national partnership for women & families
Because actions speak louder than words.

June 30, 2004

The Honorable Orrin Hatch, Chair
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Patrick Leahy, Ranking Member
Senate Judiciary Committee
152 Dirksen Senate Office Building
Washington, DC 20510

Re: Nomination of Thomas Griffith to the U.S. Court of Appeals for the District of Columbia

Dear Senators:

The National Partnership for Women & Families (National Partnership) is writing in strong opposition to the nomination of Thomas Griffith to the U.S. Court of Appeals for the District of Columbia. The National Partnership is a nonprofit, nonpartisan organization that uses public education and advocacy to promote fairness in the workplace, quality health care, and policies that help women and men meet the dual demands of work and family. We have a long history of advocacy in support of a fair and balanced judiciary that will administer the law consistent with fundamental principles of equality and justice for all. We are deeply troubled by Mr. Griffith's open hostility towards important enforcement components of Title IX of the Education Amendments of 1972,[1] the groundbreaking law that has been instrumental in expanding opportunities for women in education. His disregard for legal precedent related to Title IX, among other things, would deny opportunities for girls and women to play sports, to obtain educational scholarships, and to benefit from athletic programs that are at the heart of Title IX's mandate. Furthermore, his efforts to curtail the enforcement mechanisms used to ensure compliance with Title IX raise serious questions about whether he is an appropriate candidate for lifetime appointment to what is often considered the nation's second most powerful court. We strongly urge the Senate Judiciary Committee to reject his nomination.

I. *Mr. Griffith's Title IX Record Demonstrates a Disregard for Legal Precedent.*

Mr. Griffith served as a member of the Opportunity in Athletics Commission (Commission), a 15- member advisory body charged with examining Title IX and "ways to strengthen enforcement, expand opportunities and ensure fairness for all college and interscholastic athletes."[2] Although inequality in

[1] 86 STAT. 373 (1972). Title IX bars sex discrimination in education programs or activities that receive federal funding, including interscholastic athletic programs.
[2] Press Release, U.S. Department of Education, "Commission on Opportunity in Athletics Co-Chairs Issue Statement About Title IX Commission," (Jan. 29, 2003), *at* http://www.ed.gov/news/pressreleases/2003/01/01292003.html.

scholastic athletics still exists,[3] Title IX has been an effective tool in ensuring gender equity in many educational settings. Since Title IX was enacted in 1972, women in college athletics have increased from 30,000 to 150,000, and girls in high school athletics have grown from 294,000 to 3 million.[4] These accomplishments are due, in part, to the use of a flexible three-prong test to achieve compliance with Title IX. This test requires schools to either: 1) provide athletic opportunities to male and female students in proportion to their overall enrollment at the institution by demonstrating that athletic opportunities for women and men are "substantially proportionate" to school enrollment; 2) demonstrate a history of continually expanding athletic opportunities for the underrepresented sex; or 3) demonstrate that the available opportunities meet the interests and abilities of the underrepresented sex.[5]

As a member of the Commission, Mr. Griffith presented the most extreme and controversial proposal when he suggested completely eliminating the first prong of the three-prong test. His proposal would severely limit the scope of Title IX, a law that has been instrumental in opening up tremendous new opportunities for girls and women in athletics. Even though the current regulations provide schools with the flexibility to choose which prong to apply, Title IX's first prong has been described by many as "the only safe harbor" because its proportionality component gives schools concrete standards to measure progress and compliance with the law. [6] Under the first prong, a school can comply with Title IX if it offers programs or opportunities that are "substantially proportionate" to each gender's representation in that school's student body.[7] Mr. Griffith argued, however, that the proportionality prong of the test is unreasonable, inconsistent with Title IX, and a constitutional violation—even though eight Circuit Courts upheld the test as a valid way to comply with Title IX.[8] His proposal was solidly defeated in an 11-4 vote by the Commission.

Mr. Griffith's insistence on pushing for the elimination of Title IX's first prong clearly demonstrates his unwillingness to follow legal precedent. After being told that eight Circuit Courts had upheld the Title IX test consistent with the Department of Education's policy interpretations, Mr. Griffith continued to urge eliminating the first prong, stating matter-of-factly that "the courts got it wrong."[9] If his position had been adopted, it would have seriously reduced schools' flexibility to ensure equal opportunity in educational settings, and disturbed regulatory and judicial policies that have long-governed Title IX implementation. His proposal, thus, raises serious concerns about his ability or inclination to apply the law in a fair and even-handed manner.

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[3] For example, women outnumbered men 7.4 million to 5.8 million in undergraduate enrollment in the Fall of 2000, but account for only 42% of college athletes. Rafael Lorente, *Keep Equity Law For Women's Sports Mostly Intact, Panel Urges*, Sun-Sentinel (Fort Lauderdale, FL), Jan. 31, 2003 at 1A.

[4] *Supra*, Note 3 at 1A.

[5] A Policy Interpretation: Title IX and Intercollegiate Athletics, 40 Fed. Reg. 239 (1979).

[6] Matt Trowbridge,, *Title IX Stands Strong*, ROCKFORD REGISTER STAR, Jan. 31, 2003. Letter from Norma Cantu, Assistant Secretary for Civil Rights, U.S. Department of Education, *Transmittal Letter: Clarification of Intercollegiate Athletics Policy Guidelines: The Three Part Test* (Jan. 16, 1996) *at* http://www.ed.gov/about/offices/list/ocr/docs/clarific.html.

[7] *Supra*, Note 5.

[8] *See Miami University Wrestling Club v. Miami University*, 302 F.3d 608 (6th Cir. 2002); *Chalenor v. University of North Dakota*, 291 F. 2d 1042 (8th Cir. 2002); *Pederson v. Louisiana State University*, 213 F.3d 858 (5th Cir. 2000); *Neal v. Board of Trustees of The California State Universities*, 198 F.3d 763 (9th Cir. 1999); *Boulhanis v. Board of Regents*, 198 F.3d 633 (7th Cir. 1999), cert. denied, 530 U.S. 1284 (2000); *Cohen v. Brown Univ.*, 991 F.2d 888 (1st Cir. 1993) (Cohen I), and Cohen v. Brown Univ., 101 F.3d 155 (1st Cir. 1996) (Cohen II) cert. denied, 520 U.S. 1186 (1997); *Horner v. Kentucky High School Athletic Ass'n*, 43 F.3d 265 (6th Cir. 1994); *Kelley v. Board of Trustees, University of Illinois*, 35 F.3d 265, 270 (7th Cir. 1994), cert. denied, 510 U.S. 1004 (1993); *Williams v. School District of Bethlehem*, 998 F.2d 168 (3d Cir. 1993).

[9] Transcript of January 30, 2003 Town Hall Meeting of the Commission on Opportunity in Athletics.