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THREE'S A CROWD: A LOOK AT POTENTIAL TROUBLES CREATED BY THIRD-PARTY STANDING WHEN BRINGING A TITLE IX CLAIM

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I. INTRODUCTION

When now legendary football coach Hayden Fry first stepped into the head coaching job at the University of Iowa, clad in white pants and sunglasses, one of his first orders of business was redecorating Kinnick Stadium.[1] With an undergraduate degree in psychology, Coach Fry decided to put his schooling to use by getting inside the heads of the opponents his team—the Hawkeyes—would take on.[2] He did so by painting the walls, installing new carpets, and even replacing the ill-used urinals of the visitor locker room.[3] This would all seem standard, except that Coach Fry's redecorating had a theme—everything new in the visitor locker room was pink.[4]

Depending on the source, Coach Fry's use of pink is said to have been a tactic meant to have a calming effect on visiting opponents or a ploy to create a connotation that they were "sissies."[5] Either way, Coach Fry believes the pink walls served their purpose, stating in his autobiography, "[i]t's been fun to get

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1. *See* Fred Bierman, *Iowa Keeps Opponents Thinking Pink*, N.Y. TIMES (Oct. 21, 2010, 10:38 PM), http://thequad.blogs.nytimes.com/2010/10/21/iowa-keeps-opponents-thinking-pink/?_r=1; Travis Haney, *Oklahoma Football: Hayden Fry's Legacy Goes Beyond a Coaching Tree Featuring Bob Stoops, Kirk Ferentz*, NEWS OK (Dec. 23, 2011), http://newsok.com/oklahoma-football-hayden-frys-legacy-goes-beyond-a-coaching-tree-featuring-bob-stoops-kirk-ferentz/article/3634632/?page=2.

2. Bierman, *supra* note 1.

3. *Id.*

4. *Id.*

5. *Id.*; Peter Richmond, *Not So Pretty in Pink*, SPORTSONEARTH (Oct. 25, 2013), http://www.sportsonearth.com/article/63315532/.

the reaction of visiting coaches. . . . When I talk to an opposing coach before the game and he mentions the pink walls, I know I've got him. I can't recall a coach who has stirred up a fuss about the color and then beaten us."[6] Perhaps the most notable reaction to the locker rooms came from the University of Michigan's head coach, Bo Schembechler, who hated the color palette enough to order his coaching assistants to cover the walls with white paper before his team entered the facility.[7]

Coach Fry retired in 1999, but the all-pink visitor locker room at Kinnick Stadium remains.[8] Furthermore, the University of Iowa is no longer home to the only athletics team implementing, or attempting to implement, the pinking ploy.[9] Until December 2010, the University of Minnesota-Duluth Bulldogs hockey team played its home games at the Duluth Entertainment and Convention Center (DECC), which housed a similarly hued visitor's facility.[10] However, when plans to repeat the color scheme at the new AMSOIL Arena were put forth, they were met with resistance from an outside source.[11] Similarly, after a family from Bondurant, Iowa offered to donate $3 million to the local high school athletic department in order to build a brand new, pink visitor's locker room, the school board received some unsolicited outside counsel advising against the move.[12]

Today, headlines created by pink locker rooms tend not to be based upon the reactions of opposing players and coaches, but instead upon the potential legal issues created by the seemingly feminine motif. When plans to renovate Kinnick Stadium were announced in 2005, the University of Iowa made it clear that it intended to honor Coach Fry's legacy by maintaining the pink visitor locker room.[13] Erin Buzuvis, a then-visiting professor at the University of Iowa College of Law, attended a public forum meant to address any concerns with the renovation.[14] It was here that she expressed her opinion that maintaining the pink locker room created a potential Title IX issue and that "in light of the cultural association of pink with girls and sissies . . . the locker room symbolism

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6. HAYDEN FRY & GEORGE WINE, HAYDEN FRY: A HIGH PORCH PICNIC 102–03 (1999).

7. Sally Jenkins, *Tickled Pink by Iowa's Locker Room*, WASH. POST (Oct. 1, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/09/30/AR2005093001975.html.

8. Haney, *supra* note 1.

9. *See* Richmond, *supra* note 5.

10. Justin Magill, *Closing the DECC*, COLLEGE HOCKEY NEWS (Dec. 3, 2010), http://www.collegehockeynews.com/news/2010/12/03_closing_the_decc.php.

11. *See id.*

12. *See* Richmond, *supra* note 5.

13. Erin E. Buzuvis, *Reading the Pink Locker Room: On Football Culture and Title IX*, 14 WM. & MARY J. WOMEN & L. 1, 2 (2007).

14. *Id.* at 4.

could be perceived as a university-sponsored insult that trades in sexism and homophobia."[15]

Professor Buzuvis' opinions quickly became public, and the overall response from University officials, the press, and local citizens was less than receptive.[16] However, she did find some support in her fellow legal professionals. Jill Gaulding, a colleague of Buzuvis at the College of Law and co-founder of Gender Justice, began to "[lead] protests against the pink locker room tradition."[17] It is Gender Justice that successfully stepped in and dissuaded the University of Minnesota-Duluth and Bondurant High School from continuing the trend of "pink shaming" or else risk potential legal action.[18] While the potential Title IX issues Professors Buzuvis and Gaulding promote are intriguing—and most certainly have caught the eye of the media—what might sooner stand out to legal scholars is whether an organization such as Gender Justice has the ability to bring such a claim in court.

Traditionally, gender discrimination claims falling under the scope of Title IX are brought by the person or persons who feel a direct adverse effect as a result of a school's non-compliance with the law.[19] More recently, outside interest groups have attempted to bring third-party claims against academic institutions with varying levels of success.[20] A look at recent case law reveals that a circuit split currently exists as to third-party standing in such instances.[21]

This Comment will analyze the ability of a third party to bring a Title IX claim against an academic institution. Part II will provide an overview of the history of Title IX claims in the United States. Part III will analyze the legal concept of standing and how courts currently differ with regards to certain types of third-party claims. Finally, Part IV will advocate for one side of the current circuit split and predict the ability of a third party to bring a claim under that analysis against a school such as the University of Iowa for allowing the continuance of pink locker rooms, something Professor Buzuvis postulates "w[ill] denigrate female athletes, and thus suppress the extent to which women would report an interest in athletics."[22]

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15. *Id.*

16. *Id.* at 5.

17. *About Us*, GENDER JUSTICE, http://genderjustice.us/about/ (last visited Apr. 18, 2015).

18. Richmond, *supra* note 5.

19. *See generally* U.S. SECRETARY OF EDUCATION'S COMMISSION FOR OPPORTUNITY IN ATHLETICS, "OPEN TO ALL": TITLE IX AT THIRTY (2003), *available at* https://www2.ed.gov/about/bdscomm/list/athletics/title9report.pdf [hereinafter TITLE IX AT THIRTY].

20. *See, e.g.*, Equity in Athletics, Inc. v. Dep't of Educ., 639 F.3d 91 (4th Cir. 2011); Am. Sports Council v. Dep't of Educ., 850 F. Supp. 2d 288 (D.D.C. 2012).

21. *See, e.g.*, *Equity in Athletics*, 639 F.3d 91; *Am. Sports Council*, 850 F. Supp. 2d 288.

22. Buzuvis, *supra* note 13, at 47.

II. AN OVERVIEW OF TITLE IX CLAIMS

In the early 1970s, Congress made the important decision to enact legislation to help eliminate sex discrimination in education.[23] On June 23, 1972, President Nixon signed 20 U.S.C. § 1681 (Title IX) into law.[24] The statute 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 Federal financial assistance."[25] Due to the broad language of the statute, Title IX casts a broad net, affecting a wide range of people and programs within the education system.

A. Title IX As a Tool for Maintaining Gender Equity in Athletics

While Title IX does not directly mention the elimination of discrimination within athletics, statistics on sports participation prior to Title IX's enactment made it clear that the statute had the potential to have a drastic effect on sports at the interscholastic and collegiate levels. According to research done by the National Collegiate Athletic Association (NCAA) from 1967–1968, there were roughly 152,000 male athletes and 15,000 female athletes participating in intercollegiate athletics at that time.[26] A similar study done at the high school level in 1971 reported that 3.7 million boys and just 294,000 girls competed in school-sponsored sports that year.[27] By 1975, the United States Department of Education (DOE) Office for Civil Rights (OCR) approved a regulation pursuant to statute, directly applying Title IX to school athletics.[28] The regulation reads,

> 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.[29]

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23. Donald E. Shelton, *Equally Bad is Not Good: Allowing Title IX "Compliance" by the Elimination of Men's Collegiate Sports*, 34 U. MICH. J.L. REF. 253, 253 (2001).

24. *See generally* Buzuvis, *supra* note 13, at 44.

25. 20 U.S.C. § 1681 (2012).

26. TITLE IX AT THIRTY, *supra* note 19, at 13.

27. *Id.*

28. Shelton, *supra* note 23, at 253.

29. 45 C.F.R. § 86.41(a) (2014).

Due to the traditional male-domination in sports, athletic departments nationwide fight an on-going battle to maintain equity within their programs.[30] After the implementation of Title IX, this fact quickly became evident.

By summer 1978, the DOE received somewhere close to 100 complaints alleging Title IX violations at over fifty institutions of higher education.[31] For this reason, the OCR adopted a policy interpretation meant to clarify the ways in which a school may stay in compliance with the regulation.[32] Per the interpretation, a plaintiff can bring a successful athletic-based Title IX claim against an educational institution by showing that an educational institution has failed to maintain compliance in financial assistance, other program areas, or in meeting the interests and abilities of students of both genders.[33] The majority of Title IX publicity stems from the third part of the policy interpretation, which provides what has come to be known as the "three-prong test."[34] If an institution can show substantial proportionality of students, history and continuing practice of expanding opportunities, or accommodation of the interests of the underrepresented sex, then it will be deemed Title IX compliant.[35]

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30. *See generally* TITLE IX AT THIRTY, *supra* note 19.

31. *See* OFFICE FOR CIVIL RIGHTS, OFFICE OF THE SEC'Y, DEP'T OF HEALTH, EDUC. & WELFARE, A POLICY INTERPRETATION: TITLE IX AND INTERCOLLEGIATE ATHLETICS (Dec. 11, 1979), *available at* http://www2.ed.gov/about/offices/list/ocr/docs/t9interp.html [hereinafter 1979 POLICY INTERPRETATION].

32. *See id.*

33. *See* 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, 336–40 (2012) [hereinafter *Title IX at Forty*].

34. *Id*. at 339–40. *See also* 1979 Policy Interpretation, *supra* note 31, at § VII(C)(5)(a). Specifically, the three-prong test states,

> (1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
>
> (2) Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or
>
> (3) Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.

Id.

35. *See* 1979 Policy Interpretation, *supra* note 31.

Generally, the biggest issue for colleges and universities attempting to remain compliant with the three-prong test is maintaining proportionality.[36] Under this prong, the percentage of male and female student-athletes should be proportionate to the percentage of males and females attending the college or university.[37] This issue has become prominent due to the fact that it frequently leads to schools cutting men's athletic teams in order to reach substantial proportionality.[38] If the institution cannot prove that it has met one of the three prongs, "[a]lthough the statute itself provides for no remedies beyond the termination of federal funding, the Supreme Court has determined that Title IX is enforceable through an implied private right of action, and that damages are available for an action brought under Title IX."[39] While issues arising from a lack of equity among student-athletes seem to dominate the public's discourse regarding Title IX, such issues are far from the full scope of claims brought under the statute.

B. Title IX As a Tool for Eliminating Sex-Based Discrimination More Generally

Since the implementation of Title IX and subsequent regulations, educational institutions receiving government financial aid have been tasked with ensuring a prohibition of sex-based discrimination in their buildings and on their campuses.[40] Beyond mandating equal opportunity in athletics, courts have also found that Title IX extends to the prohibition of sex-based employment discrimination[41] and sexual harassment.[42]

When it comes to employment discrimination, one study found that over Title IX's first thirty-five years as law, 19% of the litigation studied focused on employment discrimination claims.[43] In *North Haven Board of Education v. Bell*, the Supreme Court held that the legislative history and statutory language of Title IX supported the conclusion that the law prohibits employment discrimination.[44] Further, the Court found that it was within the Department of Health,

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36. *See generally* Kimberly A. Yuracko, *One for You and One for Me: Is Title IX's Sex-Based Proportionality Requirement for College Varsity Athletic Positions Defensible?*, 97 NW. U. L. REV. 731 (2003).

37. Cohen v. Brown Univ., 101 F.3d 155, 177 (1st Cir. 1996).

38. *See generally id.*

39. *Id.* at 167.

40. 20 U.S.C. § 1681 (2012).

41. *See generally* N. Haven Bd. of Educ. v. Bell, 456 U.S. 512 (1982).

42. *See generally* Franklin v. Gwinnett Cnty. Pub. Sch., 503 U.S. 60 (1992).

43. Paul Anderson & Barbara Osborne, *Report: A Historical Review of Title IX Litigation*, 18 J. LEGAL ASPECTS SPORT 127, 136 (2008).

44. *N. Haven Bd. of Educ*., 456 U.S. at 530.

Education, and Welfare's (HEW) authority to implement regulations, such as revoking a school's federal funding, to combat unfair employment policies.[45] Ultimately, the *North Haven* case made it apparent that an individual bringing a discrimination claim against an educational program could utilize Title IX.[46]

The use of Title IX to eliminate sexual harassment in schools has also become commonplace. In *Franklin v. Gwinnett County Public Schools*, a high school student brought a claim against her teacher and coach for his repeated sexual harassment.[47] In this instance, the school had been notified of the issue and failed to take any action to end it, going so far as to discourage the student from pressing charges.[48] Eventually, Franklin brought a claim that sought damages from the school for permitting the harassment to continue.[49] The case made its way through the courts, and ultimately, the Supreme Court ruled that "Congress had not limited the remedies available under Title IX," permitting damages to be sought in the enforcement of the law going forward.[50] This decision provided potential claimants a new form of relief, as well incentive to take action against sexual harassment occurring in schools.[51]

By the mid-1990s, it became commonplace for courts to review claims of sexual harassment committed by teachers, coaches, and fellow students.[52] In 1997, the OCR published its first guidance to help clarify the application of Title IX to sexual harassment, which stated that schools are required to have policies and procedures that afford fast and fair resolutions to sexual harassment claims by students.[53] Further, it became clear that schools would be held accountable "for instances of quid pro quo sexual harassment[,] and may also be liable for hostile environment sexual harassment if the coach or other employee uses their apparent authority when they engage in harassing conduct."[54] Additionally, schools can be held liable for sexual harassment between students (i.e., peer-to-peer) if they permit a hostile environment to continue because they knew or should have known the harassment was occurring and failed to take quick and proper measures to eliminate the issue.[55] As a result of the OCR's

45. *Id.* at 537–39.

46. *Title IX at Forty*, *supra* note 33, at 342.

47. 503 U.S. 60, 63 (1992).

48. *Id.* at 63–64.

49. *See* Franklin v. Gwinnett Cnty. Pub. Sch., 911 F.2d 617 (11th Cir. 1990).

50. *Title IX at Forty*, *supra* note 33, at 346.

51. *See id.*

52. *Id.* at 356.

53. *Id.*

54. *Id.*

55. *Id.*

guidance and subsequent cases,[56] notice has been given to schools regarding their potential liability for harassing conduct by their staff or students.[57] Because of this, schools must be sure to implement adequate procedures to avoid liability.

C. Asserting a Title IX Claim

Prior to 2009, a question existed as to a complainant's ability to simultaneously bring Title IX and constitutional claims.[58] *Fitzgerald v. Barnstable School Committee* brought this issue before the Supreme Court, when parents of a harassed grade school student cited Title IX and the Equal Protection Clause in their claim against the school.[59] Initially, the Supreme Court analyzed prior decisions involving the assertion of claims under the Constitution and federal statutes, finding that "in determining whether a subsequent statute precludes the enforcement of a federal right under § 1983, [they] have placed primary emphasis on the nature and extent of that statute's remedial scheme."[60] The Court determined that it had precluded the use of both the Constitution and federal statute in instances where the statute mandated that claimants exhaust certain administrative remedies or follow a particular procedure.[61]

In the case of Title IX, the only enforcement mechanism written into the statute is the potential for withdrawal of federal funding.[62] The Court found that this, coupled with the previously held implied right of action,[63] amount to a much lesser enforcement scheme than those typically found.[64] Further, the Court concluded that the actual rights provided for by the Equal Protection Clause and Title IX are quite different, vesting "divergent coverage."[65] As such, the Court determined that "Title IX was not meant to be an exclusive mechanism for addressing gender discrimination in schools, or a substitute for § 1983 suits as a means of enforcing constitutional rights" and "suits based on the Equal Protection Clause remain available to plaintiffs alleging unconstitutional gender

56. *See* Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629 (1999); Gebster v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998).

57. *Title IX at Forty*, *supra* note 33, at 361.

58. *See id.* at 382.

59. 555 U.S. 246, 246 (2009).

60. *Id.* at 253.

61. *Id.* at 254.

62. *Id.* at 255.

63. *See generally* Cannon v. Univ. of Chicago, 441 U.S. 677 (1979).

64. *Fitzgerald*, 555 U.S. at 255.

65. *Id.* at 257–58.

discrimination in schools."[66]

Traditionally, Title IX gender discrimination claims are asserted by the person or persons who feel a direct adverse effect as a result of a school's non-compliance.[67] When issues do arise with Title IX compliance, it is commonplace to see individual employees, students, or student-athletes or members of an affected team bring suit against the responsible institution.[68] Less common, and decidedly more problematic, is when a third party, someone not directly affected by the potential breach in Title IX compliance, wishes to bring a claim against an institution.[69] This becomes troublesome due to a plaintiff's need to establish standing before he or she can bring a claim in court.

III. THIRD-PARTY STANDING AND THE CURRENT CIRCUIT SPLIT IN RELATION TO ORGANIZATION-BASED TITLE IX CLAIMS

In order for a party to have a lawsuit heard in court, the individual or group must have standing.[70] An individual or group may establish third party standing by showing they have an interest in the issue that is the subject of the claim being brought.[71] It is well established that an association or organization may bring a third party claim.[72] What is less apparent is the requisite interrelation between an organization and the government action it seeks to prohibit. Currently, a circuit split that exists over the issue is perpetuating this lack of clarity.[73]

A. Establishing Standing

Before a plaintiff may bring a claim before a court, it must be determined that the party has proper standing—essentially, the right to be heard.[74] Article III, Section 2 of the U.S. Constitution stipulates that the jurisdiction of the federal courts is limited to the types of cases and controversies listed within the

66. *Id.* at 258.

67. *See Title IX at Forty*, *supra* note 33, at 342–347.

68. *See id.*

69. *See* Colton Puckett, *American Sports Council v. United States Department of Education: Forty Years of Title IX and Still Standing (or Not)*, 20 SPORTS LAW. J. 261 (2013).

70. Hassan v. Iowa, No. 4–11–CV–00574, 2012 U.S. Dist. LEXIS 188213, at *3–4 (S.D. Iowa 2012).

71. *See* FED. R. CIV. P. 24.

72. *See, e.g.*, Equity in Athletics, Inc. v. Dep't of Educ., 639 F.3d 91 (4th Cir. 2011); City of Duluth v. Nat'l Indian Gaming Comm'n, 7 F. Supp. 3d 30 (D.D.C. 2013); Am. Sports Council v. Dep't of Educ., 850 F. Supp. 2d 288 (D.D.C. 2012).

73. *See Equity in Athletics, Inc.*, 639 F.3d 91; *cf. Am. Sports Council*, 850 F. Supp. 2d 288.

74. *Hassan*, 2012 U.S. Dist. LEXIS 188213, at *3–4.

document.[75] The Supreme Court provided an overview to Article III standing in a recent case when it said an injury must be "concrete, particularized, and actual or imminent[;] fairly traceable to the challenged action[;] and redressable by a favorable ruling."[76] Further, it has been emphasized that the party or parties bringing the claim bear the burden of establishing the Article III standing elements.[77] Moreover, parties petitioning for federal jurisdiction must, "support each of the standing requirements with the same kind and degree of evidence at the successive stages of litigation as any other matter on which the plaintiff bears the burden of proof."[78] Typically, standing is reserved for the parties directly involved in the dispute; however, it is also possible for a third party to bring a claim.[79]

B. Standing in a Title IX Claim

As in any claim, when bringing a Title IX claim, the plaintiff—usually a student, student-athlete, or team—is charged with the task of proving standing based on a showing of injury, causation, and redressability (Essential Elements Test).[80] In order to satisfy the first requirement, a plaintiff must demonstrate that an injury is "actual or imminent."[81] What is more, "[a] plaintiff seeking injunctive or declaratory relief cannot rely on past injury to satisfy the injury requirement but must show a likelihood that he or she will be injured in the future."[82] If no further injury might occur, due to graduation or similar reasoning, a court may find a claim to be moot.[83] In the case that parents are suing on behalf of their minor children, the court will determine standing based on the position of the underage individual, not his or her guardian.[84] However, if parents or guardians bring a claim themselves, rather than on behalf of their injured children, courts are inclined to find them wanting for an injury-in-fact.[85] Once standing has been established, the plaintiff or plaintiffs may prevail by showing that the academic institution has caused an injury based on its non-compliance

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75. *See* Puckett, *supra* note 69, at 265.

76. Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 140 (2010).

77. Brandon L. Garrett, *The Constitutional Standing of Corporations*, 163 U. PA. L. REV. 95, 137 (2014).

78. Constitution Party of S.D. v. Nelson, 639 F.3d 417, 420 (8th Cir. 2011).

79. *See* FED. R. CIV. P. 24.

80. McCormick v. Sch. Dist. of Mamaroneck, 370 F.3d 275, 284 (2d Cir. 2004) (citation omitted).

81. *Id.*

82. *Id.*

83. *Id.* at 285.

84. *Id.* at 284.

85. *See generally* Cobb v. U.S. Dep't of Educ. Office for Civ. Rights, No. 05-2439, 2006 U.S. Dist. LEXIS 39985 (D. Minn. June 14, 2006).

with the regulations set forth in Title IX.[86]

C. Establishing Third-Party Standing

Third-party legal standing is not a new concept when it comes to who can and cannot bring a lawsuit.[87] For a third party to be a permissible joinder to a claim, the individual or group must meet the guidelines detailed in Rule 24 of the Federal Rules of Civil Procedure.[88] Per the adequacy-based approach that directs Article III standing within the courts, claimants who can exhibit all parts of the Essential Elements Test are entitled to invoke the rights of a third party.[89] However, current doctrine maintains, as a prudential rule, that claimants generally lack standing to raise the rights of others.[90] This presumption against the permissibility of third-party claims stems from relative standing, "since the person with the greatest stake in asserting a particular right is normally the right holder herself."[91] To help overcome this presumption, a would-be third party claimant "must have a close relation to the third party, and there must exist some hindrance to the third party's ability to protect his or her own interest."[92]

If the third party or parties can meet this burden, they may be permitted to have their case heard in court. However, on numerous occasions, the Supreme Court has made it obvious that "a plaintiff's standing fails where it is purely speculative that a requested change . . . will alter the behavior of regulated third parties that are the direct cause of the plaintiff's injuries."[93] Further burdening the standing analysis are the methods for determining associational and organizational standing—the standards for claims that are brought by entities made up

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86. *Id.*

87. *See generally* Hollingsworth v. Perry, 558 U.S. 183 (2010).

88. FED. R. CIV. P. 24. On a timely motion, the court must permit anyone to intervene who,

> (1) is given an unconditional right to intervene by a federal statute; or
>
> (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Id.

89. Richard M. Re, *Relative Standing*, 102 GEO. L.J. 1191, 1223 (2014).

90. *Id.*

91. *Id.*

92. Powers v. Ohio, 499 U.S 400, 411 (1991).

93. Nat'l Wrestling Coaches Ass'n v. Dep't of Educ., 366 F.3d 930, 938 (D.C. Cir. 2004).

of many members.[94]

D. Associational v. Organizational Third-Party Standing

The terms "associational standing" and "organizational standing" suggest similar standards and are commonly analyzed together.[95] However, it is important to note the differences between the two types of standing for this examination.

1. Association Test

Associational standing may be established when a group—meaning the overarching entity rather than the members within it—can show that (1) its individual members would have standing on their own; (2) the interests the group seeks to protect are relevant to its purpose; and (3) the lawsuit does not require that the individual members bring it (Association Test).[96] This standard is permissive and broad in comparison to that of organizational standing, which involves standing for the organization itself, rather than the members or owners within.[97]

The case *National Wrestling Coaches Association v. Department of Education* (*NWCA*) offers some insight into the requirements for bringing a third-party Title IX claim as an association.[98] In this highly referenced case, the plaintiffs were the National Wrestling Coaches Association, the Marquette Wrestling Club, the Committee to Save Bucknell Wrestling, the College Sports Council, and the Yale Wrestling Association—all membership groups representing the interests of their respective schools' wrestling coaches, athletes, and alumni.[99] The claimants centered their case on the assertion that the Three-Part Test implemented by the 1979 Policy Interpretation violates the equal protection component of the Fifth Amendment Due Process Clause and requires academic institutions to intentionally discriminate in a way that goes directly against the policy of Title IX.[100]

In order to be able to bring the claim, the plaintiffs were required to establish standing by fulfilling the three elements of the Association Test.[101] Here, the

94. *See* Garrett, *supra* note 77, at 136–40.

95. *See* Equity in Athletics, Inc. v. Dep't of Educ., 639 F.3d 91 (4th Cir. 2011); *cf.* Am. Sports Council v. Dep't of Educ., 850 F. Supp. 2d 288 (D.D.C. 2012).

96. *Am. Sports Council*, 850 F. Supp. 2d at 297–98.

97. *See* Garrett, *supra* note 77, at 139.

98. *See* 366 F.3d 930 (D.C. Cir. 2004).

99. *Id.* at 935.

100. *Id.* at 936.

101. *Id.* at 937.

plaintiffs alleged that their injuries were the result of the decisions of several federally-funded institutions that opted to eliminate their wrestling programs in order to maintain Title IX compliance.[102] Ultimately, the court held that, despite showing that an injury-in-fact had occurred, the plaintiffs lacked standing due to their inability to show that a favorable decision would redress the injury.[103]

The *NWCA* court made sure to elaborate on its decision to deny standing, pointing out that associational standing fails when it is based solely on speculation that a requested change would alter the behavior of a third party that is directly causing the injury.[104] Specifically, the court noted,

> [w]hen a plaintiff's asserted injury arises from the Government's regulation of a third party that is not before the court, it becomes "substantially more difficult" to establish standing . . . . Because the necessary elements of causation and redressability in such a case hinge on the independent choices of the regulated third party, "it becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury."[105]

The Association Test for establishing standing is well-documented and continuously upheld. The statement of the elements in *NWCA* has been cited and sustained more than a dozen times in the ten years since the decision was handed down.[106] Less consistently decided is the issue of organizational standing.

2. Organization Test

While an association may be granted standing "'solely as the representative of its members' where, *inter alia*, its members would have standing to sue in their own right,"[107] organizational standing requires the entity to show it "suffered a 'concrete injury' to its own interests, apart from any separately identified

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102. *See id.*

103. *See id.* at 938.

104. *See* Nat'l Wrestling Coaches Ass'n v. Dep't of Educ., 366 F.3d 930, 938 (D.C. Cir. 2004)..

105. *Id.* at 938 (citation omitted).

106. *See generally* City of Duluth v. Nat'l Indian Gaming Comm'n, 7 F. Supp. 3d 30 (D.D.C. 2013); Bloomberg L.P. v. CFTC, 949 F. Supp. 2d 91 (D.D.C. 2013); Neighbors of Casino San Pablo v. Salazar, 442 Fed. Appx. 579 (D.C. Cir. 2011); Equal Access for El Paso, Inc. v. Hawkins, 428 F. Supp. 2d 585 (W.D. Tex. 2006).

107. Am. Sports Council v. Dep't of Educ., 850 F. Supp. 2d 288, 297 (D.D.C. 2012) (citing Hunt v. Wash. St. Apple Adver. Comm'n, 432 U.S. 333, 342 (1977)).

injury to third parties, such as employees, officers, owners, or shareholders."[108] Further, an organization-plaintiff "must allege that its 'activities have been impeded[,] not just that its mission has been compromised.'"[109] Essentially, an organization can only establish standing "based on cognizable injury to itself."[110] To summarize these organizational standing principles into one test, it can be said that an entity must show that it experienced a tangible injury to its interests as a corporation, which obstructed its ability to carryout its undertakings (Organization Test).

Factually, it is difficult to imagine a Title IX-based situation that would result in the type of concrete harm to an entity that is necessary to successfully assert the Organization Test. While not the result of a sex discrimination claim, *Lujan v. Defenders of Wildlife* provides important language from the Supreme Court about the requisite proximity of the injury to the organization.[111] In *Lujan*, the Defenders of Wildlife organization attempted to bring an action challenging a federal administrative regulation, citing the potential injury to wildlife as a nexus by which they had standing.[112] The Court concluded the nexus theory was "beyond all reason," going on to say, "Standing is not 'an ingenuous academic exercise in the conceivable,' but as we have said requires . . . a factual showing of perceptible harm."[113] In order to establish standing under this standard, an organization claiming a Title IX violation needs to show that said violation created a concrete injury to the entity, rather than simply establishing a close nexus between the harm and the interests the organization seeks to protect.

Nationally, while issues of associational and organizational standing have seemingly been evenly implemented for years, as of 2012, a circuit split exists and confusion abounds regarding these types of standing in Title IX cases; this is due to the cases *Equity in Athletics, Inc. v. Department of Education*[114] and *American Sports Council v. United States Department of Education*.[115]

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108. Garrett, *supra* note 77, at 139 (quoting Sierra Club v. Morton, 405 U.S. 727, 739 (1972)).

109. *Am. Sports Council*, 850 F. Supp. 2d at 299 (citing Abigail Alliance for Better Access v. Eschenbach, 469 F.3d 129, 133 (D.C. Cir. 1996).

110. *Id.* at 299.

111. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 565–66 (1992).

112. *See id.*

113. *Id.* at 566 (citing U. S. v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669, 688 (1973)).

114. 639 F.3d 91 (4th Cir. 2011).

115. 850 F. Supp. 2d 288 (D.D.C. 2012).

E. Associational Standing and the Current Circuit Split

1. *Equity in Athletics, Inc. v. Department of Education*

Equity in Athletics, Inc. v. Department of Education, originating in the Fourth Circuit, is the result of a non-profit group suing the DOE and James Madison University for violations of Title IX.[116] These actions stemmed from James Madison making the decision to cut seven men's and three women's athletic teams in order to stay in compliance with the proportionality prong of the Three-Part Test.[117] After learning of James Madison's intent to disband the teams, opponents of the decision incorporated Equity in Athletics, Inc. (EIA) in order to challenge the proposed cuts.[118] EIA promptly filed a motion with the court for a preliminary injunction in order to prevent James Madison from cutting the teams.[119] The defendants, James Madison and the DOE, rebutted this action by swiftly filing a motion to dismiss, which was granted by the trial court.[120] The district court reviewed the motion to dismiss de novo.[121]

Both the DOE and James Madison disputed EIA's standing to bring the case, but for varying reasons.[122] The DOE contended that the underlying injury the corporation complained of could only be redressed by the university, and not through any action on the DOE's own part.[123] James Madison took issue with the fact that the incorporation did not include any female athletes on existing teams at the university, thus nullifying EIA's right to dispute scholarship allocation.[124] The court in *Equity in Athletics* seemingly made quick work of establishing EIA's standing to bring a claim, finding that the entity had organizational standing.[125] Unfortunately, the aftermath of the decision is not quite so cut and dry due to the fact that the court actually used the Association Test under the organizational standing moniker in order to establish standing.[126]

According to the court in *Equity in Athletics*, for the EIA to secure organizational standing, the entity must satisfy the three prongs of the Associational

116. *See Equity in Athletics, Inc.*, 639 F.3d 91.
117. *Id.* at 97.
118. *Id.* at 98.
119. *Id.*
120. *Id.*
121. *Id.*
122. Equity in Athletics, Inc. v. Dep't of Educ., 639 F.3d 91, 98 (4th Cir. 2011).
123. *Id.*
124. *Id.*
125. *Id.* at 99.
126. *Id.*

Test.[127] Further, in order for the individual members of the organization to fulfill the first of the three Associational Test requirements, and therefore establish individual standing, the court found that they had to prove the elements of Article III standing, namely that "(1) they suffered an actual or threatened injury that is concrete, particularized, and not conjectural; (2) the injury is fairly traceable to the challenged conduct; and (3) the injury is likely to be redressed by a favorable decision."[128]

In this instance, despite the organizational terminology used, the court actually held that EIA had associational standing to bring claims against the DOE and James Madison.[129] First, the court stated that the individual members had standing to sue on their own, EIA sought to protect interests directly related to its purpose, and the suit did not require the participation of individual members, thus establishing associational standing.[130] Second, the court found that EIA's members had adequately shown the elements of injury, causation, and redressability as a result of James Madison and the DOE's actions, resulting in Article III standing.[131] This outcome creates questions as to precedent regarding organizational and associational standing due to the incorrect standard the court used to establish EIA's organizational standing. Further, because the case stems from a factual situation that many courts face, it does not match up with the resulting holdings in other circuits nationally.

2. *American Sports Council v. United States Department of Education*

In *American Sports Council v. United States Department of Education*, decided in the District Court for the District of Columbia, the plaintiff—American Sports Council (ASC)—is described as a "'coalition of coaches, athletes, former-athletes, parents, and fans' organized as a nonprofit."[132] ASC filed its claim against the DOE seeking, among other things, injunctive relief in order to prevent the DOE's use of the Three-Part Test at the high school level.[133] ASC purported that the implementation of the test at that level would result in lost athletic and coaching opportunities for student-athletes and coaches.[134] This

127. *Id.* (stating "(1) that its members would have standing to sue as individuals; (2) that the interests it seeks to protect are germane to the organization's purpose; and (3) that the suit does not require the participation of individual members.") (citation omitted).

128. Equity in Athletics, Inc. v. Dep't of Educ., 639 F.3d 91, 99 (4th Cir. 2011).

129. *Id.* at 100.

130. *Id.* at 99.

131. *Id.* at 99–100.

132. 850 F. Supp. 2d 288, 291 (D.D.C. 2012).

133. *Id.*

134. *Id.* at 298.

claim was not ASC's first against the DOE; the non-profit previously brought claims that were all dismissed for varying reasons.[135] The defendant quickly moved to have the case dismissed, claiming that ASC lacked subject matter jurisdiction to bring the claim as a result of a lack of standing.[136]

Arguing against the DOE's contention that ASC did not have proper standing, the non-profit leaned on both the organizational and associational standing theories.[137] In reference to organizational standing, ASC claimed that the "defendants' actions caused injury to the organization itself, and that [the] injury is redressable by a favorable decision from [the] Court."[138] Unlike in *Equity in Athletics*, this court correctly stated the Organizational Test. Elaborating on the organizational standing claim, ASC purported that the DOE's refusal to retract the applicability of the Three-Part Test in high schools athletics "frustrates its organizational mission . . . of 'preserving and promoting opportunities for students to participate in organized athletics at the collegiate and high school levels.'"[139] The court recognized that it is possible for an organization to have standing based on cognizable injury to the entity; however, it found that this claim lacked merit due to the absence of causation and redressability.[140]

Turning its attention to associational standing, the ASC claimed it had standing to bring the lawsuit "as the representative of 'coaches, athletes, former-athletes, parents, and fans' affected by the application of the Three-Part Test."[141] Looking to the elements of the Association Test, the court found that ASC had failed to establish that any one of the entities it claimed to represent would have had standing to bring the claim on its own.[142] Additionally, the court pointed out that it had declined to find associational standing in the Title

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135. *Id.* at 291.

136. *Id.* at 292.

137. *Id.* at 297–300.

138. Am. Sports Council v. U.S. Dep't of Educ., 850 F. Supp. 2d 288, 299 (D.D.C. 2012).

139. *Id.*

140. *Id.* Elaborating on the issue, the court reasoned,

> To claim organizational standing, plaintiff must allege that its "activities have been impeded[,]" not just that its "mission has been compromised." Thus, the allegation that defendants' actions impede plaintiff's other activities by necessitating diversion of resources to combat the campaigns of "activist groups" to "apply the Three-Part Test to high school Athletics" becomes central to plaintiff's claim. There can be no organizational standing where plaintiff cannot "show 'actual or threatened injury in fact that is fairly traceable to the alleged illegal action and likely to be redressed by a favorable court decision.'"

Id. (citations omitted).

141. *Id.* at 297.

142. *Id.* at 298–99.

IX context previously, pointing to its decision in *NWCA*.[143]

Ultimately, the court found that ASC lacked numerous requisite traits to bring a claim in the federal court.[144] Summarizing its finding, the court stated in its conclusion that ASC was not to be granted standing simply by virtue of the fact that it suffered procedural injury as a result of the DOE's denial of its original petition.[145] The court ensured its opinion would be clear to all when it further opined,

> [t]he claim that activist groups filed complaints "[p]ursuant to the Department's failure to clarify that the Three-Part Test does not apply to high school athletics" . . . is no more than "mere 'unadorned speculation' as to the existence of a relationship between the challenged government action and the third-party conduct [and] 'will not suffice to invoke the federal judicial power.'"[146]

Based on this strong wording by the members of the District of Columbia's judiciary, there is a divide on the issue of associational standing (termed organizational standing in *Equity in Athletics*) between it and the judiciary in the Fourth Circuit. Specifically, the circuits are at odds in regards to the threshold for showing that a defendant's actions caused harm or threatened harm to the members of an organization (i.e. that the harm was traceable).[147]

IV. PREDICTING THE APPLICATION OF THIRD-PARTY STANDING TO PUBLIC INTEREST GROUPS

The contrary holdings in *American Sports Council* and *Equity in Athletics* raise questions as to how courts should address issues of associational standing with regard to third-party Title IX claims. The proper threshold for proving injury as a result of the challenged conduct in unknown due to the circuit split.[148] It is quite possible that the circuits will remain split until such point that the United States Supreme Court accepts a case dealing with the issue; however, the Supreme Court accepting such a case is not a guarantee. At first blush, the outcome of *American Sports Council* seems to overlook the important detail that

143. *Id.*

144. Am. Sports Council v. U.S. Dep't of Educ., 850 F. Supp. 2d 288, 300 (D.D.C. 2012).

145. *Id.*

146. *Id.*

147. *See Am. Sports Council*, 850 F. Supp. 2d at 298; *see also Equity in Athletics, Inc.*, 639 F.3d 91.

148. *See Am. Sports Council*, 850 F. Supp. 2d at 298; *see also Equity in Athletics, Inc.*, 639 F.3d 91.

"'standing in no way depends on the merits of the plaintiff's contention,'" instead falling into the trap that appears when a claim seems to hold no merit.[149]

As a result of the holdings in *American Sports Council*, parties aggrieved by Title IX or other regulations would be forced to take up the issue with the courts individually, rather than filing the claim jointly as a non-profit group or other similarly situated entity. This would potentially eliminate courts being flooded by fledgling public interest groups looking for any and all opportunities to have their opinions heard. With our nation's vastly overcrowded judicial system, the idea of eliminating somewhat frivolous claims is, admittedly, appealing. However, continuing with such a system seems contrary to citizens' right to standing as afforded by the United States Constitution and other pertinent regulations. For this reason, the analysis provided in *Equity in Athletics* seems a better tool with which to predict future standing issues, as it is more in keeping with the litany of holdings that came before it.

Under the scope of *Equity in Athletics*, it seems unlikely that a public interest group such as Gender Justice could bring a successful claim against the University of Iowa or other schools similarly situated based upon associational standing. As noted in the previous cases, in order to bring a claim on behalf of its members, Gender Justice would have to show that the individual members (1) suffered actual or threatened harm; (2) that the harm was traceable to the challenged conduct; and (3) that the harm is likely to be redressed by a favorable ruling.[150] It appears probable that Gender Justice would face a substantial challenge in trying to prove all three elements.

Seemingly, Gender Justice's members do not include football players, coaches, or assistants who have come in contact with the pink locker room at the University of Iowa or elsewhere. In the cases previously discussed, each plaintiff was either a non-profit group composed of injured parties or a non-profit group representing parties that had been injured by a Title IX issue.[151] Here, the members seem to postulate that the pink-hued walls somehow adversely affect the desire of females at the University of Iowa to participate in athletics, thus creating an ability for the University to field larger male squads.[152] Even if that were the case, it would be an uphill battle for the group to find potential female athletes, coaches, and the like who feel this way, which is necessary to establish associational standing.[153] Should Gender Justice locate

149. Puckett, *supra* note 69, at 275.

150. *Equity in Athletics, Inc.*, 639 F.3d at 99.

151. *See id.*; *see, e.g.*, *Am. Sports Council*, 850 F. Supp. 2d 288; Nat'l Wrestling Coaches Ass'n v. Dep't of Educ., 366 F.3d 930 (U.S. App. D.C. 2004).

152. *See* Buzuvis, *supra* note 13, at 47.

153. *Equity in Athletics, Inc.*, 639 F.3d at 99.

a group of females at the University of Iowa who are willing to say that their desire to participate has been adversely affected by the visiting football locker rooms, the group would still have to show that the injury was specifically traceable to the color of the walls in a room the females have never entered. Further, the group would need to show that, by repainting the locker room walls a more conventional color, the assembled group of females would then be more motivated to participate in athletics at the school.

Based on these analyses, the most effective way for Gender Justice—and all others concerned with the implications raised by allowing the continuance of pink locker rooms—to impart change may simply be to continue raising awareness regarding what they deem to be a disturbing issue. Until the time that they can form an organization dedicated to the cause and that includes members directly injured by the issue, a day in court seems to be a non-option for the group.

V. CONCLUSION

The controversy surrounding the concept of pink shaming in men's locker rooms has maintained traction in the media since Professor Buzuvis initially raised the issue in 2005.[154] With the continued persistence of Gender Justice, it is not a topic that promises to disappear any time soon. However, threatening schools with potential legal claims may not be as straight forward as the public interest group makes it seem. This Comment does not attempt to analyze the existence—or lack thereof—of Title IX liability for schools such as the University of Iowa that choose to maintain examples of pink shaming in their athletic facilities. However, before the courts can examine the potential existence of a Title IX issue, a plaintiff must first establish the requisite standing.[155] The ability for Gender Justice to establish standing to bring a Title IX claim is questionable.

Despite the confusing message set forth by the circuit split within the courts, it seems clear that, in order to bring a claim based on associational standing, a party must be able to show that its members have been directly harmed by the actions of another party, that the harm is traceable to the conduct that is being challenged, and that the harm will be remedied by a sympathetic court ruling.[156] Based on these requirements, it does not seem as though a non-profit group such as Gender Justice has the means of bringing suit against the University of Iowa or other academic institutions that choose paint their locker rooms a controversial color.[157] Until such time as an individual player or coach that has been

154. *See* Bierman, *supra* note 1; Haney, *supra* note 1; Richmond, *supra* note 5.

155. Hassan v. Iowa, No. 4–11–CV–00574, 2012 U.S. Dist. LEXIS 188213, *3–4 (S.D. Iowa 2012).

156. *Equity in Athletics, Inc.*, 639 F.3d at 99.

157. *See* discussion *supra* Part IV.

directly affected by the color scheme at Kinnick Stadium comes forward with a claim, the University of Iowa may maintain the rosy disposition imparted upon the locker room by Coach Fry.