Id.* at 463. After graduating from St. Bonaventure, Smith petitioned the NCAA to play volleyball at both Hofstra and Pittsburgh as a postgraduate but was denied eligibility by the NCAA. *Id.* at 463–64. In 1996, Smith filed a lawsuit against the NCAA alleging

> that the NCAA's refusal to waive the Postbaccalaureate Bylaw excluded her from participating in intercollegiate athletics at Hofstra and the University of Pittsburgh on the basis of her sex, in violation of Title IX of the Education Amendments of 1972. The complaint did not attack the Bylaw on its face, but instead alleged that the NCAA discriminates on the basis of sex by granting more waivers from eligibility restrictions to male than female postgraduate student-athletes.

Id. at 464 (internal citations omitted). "The Postbaccalaureate Bylaw is an exception to the general NCAA rule restricting participation in intercollegiate athletics to students enrolled in a full-time program of studies leading to a baccalaureate degree." *Id.* at 463 n.1.

202. *See id.* at 464 ("The NCAA moved to dismiss Smith's Title IX claim on the ground that the complaint failed to allege that the NCAA is a recipient of federal financial assistance.").

203. *See id.* ("In opposition, Smith argued that the NCAA governs the federally funded intercollegiate athletics program of its members, that these programs are educational, and that the NCAA benefits economically from its members' receipt of federal funds.").

204. *See id.* at 462.

Court relied on *Grove City*[205] and *Department of Transportation v. Paralyzed Veterans of America*[206] to determine when an entity qualifies as a "recipient" of federal financial assistance. These precedents established that entities that receive federal financial aid, either directly or indirectly (through their students' receipt of federal aid), are "recipients" within the meaning of Title IX, but entities that merely "benefit" economically from federal financial assistance are not.[207]

In *Grove City*, the Supreme Court concluded that Title IX "encompass[es] all forms of federal aid to education, direct or indirect."[208] Under the Title IX Regulations, a "recipient" of federal financial assistance is defined as "any public or private agency, institution or organization, or other entity, or other person, to whom [f]ederal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives [or benefits from] such assistance."[209]

Therefore, it is well established that an indirect "recipient" may qualify as a "recipient" under Title IX.[210] However, in *Smith* the Court ruled that the NCAA's receipt of membership dues from educational institutions did not pass the "recipient" test.[211] Justice Ginsburg summarized the Court's findings as follows: "At most, the Association's receipt of dues demonstrates that it *indirectly benefits* from the federal

205. *See id.* at 468 ("Thus, the regulation accords with the teaching of Grove City. . . : Entities that receive federal assistance, whether directly or through an intermediary, are recipients within the meaning of Title IX; entities that only benefit economically from federal assistance are not.").

206. *Id.* at 460 (citing Dep't of Transp. v. Paralyzed Veterans of Am., 477 U.S. 597, 607–08, 610–11 (1986)). In *Department of Transportation v. Paralyzed Veterans of America*, the Court reviewed the scope of § 504 of the Rehabilitation Act of 1973, which prohibits discrimination on the basis of a disability, and ruled that airlines are not recipients of federal funds indirectly from airports who received federal funds for construction projects. 477 U.S. 597, 607–08 (1986). "[T]he statute covers those who receive the aid, but does not extend as far as those who benefit from it." *Id.* at 607. The Court explicitly wanted to prevent "limitless coverage." *Id.* at 608–11.

207. *Id.* at 468 ("Section 106.2(h) defines 'recipient' to include any entity 'to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives or benefits from such assistance." Thus, "[t]he first part of this definition makes clear that Title IX coverage is not triggered when an entity merely benefits from federal funding. Thus, the regulation accords with the teaching of *Grove City* and *Paralyzed Veterans*: Entities that receive federal assistance, whether directly or through an intermediary, are recipients within the meaning of Title IX; entities that only benefit economically from federal assistance are not.").

208. Grove City Coll. v. Bell, 465 U.S. 555, 564 (1984).

209. 34 C.F.R. § 106.2(i) (2022).

210. *See Smith*, 525 U.S. at 466–67.

211. *Id.* at 468.

assistance afforded its members. This showing, without *more*, is insufficient to trigger Title IX coverage."[212]

The Supreme Court ruled in favor of the NCAA,[213] but the ruling only addressed the narrow issue of whether membership dues constituted receipt under Title IX.[214] The *Smith* decision left open the question of whether the NCAA could be subject to Title IX under two alternative legal theories advocated by the plaintiff. First, the NCAA receives federal funds through the National Youth Sports Program.[215] Second, "when a recipient cedes controlling authority over a federally funded program to another entity, the controlling entity is covered by Title IX regardless [of] whether it is itself a recipient."[216] Although the Court did not address these two alternative theories, the "controlling authority" theory should bring the NCAA under the scope of Title IX.

The NCAA's "controlling authority" over federally funded educational institutions' athletic programs should bring the NCAA under the purview of Title IX as an indirect "recipient." Colleges and universities cede controlling authority to the NCAA to host postseason Championship tournaments. Additionally, there is an argument that the NCAA is an indirect "recipient" because of the student-athletes' participation at the NCAA Championships. As distinguished from *Smith*, where the NCAA "indirectly" benefited from membership dues, the NCAA *directly benefits* from student-athletes' participation at NCAA Championships.[217] Without the student-athletes, there are no NCAA Championships. Based on the student-athletes' participation at the NCAA Championships, the federal financial assistance provided to student-athletes flows through to the NCAA, making the NCAA an indirect "recipient" of federal aid.[218]

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212. *Id.* (emphasis added) (citing 34 C.F.R. §106.2(i) (2022)).

213. *Id.* at 468, 470 ("Unlike the earmarked student aid in *Grove City*, there is no allegation that NCAA members paid their dues with federal funds earmarked for that purpose. At most, the Association's receipt of dues demonstrates that it indirectly benefits from the federal assistance afforded its members. This showing, without more, is insufficient to trigger Title IX coverage.").

214. *Id.* at 465, 470 (granting certiorari "to decide whether a private organization that does not receive federal financial assistance is subject to Title IX because it received payments from entities that do").

215. *Id.* at 469; s*ee* Brief for Appellant, *supra* note 13, at 22 (arguing that the NCAA receives federal financial assistance through the National Youth Sports Program and that an organization that assumes control over a federally funded program is subject to Title IX).

216. *Smith*, 525 U.S. at 469–70; *see also* Brief for Appellant, *supra* note 13, at 22 (arguing that the NCAA receives federal financial assistance through the National Youth Sports Program and that an organization that assumes control over a federally funded program is subject to Title IX).

217. *Smith*, 525 U.S. at 468; KAPLAN, PHASE I, *supra* note 4, at 10, 91.

218. *See Smith*, 525 U.S. at 466–67.

3. "Controlling Authority"

a. Cureton v. NCAA

Several months after the US Supreme Court released the *Smith* decision, the Court of Appeals for the Third Circuit analyzed the "controlling authority" legal theory in a similar case considering whether the NCAA was subject to Title VI of the Civil Rights Act of 1964.[219] In *Cureton v. NCAA*, four African American student-athletes brought a class action lawsuit against the NCAA, alleging that they were denied educational opportunities when they failed to achieve the minimum standardized test score required to participate in intercollegiate athletics and receive athletic-based financial aid.[220] The prospective freshmen claimed that the NCAA's eligibility rules under Proposition 16[221] had a disparate impact on African American student-athletes and violated Title VI as unlawful discrimination.[222]

Recognizing that previous courts had already determined that the NCAA was a covered "program or activity,"[223] the NCAA argued that it was not a "recipient" of federal financial assistance and, therefore, not subject to Title VI.[224] The district court held that the NCAA was subject to Title VI under either the "indirect recipient" or "controlling authority" legal theories and that the NCAA's initial

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219. *See id.* (decided Feb. 23, 1999); Cureton v. Nat'l Collegiate Athletic Ass'n (*Cureton II*), 198 F.3d 107, 118 (3d Cir. 1999) (argued Oct. 1, 1999) (filed Dec. 22, 1999). Section 601 of Title VI provides, "No person in the United States shall, on the grounds of race, color, or national origin, be excluded from participation in, or be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d.

220. *Cureton I*, 37 F. Supp. 2d at 689. Four African American student-athletes (Tai Kwan Cureton, Leatrice Shaw, Andrea Gardner, and Alexander Wesby) brought a class action lawsuit against the NCAA after they did not meet the standardized test score cutoff and were denied an opportunity to compete in intercollegiate athletics at Division I schools, admissions, athletic scholarships, or recruiting opportunities. *Id.*

221. *Id.* In 1992, the NCAA adopted Proposition 16, codified at NCAA Bylaw 14.3, as an index to determine eligibility based on a sliding-scale formula combining a student's GPA and standardized test (SAT or ACT) scores. *Id.* at 690–91.

222. *Id.* at 698. NCAA memorandum dated July 27, 1998, to Division I members revealed research relating to Proposition 16 stating, "[African American] and low-income student-athletes have been disproportionately impacted by Proposition 16 standards." *Id.*

223. Cureton v. Nat'l Collegiate Athletic Ass'n, Civ. A. No. 97-131, 1997 WL 634376, at *2 (E.D. Pa Oct. 8, 1997).

224. *Cureton II*, 198 F.3d at 113 ("The NCAA asserts that it is not a direct recipient of [f]ederal financial assistance and this its relationship with third parties does not support the extension of Title VI coverage to the NCAA as an indirect recipient of such assistance.").

eligibility rules had a disparate impact against African Americans.[225] The district court summarized its findings that "member colleges and universities have granted the NCAA authority to promulgate rules affecting intercollegiate athletics that the members are obligated to abide by and enforce. Under these facts, the NCAA comes sufficiently within the scope of Title VI irrespective of its receipt of federal funds."[226]

However, the Third Circuit reversed the district court's decision, focusing on whether the NCAA was an indirect "recipient" of federal funds under the "controlling authority" theory.[227] Specifically, *Cureton* analyzed whether member schools ceded "controlling authority" to the NCAA to enforce eligibility rules against prospective student-athletes.[228] To analyze whether an entity is an indirect "recipient," the court of appeals attempted to identify the "intended recipient" of the federal funds.[229] Citing both *Smith*[230] and *Paralyzed Veterans,*[231] the Third Circuit reasoned that the NCAA was not the intended recipient of the federal funds and was merely a beneficiary,

225. *Cureton I*, 37 F. Supp. 2d at 696, 699–700 ("[T]he Court holds that, under either the 'indirect recipient' or 'controlling authority' theories, the NCAA is subject to Title VI for a challenge to Proposition 16."); s*ee also Cureton II*, 198 F.3d at 111–12 ("The court adopted two distinct theories to supports its finding that the NCAA is subject to the prohibitions of Title VI. First, the court found that the NCAA is an 'indirect recipient of federal financial assistance' because it exercises effective control over a block grant given by the United States Department of Health and Human Services to the [National Youth Sports Program (NYSP)]. Second, the court held that Title VI covers the NCAA because member schools, which indisputably receive federal funds, have vested the NCAA with controlling authority over federally funded athletic programs.").

226. *Cureton I*, 37 F. Supp. 2d at 696. The Court further states that the NCAA "is the [decision-making] and enforcement entity behind legislation adopted by, and enforced against, its membership, [and] is also subject to Title VI." *Id.*

227. *Cureton II*, 198 F.3d at 116. Based on the district court's conclusion that the NCAA was not a recipient of federal funds due to its relationship with the NYSP, the court of appeals also rejected the theory that the NCAA was a recipient due to the receipt of grants to the NYSP fund because "the [f]und's programs and activities [were] not an issue in th[e] case." *Id.* at 115.

228. *Id.* at 116–18.

229. *Id.* ("The case law suggests that the critical inquiry in determining whether an entity is an indirect recipient of [f]ederal assistance is whether that entity is the intended recipient of [f]ederal funds, intention being from Congress' point of view.").

230. *Id.* ("The Supreme Court, however, already has found no indication that member schools paid their dues to the NCAA with Federal assistance funds 'earmarked' for that purpose."); Nat'l Collegiate Athletic Ass'n v. Smith, 525 U.S. 459, 468 (1999).

231. *Cureton II*, 198 F.3d at 116; Dep't of Transp. v. Paralyzed Veterans of Am., 477 U.S. 597, 605–06 (1986) ("Congress limited the scope of § 504 to those who actually 'receive' federal financial assistance.").

and that Title VI coverage was limited to actual "recipients" of federal financial assistance.[232]

The Third Circuit also relied on the Supreme Court case *NCAA v. Tarkanian* to support its conclusion that "NCAA members have not ceded controlling authority to the NCAA by giving it the power to enforce its eligibility rules directly against its students."[233] In *Tarkanian,* the Supreme Court ruled that the NCAA does not "control" its members and that the NCAA was not acting as a state actor when it conducted an investigation of alleged violations and proposed sanctions.[234] *Tarkanian* acknowledged that the NCAA's rules and recommended enforcement actions influenced the University of Nevada, Las Vegas's (UNLV) decision to suspend the men's basketball coach Jerry Tarkanian, but ultimately UNLV, not the NCAA, took the final act to suspend the coach.[235]

However, the dissenting opinion in *Cureton* argued that *Tarkanian* illustrated the opposite—that the NCAA Constitution required its members to effectively cede controlling authority over their intercollegiate athletics programs to the NCAA.[236] As a condition of membership, the NCAA requires colleges and universities to adhere to NCAA rules and comply with NCAA sanctions.[237] In *Tarkanian*, UNLV was "coerced into accepting the only viable option among the three

232. *Cureton II*, 198 F.3d at 116, 118 ("[I]n considering this 'controlling authority' argument . . . only 'recipients' of [f]ederal financial assistance are subject to the disparate impact regulations, not merely organizations which have some relationship with entities receiving such assistance or organizations which benefit from such assistance."); *see also Paralyzed Veterans*, 477 U.S. at 605–07.

233. *Cureton II*, 198 F.3d at 117–18; *see also* Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 193 (1988).

234. *Cureton II*, 198 F.3d at 117 ("While not a Title VI or Title IX case, we find the Supreme Court's decision in NCAA v. Tarkanian, 488 U.S. 179, 109 S. Ct. 454, 102 L. Ed. 2d 469 (1988), instructive, as that case makes clear that the NCAA does not 'control' its members."); *see also Tarkanian*, 488 U.S. at 199.

235. *Cureton II*, 198 F.3d at 117 ("While the Court recognized that the NCAA's rules and recommendations clearly influenced the UNLV, it concluded that the UNLV, not the NCAA, took the final actions suspending Tarkanian."); *see also Tarkanian*, 488 U.S. at 181. The NCAA report detailed thirty-eight violations of NCAA rules against UNLV, including ten against the UNLV men's basketball coach, Jerry Tarkanian. NCAA placed UNLV men's basketball team on a two-year suspension "and ordered UNLV to show cause why the NCAA should not impose further penalties unless UNLV severed all ties during the probation between its intercollegiate athletic program and Tarkanian." *Id.*

236. *Cureton II*, 198 F.3d at 122 (McKee, J., concurring in part and dissenting in part) ("The majority relies heavily upon the Supreme Court's decision in [*Tarkanian*] to support its conclusion that the NCAA is not a controlling authority of the member institutions. However, *Tarkanian* proves just the opposite. *Tarkanian* illustrates the extent of absolute control the NCAA has over its member colleges and universities for purposes of our analysis, and the case establishes that the NCAA may well be a controlling authority to the extent that it should be subject to Title VI.").

237. NCAA Constitution, *supra* note 53, at art. 4.

choices left it by the NCAA's ultimatum" and forced to suspend Tarkanian.[238] Tarkanian asserted that "the power of the NCAA is so great that UNLV had no practical alternative to compliance with its demands."[239] Furthermore, UNLV's decision to suspend Tarkanian "demonstrates just how much control the NCAA has over member institutions' athletic programs."[240]

For a court to find that the NCAA is an indirect "recipient" under Title IX, a prospective plaintiff would need to distinguish the facts of *Cureton* and demonstrate the NCAA's "controlling authority" beyond the mere enforcement of rules.[241] In the context of the NCAA Championships, there is a strong argument that the NCAA controls all aspects of the Championship tournaments, including scheduling, housing, food, travel, medical protocols, branding, promotions, and media coverage. In *Tarkanian,* UNLV was the final actor enforcing the NCAA's rules, but in the context of the NCAA Championship tournaments, the NCAA is responsible for the student-athlete experience and is the final actor in all such matters.[242]

Another key distinguishing factor is the NCAA's revenue distribution model, which allocates revenues derived from the NCAA Championships to its members based on a university's performance at the Division I Men's Basketball Championship.[243] This transfer of funds presents a unique argument to counter the *Cureton* decision, which relied on finding that the NCAA was not the "intended recipient" of federal funds.[244] Universities and student-athletes are intended recipients of federal funds, and based on their participation at the NCAA Championships, the NCAA is an indirect "recipient" of federal aid.[245] Federal funds flow from a university's budget to support athletic programs that are covered under Title IX.[246] The NCAA then redistributes over $600 million in revenues derived from the NCAA Division I Men's Basketball Championship back to the universities.[247]

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238. *Cureton II*, 198 F.3d at 124 (McKee, J., concurring in part and dissenting in part) ("The fact that UNLV was coerced into accepting the only viable option among the three choices left it by the NCAA's ultimatum in that case demonstrates just how much control the NCAA has over member institutions' athletic programs.").

239. *Id.*

240. *Id.*

241. *Id.* at 116 (majority opinion).

242. *See id.* at 117; H.R. Con. Res. 39, 117th Cong. ¶ 14 (2021).

243. *See* KAPLAN, PHASE I, *supra* note 4, at 2.

244. *See Cureton II*, 198 F.3d at 116.

245. *Contra* Nat'l Collegiate Athletic Ass'n v. Smith, 525 U.S. 459, 468–69 (1999).

246. *See* H.R. Con. Res. 39 ¶¶ 2, 7, 11, 14.

247. KAPLAN, PHASE I, *supra* note 4, at 91. $613 million in revenue was redistributed back to NCAA member institutions in 2021. *Id.*

The NCAA is not merely a beneficiary, but rather an active participant and conduit for universities to monetize from the NCAA Championships.[248] In this symbiotic relationship, the NCAA is an indirect "recipient" of federal financial assistance and should be covered by Title IX.

b. Athletic Associations

Although the "controlling authority" legal theory failed to bring the NCAA under the scope of Title VI in *Cureton*, other courts have found an athletic association exercising "controlling authority" over a federally funded athletics program can be subject to Title IX.[249] In a series of decisions, state athletic associations who exercise "controlling authority" over federally funded high school athletic programs were found to be indirect "recipients" of federal financial assistance and subject to Title IX.[250]

i. *Horner v. Kentucky High School Athletic Association*

In 1992, twelve female student-athletes who played slow-pitch softball filed a lawsuit against the Kentucky High School Athletic Association (KHSAA) for discriminating against them on the basis of sex by offering fewer sports for girls and refusing to sanction fast-pitch softball.[251] In the resulting case, *Horner v. Kentucky High School Athletic Association*, the plaintiffs alleged that the KHSAA had violated Title IX and the Equal Protection Clause of the US Constitution by providing unequal athletic opportunities.[252] The KHSAA filed for a

248. *See id.*

249. LOPIANO, D., SOMMER, J., ZIMBALIST, A., GILL, E., GURNEY, G., HSU, M., LEVER, K., PORTO, B., RIDPATH, D.B., SACK, A., SMITH, B. & THATCHER, S., POSITION STATEMENT: NILS AND TITLE IX: EDUCATION INSTITUTIONS MUST FIX THE PROMOTION, PUBLICITY, AND RECRUITING INEQUITIES CRITICAL TO THE NIL MONETIZATION SUCCESS OF COLLEGE FEMALE ATHLETES AND MUST NOT USE OR ASSIST THIRD PARTIES TO EVADE THEIR TITLE IX OBLIGATIONS 18 n.34 (2021) ("Although the controlling authority theory has not been tested against the NCAA or collegiate conferences to date, courts have held that it applies to state high school athletic associations, supporting the conclusion that conferences and the NCAA cannot escape Title IX obligations.").

250. *See, e.g.*, Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n (*Cmtys. for Equity I*), 80 F. Supp. 2d 729, 733 (W.D. Mich. 2000); Horner v. Ky. High Sch. Athletic Ass'n, 43 F.3d 265, 271–72 (6th Cir. 1994).

251. *Horner*, 43 F.3d at 268 ("Plaintiffs contend that defendants, the Kentucky State Board of Education for Elementary and Secondary Education and the Kentucky High School Athletic Association, discriminated against them on the basis of sex by sanctioning fewer sports for girls than boys and by refusing to sanction girls' interscholastic fast-pitch softball.").

252. *Id.* at 270 ("Plaintiffs filed suit in June 1992, contending that defendants violated Title IX, the Equal Protection Clause, and state law by sanctioning fewer sports for girls than for boys,

motion to dismiss on grounds that the athletic association was not a "recipient" of federal funds and therefore not subject to Title IX.[253]

Both the district court and court of appeals dismissed the Equal Protection claim, concluding that student-athletes do not have a due process right to play sports and that the US Constitution does not recognize a right to compete for athletic scholarships.[254] However, the Sixth Circuit reversed the lower court's decision and found that KHSAA was subject to Title IX as a "recipient" of federal aid.[255] In addition to receiving membership dues from federally funded schools, Kentucky state law expressly permitted the school board to designate an agent to manage interscholastic athletics.[256] State agency was an important distinction in *Horner*, but the Sixth Circuit adamantly stated that "Congress has made clear its intent to extend the scope of Title IX's equal opportunity obligations to the furthest reaches of an institution's programs."[257]

In *Horner*, the Sixth Circuit analyzed the "equal opportunity" mandate of Title IX pursuant to the 1975 Regulations and the three-prong test established by the 1979 Policy Interpretation.[258] Key to the Sixth Circuit's analysis was whether the selection of sports and level of competition provided by the KHSAA "effectively accommodated the interests and abilities" of both sexes.[259] The state athletic

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thus affording unequal athletic opportunity and by refusing to sanction fast-pitch softball, with the result that plaintiffs are disadvantaged in their ability to compete for and obtain college scholarships.").

253. *Id.* ("Defendants filed motions to dismiss or for summary judgement based on a number of grounds, including arguments that they did not violate Title IX or the Equal Protection Clause, and that they were not 'recipients' of federal funds and thus not subject to Title IX.").

254. *Id.* ("Relying on cases rejecting claims that student athletes have a due process right to participate in sports, the court concluded that the plaintiffs' interest in competing for college athletic scholarships did not rise to constitutional significance.").

255. *Id.* at 271–72, 275.

256. *Id.* at 272 ("The most persuasive evidence of the KHSAA's status as a recipient is the fact that its functions are statutorily decreed to be those of the Board. The association is able to perform those functions because state law expressly permits the Board to designate an agent to manage interscholastic athletics. This, is combination with the fact that KHSAA receives dues from member schools which do receive federal funds, indicates that the association qualifies as an 'agent' which indirectly receives federal funds are described in 34 C.F.R. § 106.2(h), and is thus subject to Title IX.") (internal citations omitted).

257. *Id.*

258. *Id.*

259. *Id.* at 273 ("[T]he regulations do not impose an independent requirement that an institution always sponsor separate teams for each sport it sanctions. However, the regulations do require that institutions provide gender-blind equality of athletic opportunity to its students. An institution's compliance with this requirement is determined with reference to a number of factors, including 'whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes.'") (internal citations omitted).

association's refusal to sanction fast-pitch softball did not effectively accommodate the interests and abilities of girls who were already underrepresented; the KHSAA sanctioned eighteen total sports, ten for boys and eight for girls.[260] Based on a finding that the KHSAA failed to demonstrate compliance with Title IX, the Sixth Circuit reversed the district court's summary judgement against the plaintiffs and remanded the case.[261]

While the NCAA receives membership dues from colleges and universities that are federally funded, the NCAA does not act pursuant to state law as an agent on behalf of its members. The lack of state agency is a clear differentiating factor from the facts in *Horner*, but the Sixth Circuit's decision was premised on legislative history, which is an important factor when assessing whether the NCAA should be subject to Title IX.[262] Congress intended the scope of Title IX and mandate for an "equal opportunity" in athletics to be as broad as possible.[263] The Sixth Circuit ruled that it would "not defeat that purpose by recognizing artificial distinctions in the structure or operation of an institution."[264] The NCAA operates with federally funded member schools to create intercollegiate athletics and therefore should be subject to Title IX.

Although the NCAA does not operate as an "agent" authorized by law, the NCAA is the governing "agency" for intercollegiate athletics.[265] In this role, the NCAA enforces rules governing intercollegiate athletics by conducting investigations, issuing sanctions, and mandating compliance for perceived violations.[266] Additionally, the NCAA manages and controls the most profitable assets of the Association—the NCAA Championships.[267] The NCAA enters into long-term, multi-billion media agreements with CBS/Turner and ESPN

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260. *Id.* at 269, 275.

261. *Id.* at 275 ("It is evident that genuine issues of material fact abound in this case, and preclude any determination that defendants have complied with Title IX's equal athletic opportunity mandate. We therefore reverse the district court's entry of summary judgement on plaintiff's Title IX claims.").

262. *Id.* at 271.

263. *Id.* at 272; S. REP. NO. 100-64, at 4 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 3, 6; *see also Cohen I*, 991 F.2d at 894.

264. *Horner*, 43 F.3d at 272 ("Congress has made clear its intent to extend the scope of Title IX's equal opportunity obligations to the furthest reaches of an institution's programs. We will not defeat that purpose by recognizing artificial distinctions in the structure or operation of an institution.").

265. CONSOLIDATED FINANCIAL STATEMENTS, *supra* note 5 ("The NCAA strives for integrity in intercollegiate athletics and serves as the colleges' national athletics governing agency. One of the core values of the NCAA is to maintain intercollegiate athletics as an integral part of the education program and the athlete as an integral part of the student body.").

266. *Id.* at 16.

267. *Id.* at 9.

and negotiates corporate sponsorships on behalf of its members for the NCAA Championships.[268] Based on this degree of control and management, a court could find that the NCAA is an indirect "recipient" of federal aid through its members and covered by Title IX.

ii. *Communities for Equity v. Michigan High School Athletic Association*

In 2000, a group of parents and female high school athletes brought a class action lawsuit against the Michigan High School Athletic Association (MHSAA), claiming the scheduling of sports seasons discriminated against girls.[269] In *Communities for Equity v. Michigan High School Athletic Association*, the district court looked to the plain language meaning of Title IX and found that coverage is not limited to "recipients" of federal funds.[270] "The court concludes that any entity that exercises controlling authority over a federally funded program is subject to Title IX, regardless of whether the entity is itself a recipient of federal aid."[271] The district court found that the MHSAA was a "controlling authority" over high school athletics and an indirect "recipient" of federal aid covered by Title IX.[272] The district court concluded that the MHSAA's scheduling of sports seasons discriminated against female student-athletes on the basis of sex, which violated Title IX, the Equal Protection Clause of the Fourteenth Amendment, and Michigan state law.[273]

On appeal to the Sixth Circuit in 2006, the court of appeals first assessed whether the MHSAA was a state actor under the Equal Protection Clause of the Fourteenth Amendment pursuant to the "entwinement" theory.[274] In a similar case, *Brentwood Academy v.*

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268. *Id.* at 18–19.

269. Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n (*Cmtys. for Equity II*), 178 F. Supp. 2d 805, 807 (W.D. Mich. 2001). The complaint alleged that MHSAA discriminated against female high school athletes by scheduling girls' sports to compete in nontraditional seasons, which was disadvantageous for recruiting and resulted in unequal treatment. *Id.*

270. *Cmtys. for Equity I*, 80 F. Supp. 2d at 735 ("[B]ecause that plain meaning of Section 902 of Title IX does not limit the class of defendants to recipients of federal funds . . . any entity that exercises controlling authority over a federally funded program is subject to Title IX, regardless of whether the entity is itself a recipient of federal aid.").

271. *Id.* at 735.

272. *Cmtys. for Equity II*, 178 F. Supp. 2d at 855.

273. Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n (*Cmtys. for Equity III*), 377 F.3d 504, 506 (6th Cir. 2004). In 2004, the Sixth Circuit Court of Appeals affirmed the district court's judgement that MHSAA's actions violated the Equal Protection Clause of the Fourteenth Amendment. *Id.* The Sixth Circuit did not reach a conclusion on the MSHAA's violations of Title IX of the Civil Rights Act of 1964 or Michigan's Elliott-Larsen Civil Rights Act. *Id.*

274. *Cmtys. for Equity IV*, 459 F.3d at 691–92.

Tennessee Secondary School Athletic Association,[275] the Supreme Court had ruled that the Tennessee Secondary Athletic Association (TSAA) was a state actor based on the "entwinement" between the state's school officials and the athletic association.[276] The TSAA's regulation of interscholastic athletic competition and enforcement of its rules against member schools constituted state action.[277] Applying the *Brentwood* precedent, the Sixth Circuit upheld the district court's finding that that the MHSAA was entwined with the public schools and the state of Michigan and therefore found to be a state actor.[278]

Having determined that the MHSAA was a state actor, the Sixth Circuit analyzed whether the scheduling differences based on gender resulted in unequal treatment of female student-athletes and violated the Equal Protection Clause.[279] As defined by the Supreme Court, disparate treatment occurs when the defendant "*treats some people less favorably* than others because of their race, color, religion, sex, or national origin."[280] The MHSAA's scheduling differences were discriminatory on their face because the boys and girls were "separated and treated unequally."[281] The MHSAA failed to justify the discriminatory scheduling of practices, and the Sixth Circuit upheld the district court's finding on an Equal Protection claim.[282]

The Sixth Circuit next analyzed the discriminatory scheduling of practices under Title IX.[283] The court of appeals did not need to decide whether Title IX applied to the athletic association because the MHSAA

275. Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288 (2001).

276. *Id.* at 291 ("We hold that the associations regulatory activity may and should be treated as state action owing to the pervasive entwinement of the state school officials in the structure of the association").

277. *Id.*

278. *Cmtys. for Equity IV*, 459 F.3d at 692 ("Because MHSAA, like TSAA, is so entwined with the public schools and the state of Michigan, and because there is 'such a close nexus between the State and the challenged action,' MHSAA is a state actor.").

279. *Id.* at 694.

280. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) (emphasis added).

281. *Cmtys. for Equity IV*, 459 F.3d at 695 ("Thus, the reason that scheduling differences properly receive disparate treatment analysis based on facial discrimination is not just because the boys and girls are separated, but because they are separated and treated unequally in the scheduling of seasons.").

282. *Id.* ("In sum, MHSAA has failed to satisfy its burden of justifying its discriminatory scheduling practices under [United States v. Virginia, 518 U.S. 515 (1996)]. We therefore uphold the district court's grant of relief to the [Communities for Equity] on the equal protection claim.").

283. *Id.*

conceded that it was subject to Title IX.[284] Citing *Horner*, the Sixth Circuit confirmed that the definition of "program or activity" makes "clear that discrimination is prohibited throughout entire agencies or institutions if any part receives [f]ederal financial assistance."[285] Legislative history further supports Congress' intent to "restore the broad scope" of Title IX coverage.[286]

In *Communities for Equity*, the MHSAA contended that the district court erred because there was no proof of intentional discrimination.[287] The district court found that, like an Equal Protection claim, Title IX does not require proof of intent.[288] Discriminatory motive is not required; instead, the court focused on the consequences of the differential treatment and assessed whether the girls received an unequal opportunity.[289] Based on the gender-specific scheduling, which resulted in unequal opportunities for girls, the Sixth Circuit upheld the district court's decision and found that the MHSAA violated Title IX.[290]

State action is required to establish an Equal Protection claim under the Fourteenth Amendment.[291] The NCAA is a private organization, not a state actor, and therefore not subject to a constitutional claim.[292] However, *Communities for Equity* establishes that Title IX does not require proof of discriminatory motive.[293] In the context of the NCAA Championships, gender disparities are most pronounced at Championship tournaments where the women and men play at different venues. This combination of women being separated

284. *Id.* at 695–96 ("MSHAA's brief on remand concedes that it is subject to Title IX. ('[MHSAA] represented to the Supreme Court that it would waive its argument that Title IX does not apply if the Court granted review of the preclusion issue. As a consequence, MHSAA does not now contest that it is subject to Title IX for purposes of this case.')").

285. *Id.*

286. *Id.* ("The legislative history concerning this amendment explains that Congress sought 'to restore the broad scope of coverage and to clarify the application of Title IX of the Education Amendments of 1972.' S. Rep. No. 64, 100th Cong., 2d Sess. 4, reprinted in 1988 U.S.C.C.A.N 3, 6.").

287. *Id.* at 696.

288. *Cmtys. for Equity II*, 178 F. Supp. 2d at 856 (Title IX "does not require proof that the MHSAA intended to hurt girls and chose the scheduling system as a way to do that. The Court's task is to analyze the resulting athletic opportunities for girls and boys from the different treatment they experience by being placed in different athletic seasons, and if the girls receive unequal opportunities, Title IX has been violated.").

289. *Id.*

290. *Id.* at 856-67; *Cmtys. for Equity IV*, 459 F.3d at 969 ("We therefore agree with the district court that proof of a discriminatory motive is not required for a Title IX claim based upon disparate treatment, and uphold its judgement in finding that MHSAA is in violation of Title IX.").

291. *Cmtys. for Equity II*, 178 F. Supp. 2d at 846.

292. *See* Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 196 (1988).

293. *See Cmtys. for Equity II*, 178 F. Supp. 2d at 856–67.

and treated differently from men supports a finding of disparate treatment. As evidenced by the 2021 NCAA Division I Women's Basketball viral video and the NCAA's own admission, the NCAA has treated women "less favorably" than men.[294] If a court were to find that the NCAA is subject to Title IX as an indirect "recipient," the NCAA is unlikely to be able to defend itself against a gender inequity claim based on a lack of intent.

iii. *Williams v. University of Georgia Athletic Association*

In *Williams v. Board of Regents University System of Georgia*, the Eleventh Circuit analyzed whether the University of Georgia Athletic Association (UGAA) was an indirect "recipient" of federal financial assistance and thus subject to Title IX in a sexual harassment claim.[295] The UGAA was one of several defendants accused of knowingly recruiting a basketball player with a history of sexual misconduct against women to the University of Georgia (UGA).[296] The lawsuit involved a student-on-student sexual harassment claim under Title IX for an alleged gang rape at UGA.[297] The district court dismissed all claims, and Williams appealed the decision.[298]

On appeal, the Eleventh Circuit considered whether UGA had ceded control of its athletic programs to the UGAA.[299] In determining whether the UGAA was an indirect "recipient" under Title IX, the Eleventh Circuit cited *Communities for Equity*,[300] "noting that if we allowed funding recipients to cede control over their programs to indirect funding recipients but did not hold indirect funding recipients liable for Title IX violations, we would allow funding recipients to receive federal funds but avoid Title IX liability."[301] Under this analysis, the plaintiff had adequately demonstrated that the alleged discrimination was so severe that it denied the plaintiff access to an educational opportunity.[302] The Eleventh Circuit found that the district

294. KAPLAN, PHASE I, *supra* note 4, at 14.

295. 477 F.3d 1292, 1294 (11th Cir. 2007).

296. *Id.* at 1289–90.

297. *Id.* at 1288, 1290.

298. *Id.* at 1290–91.

299. *Id.* at 1289–90, 1294. Plaintiff Tiffany Williams, a student at UGA, claimed she was sexually assaulted by multiple student-athletes and that UGA knew that one of the alleged rapists, Tony Cole, had a criminal history involving the harassment of women at previous colleges. *Id.* at 1288–90.

300. *Id.* (citing *Cmtys. for Equity I*, 80 F. Supp. 2d at 733–34).

301. *Id.*

302. *Id.* at 1297–99.

court erred in dismissing the Title IX claims against UGA and the UGAA.[303]

Unlike other "controlling authority" cases that involved state athletic associations, *Williams* addressed the issue in the context of an intercollegiate athletic association, which is more directly analogous to the NCAA.[304] Applying the precedents from *Williams* and *Communities for Equity*, the NCAA should be subject to Title IX as an indirect "recipient."[305] If federally funded universities cede control of their athletic programs to the NCAA, the NCAA as an indirect "recipient" needs to be liable for any Title IX violations; otherwise, a student-athlete is not protected, and the federal government has funded the Title IX violation through a participating college or university.

iv. *A. B. Parents v. Hawaii Department of Education and Oahu Interscholastic Association*

In 2019, two girls on the varsity water polo and swimming teams at James Campbell High School filed a Title IX lawsuit against the Hawaii Dept. of Education (HDOE) and the Oahu Interscholastic Association (OIA), alleging that female student-athletes received fewer athletic participation opportunities and unequal treatment compared to the male student-athletes.[306] The discriminatory practices resulting in disparate treatment included inferior locker rooms, practice and competitive facilities, scheduling of games and practice times, travel, equipment and supplies, publicity and promotion, medical and training services, and coaching.[307]

To determine whether the OIA was subject to Title IX, the US District Court for the District of Hawaii analyzed the two-part test: "program or activity" and "recipient" of federal financial assistance.[308] On part one, the court found that the OIA fell within the

303. *Id.*

304. *Compare id.* (determining, *inter alia*, whether the UGAA was a funding recipient of UGA subject to Title IX liability), *with* Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 290 (2001) (determining a statewide association that regulated athletic competition among public and private secondary schools amounted to a state actor when it enforced a rule against a member school).

305. *See Williams*, 477 F.3d at 1294; *Cmtys. for Equity I*, 80 F. Supp. 2d at 732.

306. A.B. v. Haw. State Dep't of Educ., 386 F. Supp. 3d 1352, 1353–54 (D. Haw. 2019) ("Plaintiffs allege that female athletes at Campbell suffer worse treatment, fewer benefits, and fewer opportunities than male athletes, and that the OIA's policies and practices control and/or greatly influence this disparate treatment.").

307. *Id.* at 1354.

308. *Id.* at 1355 ("Thus, for an entity to be liable under Title IX, it must be both a 'program or activity' as defined under § 1687, and a recipient of 'Federal financial assistance.'").

broad interpretation of "program or activity" set forth by the CRRA in 1987.[309] The OIA was a private organization "principally engaged in the business of providing education"[310] and an entity "established by two or more entities" defined under the statute.[311] The OIA is principally engaged in education as an athletic association composed of 292 public schools and, therefore, also falls within the "catch-all" provision as a covered "program or activity" under Title IX.[312]

Having determined that the OIA was a covered "program or activity," the district court analyzed part two of the Title IX test to determine if the athletic association was a "recipient" of federal financial assistance.[313] The OIA argued that the Title IX claims should be dismissed because the athletic association was not a "recipient" of federal funds.[314] However, the plaintiffs contended that the OIA was an indirect "recipient" of federal funding and subject to Title IX under two theories.[315] First, the OIA is an "instrumentality of, and is controlled by the [H]DOE."[316] Second, the OIA and HDOE are "pervasively entwined."[317]

Under the "controlling authority" theory, the HDOE is a "recipient" of federal financial assistance and subject to Title IX.[318] The OIA has "controlling authority" over the federally funded HDOE's interscholastic athletic programs, including the scheduling, travel, publicity, and promotion and budget, which resulted in disparate treatment and fewer athletic opportunities for female student-athletes.[319] Under the plaintiff's second "entwinement" theory, the OIA acted as "an instrumentality of, and is controlled by the DOE," so the two entities are "pervasively entwined."[320] The OIA Executive Director

309. *Id.* at 1356.

310. 20 U.S.C. § 1687(3)(a)(ii) ("An entire corporation, partnership, or other private organization, or an entire sole proprietorship . . . which is principally engaged in the business of providing education.").

311. § 1687(4) ("[A]ny other entity which is established by two or more of the entities described in paragraph (1), (2), or (3); any part of which is extended Federal financial assistance.").

312. *A.B.*, 386 F. Supp. 3d at 1353, 1357.

313. *Id.* at 1357–58.

314. *Id.* at 1355.

315. *Id.*

316. *Id.* at 1354–55 ("Plaintiffs argue that Complaint pleads sufficient facts to support their theory that the OIA is an indirect recipient of federal funding, and also sets forth the alternative theories that the OIA is subject to Title IX liability as a sub-unit of a directly funded institution, *i.e.*, the DOE; and as the controlling authority over a federally funded program.").

317. *Id.* at 1354.

318. *Id.* at 1357–58.

319. *Id.* at 1354.

320. *Id.*

was a HDOE employee, and five members of the OIA's Executive Council were high school principals and DOE employees.[321] Finding that there were plausible claims that the OIA was an indirect "recipient" of federal funding and thus potentially subject to Title IX, the district court denied the defendants' motion to dismiss the case.[322]

Consistent with previous athletic association case law, the *A.B.* case supports a finding that under the "controlling authority" theory the NCAA may be found to be an indirect "recipient" of federal aid and subject to Title IX.[323] Additionally, the *A.B.* case introduces an alternative argument that could potentially bring the NCAA under coverage of Title IX.[324] The NCAA does not appear to act under the "control of" its member schools, but it does act closely with them to coordinate important decisions for intercollegiate athletics.[325] NCAA committees are comprised of representatives from member institutions who jointly make key decisions impacting intercollegiate athletics.[326] The concept that the NCAA and member schools are "entwined" together and act in close coordination could be viewed as a relationship that is mutually beneficial and triggers coverage for the NCAA as an indirect "recipient."

The US Court of Appeals for the Ninth Circuit recently ruled in April 2022 that this case can proceed as a certified class of past, present, and future female student-athletes at James Campbell High School.[327] The trial, which is scheduled for October 2023, has gained national publicity as a Title IX sex discrimination case that could "change high school sports across the [United States]."[328] Coinciding with the fiftieth

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321. *Id.*

322. *Id.* at 1358.

323. *See id.* at 1357–58 (finding there was a plausible chance that the OIA had controlling authority over the Hawaii DOE's interscholastic athletic programs and could be subject to Title IX's anti-discrimination provisions because it controlled competitive facilities, scheduling, travel, publicity, and promotion).

324. *See id.* (applying the controlling authority theory in terms of several logistical factors involved with interscholastic competition rather than those involved with financial control).

325. Cal. State Univ., Hayward v. Nat'l Collegiate Athletic Ass'n, 121 Cal. Rptr. 85, 87 (Ct. App. 1975) ("The NCAA is an unincorporated association organized to supervise and coordinate intercollegiate athletic programs and events among public and private colleges and universities.").

326. W. Burlette Carter, *Student Athlete Welfare in a Restructured NCAA*, 2 VA. J. SPORTS & L. 1, 27 (2000) ("[T]he NCAA's five central policymaking bodies are replaced with one central body: an Executive Committee comprised of approximately 20 university presidents from the member schools in each of the three divisions.").

327. A.B. v. Haw. State Dep't of Educ., 30 F.4th 828, 839 (9th Cir. 2022); *see also* David. W. Chen, *Sex Discrimination Case in Hawaii Could Change High School Sports Across the U.S.*, N.Y. TIMES (Oct. 22, 2022), https://www.nytimes.com/2022/10/22/sports/title-ix-lawsuit-hawaii.html [https://perma.cc/NQM5-6HM4].

328. Chen, *supra* note 327.

anniversary of Title IX being passed into law, the *A.B.* case could intensify pressure on the NCAA to comply with Title IX. At issue is whether the OIA is a "recipient" of federal financial assistance and covered under Title IX. This trial will likely litigate key aspects of the "controlling authority" legal theory and create new precedents to interpret the federal law.

c. NCAA Championships

The NCAA's "controlling authority" over federally funded member institutions' athletic programs is analogous to athletic association cases, particularly when analyzed in the context of the Championships, where the NCAA controls all aspects of a tournament and the student-athlete experience.[329] The NCAA serves as the "national governance agency for intercollegiate athletics"[330] and "controls" the most important part of the season—the NCAA Championships. The NCAA hosts ninety NCAA Championship tournaments in twenty-four sports across three divisions each year.[331] Over half a million student-athletes play on 19,917 teams to compete for the most prestigious title in intercollegiate sports: National Champion.[332]

The NCAA spends over $95 million on transportation, housing, and food for men's and women's teams to travel and participate at the Championship events.[333] Unlike regular season games or conference championships, where the educational institutions and conferences control the circumstances surrounding a student-athlete's experience, the NCAA controls the travel, food, budgets, accommodations, practice times, scheduling of games, media coverage, and venue locations for NCAA Championships—all of which have a direct impact on a student-athlete's experience.[334]

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329. *See* KAPLAN, PHASE II; Bowers v. Nat'l Collegiate Athletic Ass'n, 9 F. Supp. 2d 460, 494 (D.N.J. 1998) (holding the NCAA receiving federal funds through the NYSP is an issue of fact to determine whether the NCAA is a recipient of federal financial assistance); *Cureton I*, 37 F. Supp. 2d at 695.

330. CONSOLIDATED FINANCIAL STATEMENTS, *supra* note 5 (the NCAA is a voluntary association of more than 1,200 public and private educational institutions "devoted to the sound *administration of intercollegiate athletics in all its phases*. . . . The NCAA strives for integrity in intercollegiate athletics and serves as the *colleges' national governance agency*") (emphasis added).

331. *Championships*, *supra* note 7.

332. *Id.*

333. *Id*. *But see* CONSOLIDATED FINANCIAL STATEMENTS, *supra* note 5, at 4 (reporting $915 million in revenues from television and marketing rights fees for fiscal year ending August 31, 2021).

334. H.R. Con. Res. 39, 117th Cong. ¶ 14 (2021).

In the context of NCAA Championships, where the NCAA controls all aspects of a tournament and dictates the student-athlete's experience, a court should find that the NCAA has "controlling authority" over its member institutions' athletic programs and is an indirect "recipient" of federal financial assistance under Title IX. Additionally, a court should find that the NCAA is an indirect "recipient" because it directly benefits from the participation of student-athletes at the NCAA Championships. Similar to the Supreme Court's analysis in *Grove City*, the NCAA is an indirect "recipient" of federal aid through the student-athletes who receive scholarships earmarked for educational purposes.[335]

B. Statutory Reform

The second pathway to bring the NCAA under Title IX coverage is for Congress to pass a new law. Congress recently issued two bills that address gender equity in intercollegiate athletics. On June 29, 2021, the House of Representatives and Senate passed a concurrent resolution (Resolution), expressing the "sense" of Congress that the NCAA is subject to Title IX.[336] Additionally, on August 3, 2022, the Senate reintroduced the College Athletes Bill of Rights, which includes a Title IX section that mandates intercollegiate athletic associations shall not discriminate based on sex.[337] While neither of these bills currently have the full force of law, the intent of Congress is clear—the NCAA needs to comply with Title IX.

1. Concurrent Resolution

Resolved by the House of Representatives with the Senate concurring, the Resolution expresses the "sense" of Congress that Title IX applies to the NCAA and that the NCAA needs to prevent sex-based discrimination in its programs and activities.[338] Consistent with legislative history, the Resolution clarifies that Title IX was intended to prevent the use of federal financial resources for discriminatory

335. Grove City Coll. v. Bell, 465 U.S. 555, 563 (1984).

336. H.R. Con. Res. 39, 117th Cong. (2021) (resolved by House of Representatives with Senate concurring).

337. S. 4724, 117th Cong. (2022).

338. H.R. Con. Res. 39, 117th Cong. pmbl. (2021) ("Expressing the sense of Congress that Title IX of the Education Amendments of 1972 applies to the [NCAA], and the [NCAA] should work to prevent discrimination on the basis of sex in its programs and activities.").

practices in education.[339] Additionally, the Resolution provides a legal framework to challenge the "recipient" loophole in Title IX legislation, which has enabled the NCAA to operate above the law for decades.[340] Key provisions of the Resolution are:

1. *Title IX Applies to the NCAA*: Title IX prohibits sex-based discrimination in all education programs and activities that receive federal financial assistance, including athletics programs.
2. *"Recipient"*: This provision directly addresses the NCAA's defense that it is not subject to Title IX because the Association is not a *"recipient"* of federal aid.[341] Pursuant to the plain language meaning of Title IX, the statute prohibits sex-based discrimination "under any education program or activity receiving federal financial assistance," which does not restrict coverage to the actual "recipients" of federal financial assistance.[342]
3. *"Equal Opportunity"*: This section reaffirms the Department of Education's (DOE) mandate under Title IX Regulations for educational programs to offer all sexes an "equal opportunity" to play sports, allocate scholarships equitably, and provide equal benefits and services.[343] The list of benefits and services encompassed by the Regulations are extensive and include the scheduling of games and practice times, travel, locker rooms, practice and competitive facilities, medical and training facilities, publicity, promotion, and recruiting.[344]

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339. *Id.* ¶ 2 ("Whereas Title IX was intended to avoid the use of [f]ederal resources to support discriminatory practices and to provide individuals effective protection against such practices.").

340. *Id.* ¶ 6 ("Whereas, in interpreting Title IX, Federal courts have correctly held that any entity that exercises controlling authority over a federally funded program is subject to Title IX, regardless of whether the entity is itself a recipient of Federal aid.").

341. Nat'l Collegiate Athletic Ass'n v. Smith, 525 U.S. 459, 464 (1999) (NCAA claimed receipt of member dues does not bring the NCAA under scope of Title IX because NCAA is not a "recipient" of federal financial assistance).

342. H.R. Con. Res. 39 ¶ 3 ("Whereas Title IX does not, on its face, confine the list of those liable under the statute to 'recipients' of Federal funds, but simply prohibits discrimination 'under any education program or activity receiving Federal financial assistance.'").

343. *Id.* ¶ 4 ("Whereas, in the applicable implementing regulations for the Department of Education, the Department of Education requires educational programs to offer students of all sexes equal opportunities to play sports, to allocate athletic scholarships equitably, and to treat athletes of all sexes equally with respect to other benefits and services.").

344. H.R. Con. Res. 39 ¶ 4 ("Benefits and services include equipment and supplies, scheduling of games and practice times, travel and daily allowance, locker rooms, practice and competitive facilities, medical and training facilities and services, housing and dining facilities and services, publicity and promotions, support services, and recruitment of student-athletes."); *see also* 45 C.F.R. §§ 86.32, 86.39, 86.56 (2022).

4. *"Program or Activity"*: The fourth provision reaffirms that the CRRA's broad definition of "program or activity" includes all of the operations of an entity that is "principally engaged in education."[345] Additionally, "program or activity" includes the "catch-all" provision, which covers any entity "established by two or more" covered entities.[346] Note that the NCAA appears to fall within both definitions for a covered "program or activity."
5. NCAA v. Smith: The Resolution acknowledges that in *Smith*, the NCAA's receipt of membership dues alone from federally funded educational institutions does not subject the Association to Title IX, but that the Supreme Court left open two alternative theories to potentially bring the NCAA under the scope of Title IX: (i) its "controlling authority" over member schools' federally funded athletic programs and (ii) its inclusion within the definition of "program or activity."[347]
6. *"Controlling Authority" and State Athletic Associations*: Congress concurs with federal courts who have ruled that any entity exercising "controlling authority" over a federally funded program is subject to Title IX, regardless of whether that entity itself is a "recipient" of federal financial assistance.[348] Included in these decisions are state athletic associations, who exercise controlling authority over high school athletic programs and are therefore subject to Title IX.[349] Examples of this "controlling authority" include when state athletic associations set sports

345. *Id.* ¶ 5 ("Whereas the section 908 of the Education Amendments of 1972 [20 U.S.C. 1687] broadly defines 'program or activity' that receives Federal funds to mean all of the operations of a list of entities, including colleges and universities, private organizations principally engaged in education, and any other entity established by 2 or more of the listed entities – or what Congress termed the 'catch-all' provision.").

346. *Id.*

347. *Id.* ¶ 12 ("[T]he Supreme Court ruled in [Nat'l Collegiate Athletic Ass'n v. Smith, 525 U.S. 459 (1999)] that the NCAA is not subject to title IX by virtue of the dues it receives from its federally funded member schools, the Supreme Court left open the question of whether the NCAA is subject to title IX on alternative grounds, including based on its controlling authority over member schools' federally funded athletics programs or pursuant to the definition of 'program or activity' in section 908 of such Act.").

348. *Id.* ¶ 6 ("Whereas, in interpreting title IX, Federal courts have correctly held that any entity that exercises controlling authority over a federally funded program is subject to title IX, regardless of whether that entity is itself a recipient of Federal aid."); *see also* Horner v. Ky. High Sch. Athletic Ass'n, 43 F.3d 265, 271–72 (6th Cir. 1994); *Cmtys. for Equity II*, 178 F. Supp. 2d at 851.

349. H.R. Con. Res. 39 ¶ 7 ("Whereas Federal courts have held that State athletic associations exercise controlling authority over interscholastic athletic programs and are therefore subject to title IX.").

seasons, sponsor championship tournaments, and establish eligibility requirements.[350]

7. *"Controlling Authority" and the NCAA*: This provision asserts that the NCAA's controlling authority over member institutions' intercollegiate athletics programs is analogous to state athletic associations' controlling authority over interscholastic athletic programs.[351] Additionally, in the context of NCAA Championships, member schools "cede" control to the NCAA to host ninety championships in twenty-four sports.[352] During these Championship tournaments, the NCAA controls: housing, food, facilities, tournament schedule, medical, publicity, and promotion.[353]
8. *Plain Language Meaning*: Federal courts have correctly found that not subjecting an athletic association to Title IX could empower an educational institution to discriminate based on sex through the athletic association. Congress did not intend for federal funds to promote sex discrimination and such an interpretation is contrary to the plain language meaning and purpose of Title IX.[354]
9. *Regular Season and Postseason Championships*: This section emphasizes the importance of student-athletes being afforded the same Title IX protection during the regular season and postseason Championships.[355] During the regular season, student-athletes who experience sex discrimination can seek

350. *Id.* ("State athletic associations set sports seasons, sponsor State championship tournaments, and set eligibility requirements for student participation in sports.").

351. *Id.* ¶ 9 ("Whereas, like state athletic associations, the NCAA exercises controlling authority over its federally funded member institutions' athletic programs."); ¶ 7 ("In order for State athletic associations to control and regulate athletics, member institutions must cede their own ability to control many aspects of their athletic programs to the athletic association.").

352. *Id.* ¶ 14 ("Whereas member schools cede control to the NCAA by allowing it to host 90 intercollegiate championships tournaments in 24 sports across 3 divisions.").

353. *Id.*

354. *Id.* ¶ 8 ("Whereas Federal courts have correctly reasoned that not subjecting athletic associations to Title IX would encourage Federal recipients to empower someone else to promulgate discriminatory policies to avoid Title IX liability. Such an interpretation would allow Federal funds to promote sex discrimination and would therefore run afoul of the plain language, meaning, and purpose of Title IX.").

355. *Id.* ¶ 15 ("Whereas, because the NCAA is subject to title IX, it must address documented discrimination against women's teams in the benefits and services provided during championship tournaments so that student athletes who experience sex discrimination during the regular season who are able to seek remedies under title IX have the same remedies when they experience inequitable access to benefits or services during intercollegiate championship tournaments and other barriers to exercising their rights.").

remedies under Title IX.[356] At intercollegiate Championship tournaments, student-athletes need to be afforded the same remedies for inequitable benefits and services.[357] Note that Congress has expanded covered postseason tournaments to include all intercollegiate championship tournaments, not just the NCAA Championships.

10. *Gender Equity*: The NCAA provided inequitable benefits and services to women at the 2021 NCAA Division I Basketball Championships.[358] These inequities are contrary to the principles set forth by Title IX, undermine efforts in sports and society to promote gender equity, and are limiting women and girls from reaching their full potential.[359]
11. *Transparency*: To ensure meaningful change, Congress advised the NCAA to publicly release all findings and recommendations of the comprehensive gender equity review detailed in the Kaplan reports, including actionable steps to ensure change.[360]

If this Resolution were enacted as a federal law, the NCAA would be covered by Title IX and student-athletes would be afforded legal protection against sex-based discrimination in intercollegiate athletics.

2. College Athletes Bill of Rights

On August 3, 3022, Senators Cory Booker and Richard Blumenthal reintroduced the College Athletes Bill of Rights to protect the rights of college student-athletes and establish a Commission on College Athletics.[361] While the primary impetus behind the bill was to

356. *Id.* ¶ 13 ("Whereas the NCAA is an unincorporated association of approximately 1,200 members, including virtually all public and private universities and [four]-year colleges conducting major athletics programs in the United States. Members of the NCAA that receive Federal funds are subject to title IX.").

357. *Id.* ¶ 14 ("During championship tournaments, the NCAA controls the medical, training, housing, dining, and competition facilities, and dictates the tournament schedule and the publicity and promotion of the teams.").

358. *Id.* ¶ 16 ("[T]he NCAA provided inequitable benefits and services to women's basketball teams in its 2021 Division I Tournaments, including inferior publicity, promotions, equipment, supplies, food, facilities, travel accommodations, and health care protocols and resources.").

359. *Id.* ¶ 17 ("Whereas these disparities are contrary to the letter and spirit of title IX, undermine efforts to ensure gender equity in sports and society writ large, and hold women and girls back from reaching their full potential.").

360. *Id.* ¶ 18 ("Whereas the NCAA leadership and Board of Governors of the NCAA should publicly release all findings and recommendations of the comprehensive review of gender equity issues in NCAA sports announced on March 25, 2021, including actionable next steps to ensure transparency and meaningful change.").

361. S. 4724, 117th Cong. (2022).

address name, image and likeness issues arising from the recent US Supreme Court case *NCAA v. Alston*,[362] Title IX is also discussed in the recent legislation.

The College Athletes Bill of Rights stipulates that intercollegiate athletic associations, including the NCAA, shall not discriminate on the basis of sex.[363] Each institution of higher education is required to complete an annual Title IX evaluation and publish it publicly on a website.[364] If an individual knowingly provides misleading information or omissions in the Title IX evaluation, the intercollegiate athletic association can permanently ban that individual.[365]

While the College Bill of Rights does not address gender equity issues as comprehensively as the Resolution, the legislation confirms Congress' intent to bring the NCAA and all other athletic associations under the scope of Title IX to prevent sex-based discrimination in intercollegiate athletics.

C. Voluntary Compliance

1. NCAA Gender Equity Principles

The third pathway to bring the NCAA under Title IX coverage is for the NCAA to voluntarily comply with Title IX. The NCAA states a commitment to gender equity in the NCAA Constitution, its Inclusion Statement, and its definition of gender equity. These three commitments are summarized below:

1. *NCAA Constitution*: Gender equity is a core principle articulated by the NCAA in the Constitution.[366] "The Association is committed to gender equity."[367] As part of its commitment to gender equity, the NCAA requires the Association, division, conferences, and member institutions to conduct activities in a

362. *See id.* § 11(d)(1)(A) ("The Commission shall establish standards with respect to a college athlete's use of, and ability to profit from, their name, image, likeness, and athletic reputation.").

363. *Id.* § 4(b) ("An intercollegiate athletic association or a conference shall not discriminate on the basis of sex with regard to the provision, to college athletes in comparable sports, of health and safety, medical care, rest, room and board, nutrition, athletic facilities, athletic participation, transportation, and event promotions.").

364. *Id.* § 10(a).

365. *Id.* § 12(a).

366. NCAA Constitution, *supra* note 53.

367. *Id.*

manner free of "gender bias."[368] Additionally, the NCAA is committed to "diversity, equity, and inclusion," and mandates that the Association, divisions, conferences, and member institutions operate in an environment that respects every person.[369]

2. *NCAA Inclusion Statement*: A core value of the NCAA is its "commitment to diversity, inclusion and gender equity among its [student-athletes], coaches and administrators. . . . Programming and education also will strive to support equitable laws and practices."[370]
3. *Definition of Gender Equity*: The NCAA defined gender equity at the NCAA Gender Equity Task Force in 1992. "An athletic program can be considered gender equitable when the participants in both the men's and women's sports programs would accept as fair and equitable the overall program of the other gender. No individual should be discriminated against on the basis of gender, institutionally or nationally, in intercollegiate athletics."[371]

Pursuant to the NCAA's stated commitments to gender equity, voluntary compliance with Title IX is the most direct course to ensure gender equity at the NCAA Championships. The NCAA's commitment to gender equity dates back to the 1990s, when the NCAA conducted its own study revealing significant gender disparities in intercollegiate athletics.[372] The 1991 NCAA survey of membership expenditures revealed that women, who represented approximately 50 percent of undergraduate enrollment, only accounted for 30 percent of intercollegiate athletes.[373] Additionally, the study revealed that women

368. *Id.* ("Activities of the Association, its divisions, conferences and member institutions shall be conducted in a manner free of gender [bias.] Divisions, conferences and member institutions shall commit to preventing gender bias in athletics activities and events, hiring practices, professional and coaching relationships, leadership and advancement opportunities.").

369. *Id.* at art. 1(F).

370. *NCAA Inclusion Statement*, NAT'L COLLEGIATE ATHLETIC ASS'N, https://www.ncaa.org/sports/2016/3/2/ncaa-inclusion-statement.aspx [https://perma.cc/R38K-9NNV] (last visited Feb. 7, 2023).

371. *Gender Equity and Title IX*, *supra* note 53.

372. WILSON, *supra* note 2, at 7. NCAA appointed the NCAA Gender Equity Task Force in 1992 in response to NCAA's 1991 survey, which detailed significant gender disparities. *Id.* Results of the 1991 NCAA Survey of Membership Expenditures revealed: Participation Opportunities (70% men, 30% women), Operating Budgets (77% men, 23% women), Athletic Scholarship Funds, (70% men, 30% women), Recruiting Funds (83% men, 17% women). *Id.* NCAA Executive Director Richard D. Schultz issued a call to action: "We must be proactive, we must be a leader. We have the resources within the NCAA . . . to deal with this problem and solve this problem. This is more than a financial issue; it's a moral issue as well." *Id.*

373. *Id.*

only received 23 percent of athletic operating budgets, 30 percent of athletic scholarships, and 17 percent of recruiting funds.[374] Based on these gender inequities, NCAA Executive Director Richard Schultz called for action: "We must be proactive, we must be a leader. We have the resources within the NCAA . . . to deal with this problem and solve this problem. This is more than a financial issue; it's a moral issue as well."[375]

In 1992, the NCAA appointed a Gender Equity Task Force to define gender equity, establish key principles and set guidelines to achieve "substantially proportionate" participation opportunities.[376] The Gender Equity Task Force released a report detailing its findings and recommendations,[377] and defined gender equity as "when the participants in both the men's and women's sports programs would accept as fair and equitable the overall program of the other gender."[378] Based on the recommendations of the report, members adopted the Gender Equity Principle at the 1994 NCAA Annual Convention.[379] The Gender Equity Principle mandated the following:

1. *Compliance with Federal and State Legislation*: It is the responsibility of each member institution to comply with federal and state laws regarding gender equity.[380]
2. *NCAA Legislation*: The NCAA would not adopt legislation that would prevent a member institution from complying with gender equity laws and should adopt legislation to enhance member institutions' compliance with gender equity laws.[381]
3. *Gender Bias*: Activities of the Association should be conducted in a manner free of gender bias.[382]

The Gender Equity Principle established in 1994 continues to be an important provision of the NCAA Constitution. Accordingly, the Association, divisions, conferences, and member institutions are required "to comply with federal and state laws," with a specific reference to "gender equity."[383]

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374. *Id.*

375. *Id.*

376. *Gender-Equity Task Force Final Report*, NCAA NEWS, Aug. 14, 1993, at 14.

377. *Id.*

378. *Id.*

379. Nat'l Collegiate Athletic Ass'n, 1994–1995 NCAA Div. I Manual, at art. 2.3 (Aug. 1, 1994).

380. *Id.* art. 2.3.1.

381. *Id.* art. 2.3.2.

382. *Id.* art. 2.3.3.

383. NCAA Constitution, *supra* note 53, at art. 6(C) ("It is the responsibility of the Association and each division, conference and member institution to comply with federal and state

However, thirty years after the NCAA established the Gender Equity Principle, the Kaplan reports reveal significant gender inequities continue to exist at the NCAA Championships.[384] Past commitments by the NCAA to promote gender equity have produced limited results, but there is a renewed commitment by the NCAA to uphold the ideals set forth by Title IX.[385] After reviewing the Kaplan Phase I report on 2021 Division I Basketball, the NCAA Board of Governors stated that it was "wholly committed to an equitable experience among its championships."[386] The NCAA is working towards voluntary compliance by implementing the Kaplan recommendations and declaring in its *Title IX 50th Anniversary Report*, "It's time to recommit to equity in intercollegiate athletics."[387]

2. Amended Constitution

On July 30, 2021, the NCAA Board of Governors announced the formation of a committee to redraft the NCAA Constitution.[388] On December 14, 2022, the NCAA released an amended constitution, which was approved at the 2022 NCAA Annual Convention in January and went into effect on August 1, 2022.[389] The amended constitution establishes that the opportunity to participate in intercollegiate

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laws and local ordinances, including with respect to gender equity, diversity and inclusion.").

384. *See* KAPLAN, PHASE I, *supra* note 4, at 14.

385. *See id.* at 1–2.

386. *Board of Governors Statement on Gender Equity Report*, NAT'L COLLEGIATE ATHLETIC ASS'N (Aug. 3, 2021, 5:18 PM), https://www.ncaa.org/news/2021/8/3/general-board-of-governors-statement-on-gender-equity-report.aspx [https://perma.cc/7Y7D-PV2E]; WILSON, *supra* note 2, at 8.

387. WILSON, *supra* note 2 at 8, 54.

388. Meghan Durham, *NCAA Board of Governors to Convene Constitutional Convention*, NAT'L COLLEGIATE ATHLETIC ASS'N (July 30, 2021, 4:00 PM), https://www.ncaa.org/news/2021/7/30/general-ncaa-board-of-governors-to-convene-constitutional-convention.aspx [https://perma.cc/8KYD-R8FE].

389. Corbin McGuire, *NCAA Members Approve New Constitution*, NAT'L COLLEGIATE ATHLETIC ASS'N (Jan. 20, 2022, 6:12 PM), https://www.ncaa.org/news/2022/1/20/media-center-ncaa-members-approve-new-constitution.aspx [https://perma.cc/7QPM-A5Y8] ("More than 1,000 NCAA members participated in the vote, with 801 voting in favor of the new constitution that . . . provides significant authority to the three divisions to reorganize and restructure. It marks the first major constitution revision since 1997, when each division was provided a high level of autonomy."); *see also* Charlie Henry, *Emmert Urges Support for Constitution*, NAT'L COLLEGIATE ATHLETIC ASS'N (Jan. 20, 2022, 2:00 PM), https://www.ncaa.org/news/2022/1/20/media-center-emmert-urges-support-for-constitution.aspx [https://perma.cc/9ZGY-KUAF] (NCAA President Mark Emmert addressed the member schools and conferences at 2022 NCAA Convention before the Association voted on proposed new constitution).

athletics is a vital part of the educational experience[390] and that member schools and conferences are responsible for the "institutional control" of those athletic programs.[391] Key provisions of the amended constitution include the following:

1. *Institutional Control*: The amended constitution states that "institutional control" is the "responsibility of each member institution to monitor and control its athletic programs" and comply with rules established by the NCAA, its divisions, and conferences.[392] Additionally, "it is the responsibility of the Association and each division, conference and member to comply with federal and state laws," including gender equity.[393] The plain language reading of this provision stipulates that the NCAA must comply with federal laws, which include Title IX. The NCAA's delegation of control and responsibility to the divisions, conferences, and member institutions appears to be a proactive step by the Association to evade the perception of "controlling authority" over colleges and universities who are federally funded and covered under Title IX.
2. *Delegation of Responsibility and Authority*: Recognizing that the NCAA membership is comprised of over 1,200 public and private institutions, governance of the diverse Association is achieved by "the delegation of authorities and responsibilities to the divisions, conferences and individual institutions."[394] Historically, the NCAA assumed greater responsibility overseeing and enforcing intercollegiate athletic programs

390. NCAA Constitution, *supra* note 53, at pmbl. ("Member institutions and conferences believe that intercollegiate athletics programs provide student-athletes with the opportunity to participate in sports and compete as a vital, co-curricular part of their educational experience. . . . The basic purpose of the Association is to support and promote healthy and safe intercollegiate athletics, including national championships, as an integral part of the education program and the student-athletes as an integral part of the student-body."); *see also* CONSOLIDATED FINANCIAL STATEMENTS, *supra* note 5 ("One of the core values of the NCAA is to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body.").

391. NCAA Constitution, *supra* note 53, at pmbl. ("The member schools and conferences likewise are committed to integrity and sportsmanship in their athletics program and to institutional control of and responsibility for those programs.").

392. *Id.* at art. 1(E).

393. *Id.* at art. 6(C) ("It is the responsibility of the Association and each division, conference and member institution to comply with federal and state laws and local ordinances, including with respect to gender equity, diversity and inclusion.").

394. *Id.* at art. 2(A)(1) ("The membership of the NCAA encompasses public and private institutions and conferences of widely varying missions, size, resources and opportunities. Accordingly, Association-wide governance must reflect these differences through the delegation of authorities and responsibilities to the divisions, conferences and individual member institutions except where necessary to promote and maintain the Association's core principles.").

pursuant to the NCAA rules and regulations set forth in the NCAA Constitution.[395] The NCAA's delegation of rules, oversight, and enforcement back to the divisions, conferences, and member institutions is a notable difference from the past. This relinquishment of "responsibility" and "control" appears to be a proactive attempt by the NCAA to avoid the perception of "controlling authority" over any of its member institutions who are federally funded and covered by Title IX.

3. *NCAA Championships*: While the NCAA has delegated much of the control and responsibility for the conduct of intercollegiate athletics to the divisions, conferences, and member institutions, the NCAA has retained responsibility for the Championships.[396] The NCAA's Multimedia Agreements with CBS/Turner and ESPN coupled with the Corporate Sponsor Program for the NCAA Division I Basketball Championships generate approximately $1 billion revenues annually.[397] The Association has not delegated any authority or responsibility to divisions, conferences, or member institutions to control these invaluable assets. Additionally, the NCAA has retained the media rights and intellectual property associated with the NCAA Championships, including the March Madness logo.[398] Consistent with Kaplan's conclusion that the NCAA's focus on "revenue-producing" sports has produced significant gender disparities, money continues to play a critical role in the organization and operations of intercollegiate sports.[399]

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395. Nat'l Collegiate Athletic Ass'n, 2000-2001 NCAA Div. I Manual, at art. 2.8.2 (Aug. 1, 2000) ("The Association shall assist the institution in its efforts to achieve full compliance with all rules and regulations and shall afford the institution, its staff and student-athletes fair procedures in the consideration of an identified or alleged failure in compliance.").

396. NCAA Constitution, *supra* note 53, at art. 2(A)(2)(a) ("The Association shall: Conduct all NCAA championships. Each member in good standing in its division shall be eligible to compete in NCAA championships assuming it meets applicable Association, division and conference requirements. The Association shall oversee broadcasting, communications and media rights for all NCAA-conducted national championships.").

397. *See* Eben Novy-Williams, *March Madness Daily: The NCAA's Billion-Dollar Cash Cow*, SPORTICO (Mar. 26, 2022, 9:00 AM), https://www.sportico.com/leagues/college-sports/2022/march-madness-daily-the-ncaas-billion-dollar-cash-cow-1234668823/ [https://perma.cc/WM2D-Y83L].

398. NCAA Constitution, *supra* note 53, at art. 2(A)(2)(e) ("The Association shall: Manage the Association's intellectual property.").

399. *See* KAPLAN, PHASE II, *supra* note 4, at 2.

V. A VISION OF CHAMPIONSHIP EQUITY

A vision of championship equity would embody the NCAA's definition of gender equity: "participants in both the men's and women's sports programs would accept as fair and equitable the overall program of the other gender."[400] Title IX sets forth a simple concept: an equal opportunity. Women want and deserve the same opportunities as men, both on and off the field.

Title IX was enacted to address widespread discrimination in education and to prevent the use of federal funds to support discriminatory practices.[401] Educational institutions are required to comply with Title IX as "recipients" of federal financial assistance, and student-athletes are protected as participants in a covered "program or activity" under Title IX.[402] From a public policy perspective, it is hypocritical for the NCAA to argue that the Association is not subject to the same federal laws as its member institutions. The NCAA Constitution mandates member institutions to comply with federal and state laws.[403] If the NCAA fails to uphold Title IX's mandate for an "equal opportunity," then how can a member institution participate at the NCAA Championships without violating the federal law?

The need for a prohibition against discrimination in education is undisputed, but once athletics is added to the equation, money convolutes the necessity for this protection. The NCAA generates approximately $1 billion annually from the NCAA Championships.[404] As part of its revenue redistribution model, the NCAA returns over $600 million back to its member institutions.[405] This flow of funds aligns the universities and colleges with the NCAA's goal to maximize profits at the NCAA Men's Basketball Championships and is the source behind many of the gender disparities in intercollegiate sports today.

Money is the primary factor driving gender inequities, but the NCAA and its members are not-for-profit institutions.[406] Nowhere in the mission statement of a university or the NCAA is there a commitment to generate revenues from athletics. Instead, the NCAA

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400. *See Gender-Equity Task Force Final Repor*t, *supra* note 376.

401. *See* 20 U.S.C. § 1681(a).

402. *See id.*

403. NCAA Constitution, *supra* note 53, at art. 6(C) ("It is the responsibility of the Association and each division, conference and member institution to comply with federal and state laws and local ordinances, including with respect to gender equity, diversity and inclusion.").

404. Novy-Williams, *supra* note 397.

405. *Id.*

406. *See* KAPLAN, PHASE II, *supra* note 4, at 11.

and member institutions advocate for amateur athletics; sports are an extension of the academic experience for a student-athlete. As the "governing agency" for intercollegiate athletics, the NCAA has an obligation to uphold these ideals and perpetuate opportunities for student-athletes to develop in the classroom and on the athletic field.[407] NCAA Championships serve as the ultimate showcase to display intercollegiate athletics at the highest level, and the NCAA should want to showcase its commitment to gender equity by providing women with an equal opportunity.

Accountability and transparency are key to achieving gender equity in sports. Without enforcement, gender disparities in intercollegiate athletics are likely to continue, as illustrated by the countless violations at educational institutions.[408] Accountability will likely come from corporate sponsors threatening to withdraw lucrative endorsements if the NCAA does not comply with Title IX and conduct intercollegiate Championships in an equitable manner.[409] Pressure to adhere to principles of gender equity are more pronounced today than ever before, and while companies want to be associated with high-profile sporting events, elite athletes, and top teams, sponsors do not want to be associated with coverage that could be viewed as discriminating against women.[410]

Sedona Prince's 2021 viral video served as a catalyst to analyze gender equity issues in intercollegiate athletics.[411] The Kaplan reports confirmed longstanding disparities and set in motion the enforcement

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407. *See* CONSOLIDATED FINANCIAL STATEMENTS, *supra* note 5.

408. Alex Azzi, *Title IX Is 50 Years Old. Why Aren't Schools Complying with the Law?*, NBC SPORTS (June 23, 2022, 2:40 PM), https://onherturf.nbcsports.com/2022/06/23/title-ix-50-years-why-isnt-the-law-being-enforced/ [https://perma.cc/3D63-LUP7]; Alex Azzi, *Fifty Years After Title IX, Girls and Women in Sport Still Have Fewer Opportunities*, NBC SPORTS (May 4, 2022, 1:35 PM), https://onherturf.nbcsports.com/2022/05/04/title-ix-anniersary-womens-sports-foundation-report/ [https://perma.cc/M5X6-5XXG].

409. *See* Email from Ellen Lucey, Dir. of NCAA Championships and Alls., Corp. Rels., Mktg. & Branding, to NCAA colleagues JoAn Scott and Christopher Termini (Mar. 19, 2021, 8:58 PM) ("All day I have fielded calls from partners really upset with the situation and wanting help. We have declined them all. Not to mention numerous partners wanted to gift student-athletes gift cards and we said no. I hate to think we have a non-partner come in to save the day. AT&T, Coke, Capital One, Aflac, Nissan, Pizza Hut to name a few I have spoken to directly.") [hereinafter Email I]; *see also* Email from Ellen Lucey, Dir. of NCAA Championships and Alls., Corp. Rels., Mktg. and Branding to NCAA colleagues JoAn Scott and Christopher Termini (Mar. 21, 2021, 9:01 PM) ("Update, I spoke to Capital One tonight and shared that there are no more inequalities between the men and the Women's tournament that needs to be addressed. He asked, 'we will not continue to see or hear about issues?' I told him, no. I also shared we are working on statements to explain our partners have been there for women's basketball for years.") [hereinafter Email II].

410. Email II, *supra* note 409.

411. KAPLAN, PHASE I, *supra* note 4, at 1.

of Title IX fifty years after Congress enacted this federal law.[412] As part of this gender equity assessment, Mark Emmert made a commitment "to ensure that all student-athletes are equally supported at our NCAA Championships events."[413] Pursuant to this commitment, the NCAA should comply with Title IX to provide equal opportunities and an equitable experience for all student-athletes.

412. *Id.* at 96–98.

413. Letter from Mark Emmert, NCAA President, to Suzette McQueen, Chair of NCAA Comm. on Women's Athletics (Mar. 23, 2021) ("I will be calling for an independent review to closely examine the circumstances surrounding the events that transpired in San Antonio. This review will also include an analysis of allocation of financial and human resources, facilities, and decision-making processes and procedures to ensure that all student-athletes are equally supported at our NCAA Championship events.").