
**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

VERONICA OLLIER; NAUDIA RANGEL, BY HER NEXT FRIENDS STEVE AND CARMEN RANGEL; MARITZA RANGEL, BY HER NEXT FRIENDS STEVE AND CARMEN RANGEL; AMANDA HERNANDEZ, BY HER NEXT FRIEND ARMANDO HERNANDEZ; ARIANNA HERNANDEZ, BY HER NEXT FRIEND ARMANDO HERNANDEZ, INDIVIDUALLY AND ON BEHALF OF ALL THOSE SIMILARLY SITUATED,

Plaintiffs-Appellees,

v.

SWEETWATER UNION HIGH SCHOOL DISTRICT; ARLIE N. RICASA; PEARL QUINONES; JIM CARTMILL; JAMIE MERCADO; GREG R. SANDOVAL; JESUS M. GANDARA; EARL WEINS; RUSSELL MOORE, IN THEIR OFFICIAL CAPACITIES,

Defendants-Appellants.

On Appeal from the United States District Court for the Southern District of California, Civil Case No. 07-CV-00714 (Hon. M. James Lorenz)

**BRIEF OF AMICI CURIAE NATIONAL WOMEN'S LAW CENTER ET AL.
IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE**

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CORPORATE DISCLOSURE STATEMENT

Undersigned counsel for amicus curiae American Civil Liberties Union of San Diego & Imperial Counties states that it is a California non-profit corporation with no parent, subsidiary, or stock held by any person or entity, including any publicly held company.

Undersigned counsel for amicus curiae National Association of Social Workers states that it is a Delaware non-profit corporation with no parent, subsidiary, or stock held by any person or entity, including any publicly held company.

Undersigned counsel for amicus curiae National Association of Women Lawyers states that it is a Delaware non-profit corporation and further states that there is no parent corporation nor any publicly held corporation owning 10% or more of its stock.

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<i>Burlington Northern & Santa Fe Railway Co. v. White</i> , 548 U.S. 53 (2006).....	24, 26, 29
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<i>Cohen v. Brown University</i> , 991 F.2d 888 (1st Cir. 1993)	8
<i>Cruz ex rel. Cruz v. Alhambra School District</i> , 601 F. Supp. 2d 1183 (C.D. Cal. 2009).....	3
<i>Davis v. Monroe County Board of Education</i> , 526 U.S. 629 (1999).....	28, 29
<i>Emeldi v. University of Oregon</i> , 698 F.3d 715 (9th Cir. 2012), <i>cert. denied</i> , 2013 WL 182746 (U.S. Apr. 22, 2013).....	21, 22, 25, 26, 28
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<i>Garcia v. Lawn</i> , 805 F.2d 1400 (9th Cir. 1986)	25
<i>Guckenberger v. Boston University</i> , 957 F. Supp. 306 (D. Mass. 1997)	26
<i>Horner v. Kentucky High School Athletic Ass’n</i> , 43 F.3d 265 (6th Cir. 1994)	10
<i>Jackson v. Birmingham Board of Education</i> , 544 U.S. 167 (2005)	passim

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<i>Lowery v. Euverard</i> , 497 F.3d 584 (6th Cir. 2007)	23
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§ 106.41(c).....	5
44 Fed. Reg. 71,413 (Dec. 11, 1979).....	<i>passim</i>
<i>Sex Discrimination Regulations: Hearings Before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor, 94th Cong. (1975)</i>	5
<i>Intercollegiate Sports: Title IX Impact on Women’s Participation in Intercollegiate Athletics and Gender Equity: Hearing Before the Subcomm. on Commerce, Consumer Protection, & Competitiveness of the H. Comm. on Energy & Commerce, 103d Cong. (1993)</i>	8, 9, 12, 15, 19
<i>Title IX: Building on 30 Years of Progress: Hearing Before the S. Comm. on Health, Education, Labor & Pensions, 107th Cong. (2002)</i>	24
118 Cong. Rec. 5804 (1972)	4
Fed. R. App. P. 29(c)(5).....	1
Fed. R. Civ. P. 23(b)(2).....	28

OTHER AUTHORITIES

Ahlberg, Matthew, et al., <i>Developing Autonomy Supportive Coaching Behaviors: An Action Research Approach to Coach Development</i> , 2 Int. J. Coaching Sci. 3 (July 2008)	23, 24
Brake, Deborah L., <i>Getting in the Game: Title IX and the Women’s Sports Revolution</i> (2010)	7
Buzuvis, Erin E., <i>Sidelined: Title IX Retaliation Cases and Women’s Leadership in College Athletics</i> , 17 Duke J. Gender L. & Pol’y 1 (2010).....	23

California Interscholastic Federation, <i>Field Hockey</i> , available at http://www.cifstate.org/index.php/other-approved-sports/ field-hockey (last visited May 22, 2013).....	21
Conte, Alba, & Herbert B. Newberg, <i>Newberg on Class Actions</i> (4th ed. 2002).....	28
Furr, Kelly Dixon, <i>How Well Are the Nation’s Children Protected from Peer Harassment at School?: Title IX Liability in the Wake of Davis v. Monroe County Board of Education</i> , 78 N.C. L. Rev. 1573 (2000).....	23
Letter from Margaret Spellings, Secretary of Education, to Steven Geoffrey Gieseler, Pacific Legal Foundation (Mar. 27, 2008), http://www2.ed.gov/about/offices/list/ocr/letters/title-ix-2008- 0327.pdf	11
National Federation of State High School Associations, <i>2011-12 High School Athletics Participation Survey</i> (2012), available at http://www.nfhs.org/WorkArea/linkit.aspx?LinkIdentifier=id&Ite mID=7496&libID=7517	2
National Women’s Law Center, <i>The Battle for Gender Equity in Athletics in Elementary and Secondary Schools</i> (2012), available at http://www.nwlc.org/resource/battle-gender-equity-athletics- elementary-and-secondary-schools	3
National Women’s Law Center, <i>Center Files Title IX Complaints Against 12 School Districts</i> , available at http://www.nwlc.org/press- release/center-files-title-ix-complaints-against-12-school-districts (last visited May 22, 2013)	2
National Women’s Law Center, <i>OCR Resolves Five NWLC Title IX Complaints and Finds District-Wide Underrepresentation of Girls in Sports</i> , available at http://www.nwlc.org/success/ocr-resolves- five-nwlc-title-ix-complaints-and-finds-district-wide- underrepresentation-girls (last visited May 22, 2013).....	2
Office for Civil Rights, <i>Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test</i> (1996), available at http://www2.ed.gov/about/offices/list/ocr/docs/ clarific.html	<i>passim</i>

Office for Civil Rights, <i>Intercollegiate Athletics Policy Clarification: The Three Part Test—Part Three</i> (2010), available at http://www2.ed.gov/about/offices/list/ocr/letters/colleague-20100420.html	7, 10, 19
Sabo, Don, & Phil Veliz, Women’s Sports Foundation, <i>Go Out and Play: Youth Sports in America</i> (2008), available at http://www.womenssportsfoundation.org/sitecore/content/home/research/articles-and-reports/mental-and-physical-health/go-out-and-play.aspx	2
Samuels, Jocelyn, & Kristen Galles, <i>In Defense of Title IX: Why Current Policies Are Required to Ensure Equality of Opportunity</i> , 14 Marq. Sports L. Rev. 11 (2003)	8
Vealy, Robin S., et al., <i>Influence of Perceived Coaching Behaviors on Burnout and Competitive Anxiety in Female College Athletes</i> , 10 J. Applied Sport Psychol. 297 (1998)	23
Wright, Charles Alan, et al., <i>Federal Practice & Procedure</i> (3d ed. 2005)	28

INTERESTS OF AMICI CURIAE

All parties have consented to the filing of this brief by amici curiae National Women’s Law Center (“NWLC”), et al.¹ NWLC is a non-profit legal advocacy organization dedicated to the advancement and protection of women’s rights and the corresponding elimination of sex discrimination from all facets of American life. Since 1972, NWLC has worked to secure equal opportunities in education for girls and women through the full enforcement of Title IX in all arenas, including interscholastic and collegiate athletics. NWLC is joined in filing this brief by twenty organizations that share a longstanding commitment to civil rights and equality in education for all students. The individual organizations are described in the attached Addendum.

INTRODUCTION

Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681, *et seq.*, bars sex discrimination in educational programs that receive federal funding. Since its enactment, Title IX has played a vital role in breaking down barriers for girls to participate in interscholastic sports. By prohibiting sex discrimination in

¹ Pursuant to Federal Rule of Appellate Procedure 29(c)(5), amici state that amici and their counsel authored this brief in whole, no counsel for a party authored this brief in any respect, and no person or entity—other than amici, their members, and their counsel—made a monetary contribution to the preparation or submission of this brief.

school athletics programs, Title IX has enabled millions of girls across the country to participate in and reap the many benefits of playing sports.

Despite these gains, there is still a long road ahead before the equality envisioned by Title IX becomes a reality. Over forty years after Title IX's enactment, many high schools still fail to provide equal athletic opportunities for female students. In fact, girls' opportunities are still not at the level of boys' opportunities in 1972 and schools are still providing about 1.3 million fewer chances for girls to play high school sports.² Girls of color, in particular, play sports at far lower rates than Caucasian girls and are much more likely than their male counterparts to be non-athletes.³ Moreover, female athletes often face inequitable treatment, including being relegated to inferior facilities, assigned to

² National Federation of State High School Associations, *2011-12 High School Athletics Participation Survey 2* (2012), available at <http://www.nfhs.org/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=7496&libID=7517>; see, e.g., NWLC, *OCR Resolves Five NWLC Title IX Complaints and Finds District-Wide Underrepresentation of Girls in Sports*, available at <http://www.nwlc.org/success/ocr-resolves-five-nwlc-title-ix-complaints-and-finds-district-wide-underrepresentation-girls> (last visited May 22, 2013) (describing resolution of five out of twelve administrative complaints filed against school districts nationwide for failure to provide equal participation opportunities); see also NWLC, *Center Files Title IX Complaints Against 12 School Districts*, available at <http://www.nwlc.org/press-release/center-files-title-ix-complaints-against-12-school-districts> (last visited May 22, 2013).

³ Don Sabo & Phil Veliz, Women's Sports Foundation, *Go Out and Play: Youth Sports in America* 5, 15-16 (2008), available at <http://www.womenssportsfoundation.org/sitecore/content/home/research/articles-and-reports/mental-and-physical-health/go-out-and-play.aspx> (click "Download Now" link to PDF).

disadvantageous times for practicing and competing, and allocated less funding. *See, e.g., Parker v. Franklin County Cmty. Sch. Corp.*, 667 F.3d 910, 923-924 (7th Cir. 2012) (“disparate scheduling creates a cyclical effect that stifles community support, prevents the development of a fan base, and discourages females from participating in a traditionally male-dominated sport”); *Cruz ex rel. Cruz v. Alhambra Sch. Dist.*, 601 F. Supp. 2d 1183, 1187-1188 (C.D. Cal. 2009) (describing settlement of Title IX lawsuit to address unequal fields, athletic facilities, practice and game times, funding, publicity, and coaching).⁴ Enforcement of Title IX is essential to ensure that schools provide young women with genuine and equal opportunities to participate in sports.

In this case, the district court properly held that Sweetwater violated Title IX by failing to provide equal participation opportunities for girls in athletics (ER1538), failing to provide existing female athletes with equal benefits and services (ER30), and retaliating against the plaintiff class of female athletes, who had engaged in protected activity (ER26-28). The district court correctly applied the law on all of these issues. This brief seeks to assist the Court by explaining two legal issues that are of particular importance to amici: the Department of

⁴ See also NWLC, *The Battle for Gender Equity in Athletics in Elementary and Secondary Schools* 1-2 (2012), available at <http://www.nwlc.org/resource/battle-gender-equity-athletics-elementary-and-secondary-schools> (click link to PDF).

Education’s three-part test regarding participation opportunities, to which this Court and others have long deferred as an appropriate interpretation of Title IX, and Title IX’s prohibition against retaliation.

ARGUMENT

I. THE DISTRICT COURT PROPERLY APPLIED TITLE IX’S THREE-PART PARTICIPATION TEST

A. Consistent With Congress’s Broad Remedial Goals, The Three-Part Participation Test Provides A Reasonable And Flexible Interpretation Of The Statute And The Regulation

Title IX’s prohibition against sex discrimination is of a broad and remedial nature. *See North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982); *Cannon v. University of Chi.*, 441 U.S. 677, 698 (1979). As the principal Senate sponsor, Senator Birch Bayh, explained, Title IX was intended to be “a strong and comprehensive measure [that would] provide women with solid legal protection from the persistent, pernicious discrimination which is serving to perpetuate second-class citizenship for American women.” 118 Cong. Rec. 5804 (1972). With respect to athletics, Title IX permits single-sex teams, and indeed most schools offer sex-segregated teams. *See Biediger v. Quinnipiac Univ.*, 691 F.3d 85, 98 (2d Cir. 2012) (“A choice to allocate specific athletic opportunities on the basis of sex will not violate Title IX provided that, in general, the participation opportunities afforded the two sexes are ‘equal.’”). As such, schools generally apportion a limited number of athletic opportunities between males and females.

In this unique context, Title IX simply ensures that the sex-based allocation of opportunities does not disadvantage students of either sex.

1. The 1979 Policy Interpretation

To further these goals, the Office for Civil Rights (“OCR”) of the U.S. Department of Education, and its predecessor the U.S. Department of Health, Education, and Welfare (“HEW”), promulgated regulations interpreting Title IX that require federally funded educational programs to “provide equal athletic opportunity for members of both sexes.” 34 C.F.R. § 106.41(c). In 1979, HEW published a policy interpretation of those regulations stating that schools seeking to provide equal athletic opportunity for both sexes must provide *both* (1) equal opportunities for male and female students to *participate* in athletics and (2) equal *treatment* of athletes of both sexes. 44 Fed. Reg. 71,413, 71,418 (Dec. 11, 1979) (“1979 Policy Interpretation”).

With respect to the participation requirement, Congress understood that making more athletic opportunities available to women would lead more women to express their athletic interests. *See, e.g., Sex Discrimination Regulations: Hearings Before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor*, 94th Cong. 21, 63 (1975) (remarks of Rep. Esch) (“If women have more encouragement to participate, more of them will participate.”); *see also Pederson v. Louisiana State Univ.*, 213 F.3d 858, 878 (5th Cir. 2000)

("[O]f course fewer women participate in sports, given the voluminous evidence that [the university] has discriminated against women in refusing to offer them comparable athletic opportunities to those it offers its male students."); *Neal v. Board of Trs. of Cal. State Univs.*, 198 F.3d 763, 768 (9th Cir. 1999) ("[A] central aspect of Title IX's purpose was to *encourage* women to participate in sports: The increased number of roster spots and scholarships reserved for women would gradually increase demand among women for those roster spots and scholarships."). "The [1979] Policy Interpretation recognizes that women's lower rate of participation in athletics reflects women's historical lack of opportunities to participate in sports." *Cohen v. Brown Univ.*, 101 F.3d 155, 179 (1st Cir. 1996) ("*Cohen II*").

2. The three-part participation test

The 1979 Policy Interpretation established a three-part test for assessing whether an institution provides equal participation opportunities for both male and female students—meaning that schools have “three safe harbors in defending against an effective accommodation claim.” *Biediger*, 691 F.3d at 93. In 1996, OCR provided additional guidance on the proper application of the three-part test. OCR, *Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test* (1996) (“1996 Clarification”), available at <http://www2.ed.gov/about/offices/list/ocr/docs/clarific.html>; see *Mansourian v. Regents of Univ. of Cal.*, 602

F.3d 957, 965 (9th Cir. 2010) (OCR’s 1996 Clarification “further elaborated” its 1979 Policy Interpretation). The 1996 Clarification “respond[ed] to requests for specific guidance about the existing standards that have guided the enforcement of Title IX.” 1996 Clarification. In 2010, OCR provided additional information to evaluate “compliance with Part Three and the nondiscriminatory implementation of assessments of students’ athletic interests and abilities.” See OCR, *Intercollegiate Athletics Policy Clarification: The Three Part Test—Part Three 4* (2010) (“2010 Clarification”), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-20100420.html> (click link to PDF).

The three-part participation test, which Sweetwater acknowledges (at 16-17) governs plaintiffs’ participation claim here, reflects that “Title IX is a dynamic statute, not a static one. It envisions continuing progress toward the goal of equal opportunity for all athletes and recognizes that, where society has conditioned women to expect less than their fair share of the athletic opportunities, women’s interest in participating in sports will not rise to a par with men’s overnight.” *Neal*, 198 F.3d at 769. Consistent with the goals of Title IX, the test “is geared toward developing and promoting the athletic interests and abilities of women,” who are still unfortunately the underrepresented sex in the vast majority of athletic programs. Deborah L. Brake, *Getting in the Game: Title IX and the Women’s Sports Revolution* 70 (2010).

The first prong of the three-part test allows a school to comply with the equal participation opportunities requirement by showing that the percentage of athletes of the underrepresented sex mirrors, or is proportional to, the percentage of students of that sex (“the proportionality prong”). 1979 Policy Interpretation, 44 Fed. Reg. at 71,418. For example, proportionality would be demonstrated if a school provides girls with 50% of all participation opportunities where girls are 50% of all students.⁵ The proportionality prong, in particular, is a reflection of the unique and often sex-segregated nature of athletics programs. 34 C.F.R. § 106.41(b). Schools generally decide how many and which teams to provide for men and women, and in so doing they decide how many opportunities will be provided to each gender. Prong one of the three-part test merely requires schools to allocate these participation opportunities in a nondiscriminatory manner.⁶

⁵ Prong one is gender neutral: it favors neither male nor female athletes. See *Cohen v. Brown Univ.*, 991 F.2d 888, 900 n.17 (1st Cir. 1993). But because of the prevalence of sex discrimination against girls in interscholastic athletics, it is most often female athletes whose participation opportunities are disproportionate to their enrollment.

⁶ Reflecting the reality that discrimination is responsible for the lower numbers of females participating in sports, prong one defines equality as providing each of the sexes with a proportionately equal chance of participating in athletics. See 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, 15 (2003); see also *Intercollegiate Sports: Title IX Impact on Women’s Participation in Intercollegiate Athletics and Gender Equity: Hearing Before the Subcomm. on Commerce, Consumer Protection, & Competitiveness of the H. Comm. on Energy & Commerce* (“Title IX Impact”), 103d Cong. 2 (1993).

The second prong of the test allows a school to demonstrate compliance with the participation requirement by showing a history and continuing practice of program expansion for members of the underrepresented sex, even if equality of opportunities is not yet provided. 1979 Policy Interpretation, 44 Fed. Reg. at 71,418. Prong two is an atypically generous and flexible civil rights standard: it allows compliance with a nondiscrimination law by demonstrating “continuous progress toward the mandate of gender equality.” *Mansourian*, 602 F.3d at 973; see 1996 Clarification.

The third prong allows a school to satisfy the participation requirement by showing that its current program fully and effectively accommodates the underrepresented sex, even if the school is not providing opportunities to that sex in proportion to its representation in the student body and cannot show program expansion for that sex. See *Mansourian*, 602 F.3d at 965 (citing 1979 Policy Interpretation, 44 Fed. Reg. at 71,418).

3. Courts have unanimously deferred to OCR’s Title IX interpretations and applied them to interscholastic athletics

This Court, along with every circuit to have addressed the question, has held that OCR’s regulation, the 1979 Policy Interpretation, and the 1996 Clarification

(statement of Rep. Collins) (“Lower [women’s] participation rates are the result of discrimination and not an excuse for continued inequities.”); *id.* at 25 (responses to subcommittee questions by Donna A. Lopiano, Executive Director, Women’s Sports Foundation) (“Opportunity drives interest. ‘If you build it, they will come.’”).

are entitled to deference. *Neal*, 198 F.3d at 771; *see also Mansourian*, 602 F.3d at 965 n.9 (“We ... have held that both the Policy Interpretation and the [1996] Clarification are entitled to deference”).⁷ Because the 2010 Clarification is consistent with the 1996 Clarification and is a reasonable interpretation of Title IX and the agency’s own regulations, it too is entitled to deference. *See Martin v. Occupational Safety & Health Review Comm’n*, 499 U.S. 144, 149-150 (1991); *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837, 843-844 (1984).

In addition, every circuit to have considered Title IX’s application to high school athletics has held that OCR’s guidelines apply equally to interscholastic and intercollegiate athletics.⁸ There is accordingly no basis for Sweetwater’s suggestion (at 20) that secondary schools should be held to a lower standard for Title IX compliance. Indeed, OCR’s regulation expressly applies to “interscholastic ... athletics,” 34 C.F.R. § 106.41(a), and OCR has consistently

⁷ *See, e.g., Biediger*, 691 F.3d at 96-97; *Parker*, 667 F.3d at 918; *Miami Univ. Wrestling Club v. Miami Univ.*, 302 F.3d 608, 615 (6th Cir. 2002); *Chalenor v. University of N.D.*, 291 F.3d 1042, 1046-1047 (8th Cir. 2002); *Pederson*, 213 F.3d at 879; *Cohen II*, 101 F.3d at 173; *Horner v. Kentucky High Sch. Athletic Ass’n*, 43 F.3d 265, 273-275 (6th Cir. 1994); *Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824, 828 (10th Cir. 1993); *Williams v. School Dist. of Bethlehem*, 998 F.2d 168, 171 (3d Cir. 1993); *see also Equity in Athletics, Inc. v. DOE*, 675 F. Supp. 2d 660, 676 (W.D. Va. 2009), *aff’d*, 639 F.3d 91 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 1004 (2012); *National Wrestling Coaches Ass’n v. DOE*, 263 F. Supp. 2d 82, 95-96 (D.D.C. 2003), *aff’d*, 366 F.3d 930 (D.C. Cir. 2004).

⁸ *Parker*, 667 F.3d at 918; *McCormick ex rel. McCormick v. School Dist. of Mamaroneck*, 370 F.3d 275, 290-291 (2d Cir. 2004); *Horner*, 43 F.3d at 273-274; *Williams*, 998 F.2d at 171-172, 175-176.

recognized that the principles articulated in its policy interpretations apply to interscholastic athletic programs, *see* 1996 Clarification n.1 (noting that OCR policy interpretations “often will apply to elementary and secondary interscholastic athletic programs”); *see also* 1979 Policy Interpretation, 44 Fed. Reg. at 71,413 (same). In 2008, the Secretary of Education denied a petition that sought to make the three-part test inapplicable to high schools, and a court challenge to that denial was dismissed. *See* Letter from Margaret Spellings, Secretary of Education, to Steven Geoffrey Gieseler, Pacific Legal Foundation (Mar. 27, 2008), <http://www2.ed.gov/about/offices/list/ocr/letters/title-ix-2008-0327.pdf>; *American Sports Council v. DOE*, 850 F. Supp. 2d 288 (D.D.C. 2012).

B. Sweetwater Failed To Provide Equal Participation Opportunities For Female Students Under The Three-Part Test

The district court properly held that Sweetwater did not satisfy any prong of Title IX’s three-part participation test. While Sweetwater purports to apply this test (at 16-17, 22), its analysis of each prong evidences a fundamental misunderstanding of the test that not only conflicts with OCR’s guidance, but also undermines the very purpose of Title IX.

1. Sweetwater misinterprets OCR’s “substantially proportionate” requirement and does not satisfy prong one as properly understood

Prong one of the three-part test (whether participation is “substantially proportionate” to enrollment) recognizes that “[m]ale athletes ha[ve] been given an

enormous head start in the race against their female counterparts for athletic resources,” and “prompt[s] [educational institutions] to level the proverbial playing field” by increasing athletic opportunities for female students. *Neal*, 198 F.3d at 767. Accordingly, OCR instructs that prong one can only be satisfied when the “opportunities for male and female students are provided in numbers substantially proportionate *to their respective enrollments*.” 1979 Policy Interpretation, 44 Fed. Reg. at 71,418 (emphasis added). When opportunities are proportionate to enrollment, female students are encouraged to participate in sports because the availability of athletic opportunities is commensurate with the proportion of female students in the student population. *See Title IX Impact*, 103d Cong. 25 (statements of Donna A. Lopiano, Executive Director, Women’s Sports Foundation).

OCR has established a two-step analysis for evaluating substantial proportionality: (1) determine “the number of participation opportunities afforded to male and female athletes in the inter[scholastic] athletic program”; and (2) determine “whether participation opportunities are ‘substantially’ proportionate *to enrollment rates*.” 1996 Clarification (emphasis added). In other words, substantial proportionality is achieved when the percentage of athletic participants who are girls mirrors the percentage of students who are girls.

Although “substantial proportionality entails a fairly close relationship between athletic participation and ... enrollment” (*i.e.*, a small percentage

disparity), *Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824, 830 (10th Cir. 1993), OCR recognizes that in some circumstances it would be unreasonable to expect an institution to achieve exact proportionality. 1996 Clarification. Thus, substantial proportionality is not determined based on a specific percentage disparity. *Biediger*, 691 F.3d at 106; *Equity in Athletics, Inc. v. DOE*, 639 F.3d 91, 110 (4th Cir. 2011). Rather, OCR considers whether the number of athletic participation opportunities the school would have to add to close the percentage disparity—known as the “participation gap”—equates to enough participants to field a viable sports team. *See* 1996 Clarification; *see also Biediger*, 691 F.3d at 107. This is because the same percentage disparity in a school with a large athletics program and a school with a smaller athletics program will result in different participation gaps, and OCR appropriately recognizes that it is not reasonable to require a school to close the gap if it translates into only a very small number of students. This point is illustrated by the chart below, which is based directly on an example from the 1996 Clarification.

Institution	Total Athletes	Enrollment	Sports Participation	Percentage Disparity	Participation Gap	Substantially Proportionate?
A	600	52% women	47% women	5%	62 women	No
B	60	52% women	47% women	5%	6 women	Yes

See 1996 Clarification.

In the instant case, the district court’s application of prong one followed OCR’s guidance. After determining that the relevant disparity between participation and enrollment was 6.7 percentage points, the district court considered its significance by assessing whether the number of additional opportunities necessary to close this disparity would yield enough participants to field a viable team. *See* ER1532-1533. The court correctly found that “this particular disparity is not substantially proportionate because the 6.7% difference reflects 47 girls who would have played sports if athletic participation was proportional to female enrollment,” which is enough to form one or more viable teams. ER1533.⁹

Ignoring the longstanding Title IX policies and deference accorded them, and citing no authority, Sweetwater urges this Court (at 18-19) to adopt its brand-new-on-appeal prong one standard, requiring only a comparison of the percentage

⁹ Sweetwater’s argument (at 20) that the court failed to consider whether 47 girls had expressed interest “in any single non-offered sport” conflates prong one with prong three. Under prong one, the ability to field a viable team is used as a benchmark for determining the significance of the underlying percentage disparity. But it is prong three that assesses whether there is *sufficient interest and ability* to field a viable team. *See* 1996 Clarification. Similarly, Sweetwater’s emphasis (at 21) on whether it has increased the number of sports teams over the years impermissibly shifts the focus from prong one to prong two. Prong one focuses solely on the proportionality between participation and enrollment and does not consider the school’s history of program expansion. OCR’s test establishes three *separate* means for complying with the participation requirement of Title IX, not a list of factors that can be arbitrarily combined in an effort to demonstrate compliance.

of all girls who participate in sports (female athletes/all females) to the percentage of all boys who participate in sports. Contrary to the longstanding OCR standard that compares female participation to enrollment, however, Sweetwater's test does not measure equality of opportunity because it does not examine what share of the limited participation opportunities a school is actually providing to girls. Nor does Sweetwater attempt to explain how its proposed measure would work in practice or to provide any justification for its departure from the established OCR measure. Finally, Sweetwater cannot demonstrate proportionality even under its invented standard, which underestimates the percentage disparity here.

Thus, Sweetwater's proposal undermines Title IX's goal of increasing athletic participation opportunities for female students and is inconsistent with Title IX's requirement to provide equal participation opportunities. Indeed, contrary to the directives of Title IX, "use [of] participation percentages and not enrollment percentages to justify unequal treatment" would permit the opportunities available to female students to remain stagnant. *See Title IX Impact*, 103d Cong. 2 (statement of Rep. Collins). Sweetwater's attempt to create an entirely new and inscrutable participation standard should be rejected.

2. Sweetwater does not satisfy prong two because it lacks a "history and continuing practice of program expansion"

Sweetwater correctly recognizes (at 22) that prong two of the three-part test is also governed by the 1979 Policy Interpretation and the 1996 Clarification. This

prong involves an “examination of an institution’s good faith expansion of athletic opportunities through its response to developing interests of the underrepresented sex.” 1996 Clarification. Under prong two, the *entire* history of the athletic program must be examined to determine: (1) whether the “history ... of program expansion ... is demonstrably responsive to the developing interests and abilities of the underrepresented sex”; and (2) whether there is “a continuing (i.e., present) practice of program expansion as warranted by developing interests and abilities.” 1996 Clarification; *see also Mansourian*, 602 F.3d at 969 (“[W]e must ... focus on both the institution’s record of adding female participation opportunities and its current ‘plan of program expansion’” (internal quotation marks omitted)). An institution does not “satisf[y] part two where it established teams for the underrepresented sex only at the initiation of its program ... or where it merely promises to expand its program ... in the future.” 1996 Clarification. Thus, where *either* a history or continuing practice is lacking, prong two is not satisfied.

First, the history of program expansion is determined by assessing an institution’s: (1) “record of adding inter[scholastic] teams ... for the underrepresented sex,” (2) “record of increasing the numbers of participants in inter[scholastic] athletics who are members of the underrepresented sex,” and (3) “affirmative responses to requests by students or others for addition or elevation of sports.” 1996 Clarification; *see Mansourian*, 602 F.3d at 969. This

“analysis focuses primarily ... on increasing the number of women’s athletic opportunities rather than increasing the number of women’s teams,” *Mansourian*, 602 F.3d at 969, and it is not satisfied when there is a relative increase in the share of women’s opportunities resulting from a reduction in men’s opportunities, *Roberts*, 998 F.2d at 830.

Second, the continuing practice of program expansion is determined by analyzing an institution’s: (1) “‘non-discriminatory policy or procedure for requesting the addition of sports ... and the effective communication of the policy,’” and (2) “‘current implementation of a plan of program expansion that is responsive to developing interests and abilities.’” *Mansourian*, 602 F.3d at 971 (quoting 1996 Clarification). The 1996 Clarification clearly requires more than “promises to expand ... in the future,” and this part of the inquiry is not satisfied where the school has no current plans to continue the expansion.

Even under the lenient and incremental standard used to evaluate prong two, Sweetwater cannot show that it has increased athletic opportunities for female students. Sweetwater has failed to demonstrate a history of program expansion, and what little they have done can only be described as “at best, stagnant.” *Mansourian*, 602 F.3d at 971; see Appellants’ Br. 23-24. Sweetwater’s own evidence demonstrates that it has failed to make any significant increases either in the number of teams or the number of athletic opportunities available to girls over

a ten-year period. During the relevant time, the number of girls' teams remained constant year-to-year for the school years beginning in 1998, 1999, 2002, 2003, 2004, and 2005, and actually *decreased* for the school year beginning in 2006. *See* Appellants' Br. 23. Contrary to Sweetwater's assertion that it has shown a "steady increase in female participation" (at 25), the number of athletic opportunities for girls actually *decreased* during the relevant time period from 161 in the 2001-2002 school year to 149 in the 2007-2008 school year (ER1848). And Sweetwater has pointed to no evidence of a plan for adding athletic opportunities that can satisfy this inquiry. As the district court correctly determined, "when, as here, there is no steady increase in female participation, defendants are not entitled to show compliance with Title IX based on a history and continuing practice of program expansion." ER1534.

3. Sweetwater does not satisfy prong three because it has not "fully and effectively accommodated" the interests and abilities of female students

Under prong three, an institution can demonstrate compliance by showing "that the imbalance [under prong one] does not reflect discrimination [because] it can be demonstrated that, notwithstanding disproportionately low participation rates by the institution's students of the underrepresented sex, the interests and abilities of these students are, in fact, being fully and effectively accommodated." 1996 Clarification. As Sweetwater admits (at 28), the standard it must meet to

establish full and effective accommodation “is a high one.” Where there is “(a) unmet interest in a particular sport; (b) sufficient ability to sustain a team in the sport; and (c) a reasonable expectation of competition for the team ... an institution has not fully and effectively accommodated the interests and abilities of the underrepresented sex.” 1996 Clarification. This is particularly true where, as here, the institution eliminates a viable sports team. In these circumstances, prong three is not satisfied unless the institution can produce clear evidence “that interest, ability, or available competition no longer exists.” 1996 Clarification. In other words, the elimination of a viable sports team creates “a *presumption* that the institution is not in compliance with [prong three]” that can only be “overcome if the institution can provide *strong evidence*” to the contrary. 2010 Clarification at 5 (emphases added).

This presumption is a reasonable interpretation of the regulation. Absent strong contrary evidence, where a viable sports team has been eliminated, there is clearly sufficient interest and ability among the members of the eliminated team, as well as competing teams at other schools against whom that team could play. The presumption is particularly important in the context of women’s athletics because due to “the historical discouragement of female participation, an accurate measurement of interest in athletics among women can be difficult to achieve.” *Title IX Impact*, 103d Cong. 13 (statement of Phyllis L. Howlett, Co-Chair, NCAA

Task Force on Gender Equity). The presumption that prong three is not satisfied where a viable sports team has been eliminated should thus be accorded substantial deference.¹⁰

Such a presumption is particularly apt here. Sweetwater eliminated the girls' field hockey program twice during the relevant period, and the program had not been revived at the time of the district court's summary adjudication order. ER1536. Sweetwater attempts to rebut the presumption by arguing (at 29, 30) that because the California Interscholastic Federation ("CIF") has not created a "CIF division within the interscholastic conference" for field hockey, the sport "should not be considered for the purpose of evaluating interest under [prong three]." As the district court noted (ER1535), however, Sweetwater has not cited any record support indicating that there is no competition available for field hockey. Even if the CIF does not sponsor a regional or state championship for field hockey, it is a CIF approved sport and playoffs in field hockey are conducted by CIF Section

¹⁰ Even before OCR's 1996 Clarification, appellate courts effectively applied a presumption that the elimination of a viable sports team demonstrated failure to comply with prong three. *See, e.g., Roberts*, 998 F.2d at 832 (holding university failed to demonstrate compliance with prong three in light of elimination of women's softball team, and noting that "[q]uestions of fact under this third prong will be less vexing when plaintiffs seek the reinstatement of an established team rather than the creation of a new one").

Offices throughout the state.¹¹ It is also undisputed that a field hockey team competed during the 2001-2005 and 2006-2007 school years, further undermining any contention that no competition was available.¹² Sweetwater's proffer thus falls far short of the "strong evidence" required to rebut the presumption created by the elimination of a viable sports team.

II. THE DISTRICT COURT'S RETALIATION RULING IS INTEGRAL TO ENFORCING TITLE IX EFFECTIVELY

Title IX prohibits schools from retaliating against individuals who complain about sex discrimination. As the Supreme Court has recognized, Title IX's objectives "would be difficult, if not impossible, to achieve if persons who complain about sex discrimination did not have effective protection against retaliation." *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 180 (2005). "Indeed, if retaliation were not prohibited, Title IX's enforcement scheme would unravel." *Id.*

In *Emeldi v. University of Oregon*, 698 F.3d 715, 724 (9th Cir. 2012), *cert. denied*, 2013 WL 182746 (U.S. Apr. 22, 2013), this Court held that the framework

¹¹ See CIF, *Field Hockey*, available at <http://www.cifstate.org/index.php/other-approved-sports/field-hockey> (last visited May 22, 2013).

¹² Sweetwater also claims that there was insufficient interest to field a viable field hockey team because in the 2006-2007 school year only nine students were interested in field hockey. However, in the 2007-2008 school year when the field hockey team was eliminated, the National Federation of State High School Associations Field Hockey rules (which were adopted by the CIF) required only *seven players* for a field hockey team to compete. See ER1802.

for deciding retaliation claims under Title VII also applies to retaliation claims under Title IX. *Id.* at 724. Under that framework, “a plaintiff who lacks direct evidence of retaliation must first make out a prima facie case of retaliation by showing (a) that he or she was engaged in protected activity, (b) that he or she suffered an adverse action, and (c) that there was a causal link between the two.” *Id.* Once the plaintiff has made that prima facie showing, “the defendant must articulate a legitimate, non-retaliatory reason for the challenged action.” *Id.* “If the defendant does so, the plaintiff must then ‘show that the reason is pretextual’” *Id.*

In this case, in response to complaints by the class about Sweetwater’s sex discrimination against female athletes, Sweetwater took retaliatory action, including the firing of a trusted and well-liked softball coach, the effects of which were felt by the class as a whole. Without an effective remedy for such retaliatory conduct, the students “who witness discrimination would likely not report it ... and the underlying discrimination would go unremedied.” *Jackson*, 544 U.S. at 180-181. Consistent with the goals of Title IX, the district court correctly found retaliation here.

A. High School Athletes Are Particularly Vulnerable To The Effects Of Retaliation, Especially The Firing Of A Trusted Coach

Preventing retaliation against students, including retaliation in the form of firing adults who report sex discrimination against those students, is critical to the

successful enforcement of Title IX in high schools. Because of their youth, high school students often lack the experience, knowledge, and confidence needed to protest discrimination on their own. Students may also be reluctant to speak out about discrimination due to fear of drawing attention to themselves or of negative reactions from school administrators or their peers.¹³ Many students simply may not be aware of their rights under Title IX or of the proper mechanisms for enforcing those rights. Thus, “teachers and coaches ... are often in the best position to vindicate the rights of their students because they are better able to identify discrimination and bring it to the attention of administrators.” *Jackson*, 544 U.S. at 181.¹⁴

Firing a coach is a particularly pernicious form of retaliation against a high school team because of the importance of the team’s relationship with its coach. For example, “[t]he coach, particularly at the high school level, is ... responsible for providing ‘an educational environment conducive to learning team unity and sportsmanship.’” *Lowery v. Euverard*, 497 F.3d 584, 594 (6th Cir. 2007).¹⁵ In

¹³ See Kelly Dixon Furr, *How Well Are the Nation’s Children Protected from Peer Harassment at School?: Title IX Liability in the Wake of Davis v. Monroe County Board of Education*, 78 N.C. L. Rev. 1573, 1595 (2000).

¹⁴ See Erin E. Buzuvis, *Sidelined: Title IX Retaliation Cases and Women’s Leadership in College Athletics*, 17 Duke J. Gender L. & Pol’y 1, 45 (2010).

¹⁵ See Matthew Ahlberg et al., *Developing Autonomy Supportive Coaching Behaviors: An Action Research Approach to Coach Development*, 2 Int. J. Coaching Sci. 3, 5-6 (July 2008); Robin S. Vealy, et al., *Influence of Perceived*

addition to affecting a team's athletic performance, effective coaches help students become self-motivated and encourage students to support and empower each other.¹⁶ Thus, the retaliatory act of firing a coach directly harms students.

Firing a coach is also likely to chill future complaints about ongoing sex discrimination in the school's athletics program. In *Thompson v. North American Stainless, LP*, the Supreme Court held in the employment context that adverse action can take the form of retaliation against a third party, even if that person did not engage in protected activity him or herself, and emphasized that “the significance of any given act of retaliation will often depend upon the particular circumstances.” 131 S. Ct. 863, 868 (2011) (quoting *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006)). Given the importance of the coach-student relationship, the firing of a coach is a significant reprisal that would deter student-athletes from reporting or protesting sex discrimination in a school's athletics program.¹⁷ If high school athletes know that the school could fire their

Coaching Behaviors on Burnout and Competitive Anxiety in Female College Athletes, 10 J. Applied Sport Psychol. 297, 298 (1998).

¹⁶ See Ahlberg, *supra* n.15, at 4; *Title IX: Building on 30 Years of Progress: Hearing Before the S. Comm. on Health, Education, Labor & Pensions*, 107th Cong. 7-8 (2002) (opening statement of Sen. Mikulski).

¹⁷ Because this plaintiff class suffered retaliation directed at them, as well as direct adverse effects from the firing of their coach, the out-of-circuit district court cases that Sweetwater cites (at 68) rejecting third-party retaliation claims are inapposite. They also all pre-date *Thompson*, in which the Supreme Court held that the firing of one's fiancé would dissuade a reasonable worker from engaging

coach with impunity if they report or protest discrimination, that would deter them from doing so, frustrating the purposes of Title IX.

Particularly where the victims of sex discrimination are youths who may be unable to identify and report Title IX violations without the help of their coaches, retaliation can have a long-lasting effect in dissuading such reports. In this type of situation, injunctive relief—as the district court imposed here—is both appropriate and necessary to redress the plaintiffs’ injuries. *See Stanley v. University of S. Cal.*, 13 F.3d 1313, 1324 n.5 (9th Cir. 1994) (recognizing that the “chilling effect of retaliation may be irreparable harm” warranting injunctive relief in Title IX cases (citing *Garcia v. Lawn*, 805 F.2d 1400, 1405 (9th Cir. 1986))).

B. Sweetwater’s Retaliation Caused Injury To The Plaintiff Class And Violated Title IX

Upholding the district court’s well-documented finding of retaliation here is important to ensuring future compliance with Title IX. *See Jackson*, 544 U.S. at 180-181. The plaintiff class clearly suffered actionable adverse actions—including the firing of their coach—as a result of their complaints about Sweetwater’s sex discrimination. *Emeldi*, 698 F.3d at 726 (adverse action requirement met when “‘a reasonable [person] would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable [person]

in protected activity and “decline[d] to identify a fixed class of relationships for which third-party reprisals are unlawful.” 131 S. Ct. at 868.

from making or supporting a charge of discrimination’” (alterations in original) (quoting *Burlington*, 548 U.S. at 68)). *Emeldi*’s analysis focuses on the perspective of the victim and considers whether a reasonable person in the victim’s position—here, a high school student—would be deterred from reporting discrimination. *Burlington*, 548 U.S. at 68-69. The district court correctly found retaliation in violation of Title IX.

First, Sweetwater frames its challenge to the district court’s retaliation finding as an attack on the plaintiffs’ standing. Appellants’ Br. 63. The plaintiff class, however, readily satisfies the requirements for Article III standing. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). Standing is satisfied if at least one named plaintiff meets these requirements at the outset of the litigation. *Bates v. UPS, Inc.*, 511 F.3d 974, 985 (9th Cir. 2007); see also *U.S. Parole Comm’n v. Geraghty*, 445 U.S. 388, 397-398 (1980).¹⁸

¹⁸ The case is not mooted even if the named plaintiffs graduated because, when the class was certified, several of the named plaintiffs were students at Sweetwater. See ER3; *Geraghty*, 445 U.S. at 398 (explaining that mootness “can be avoided through certification of a class prior to expiration of the named plaintiff’s personal claim”). If the rule were otherwise, schools could perpetrate discrimination against students and then prolong any resulting litigation until the current students had graduated, thereby evading an adverse judgment. *Guckenberger v. Boston Univ.*, 957 F. Supp. 306, 326-327 (D. Mass. 1997) (“Students graduate, transfer, drop out, move away, grow disinterested, fall in love. ... [A]ll too often student-initiated disputes escape review. The class action mechanism solves this potential ... problem.” (citations omitted)).

As the district court found, the plaintiff class suffered numerous and ongoing injuries caused by Sweetwater's actions against the plaintiffs, including the firing of the softball coach. ER27.¹⁹ In addition, and in particular where retaliation is not remediated, the injuries from sex discrimination often persist. As the district court found here, despite "some evidence of changes to athletic facilities at CPHS ... additional evidence shows that many violations of Title IX have not been remedied or even addressed." ER26.

Second, Sweetwater now suggests (at 65)—apparently for the first time in this litigation—that each individual member of the plaintiff class must show that she personally engaged in protected activity. But requiring each student to complain individually would severely undermine the purposes and utility of Title IX and the class action mechanism by effectively precluding any claims of retaliation from being brought on behalf of a class of individuals. By contrast, protecting the rights of students and their advocates to act collectively on behalf of other students without reprisal helps to ensure that discrimination will be reported. *Jackson*, 544 U.S. at 176, 181; *id.* at 179 n.3 (noting that Title IX applies where the captain of one team complains of discrimination against another team). The class

¹⁹ Whether the plaintiffs have objected to the *current* coach is irrelevant. Appellants' Br. 66-67, 69. The named plaintiffs were suffering injuries when the litigation began and the class members continue to suffer ongoing chilling effects resulting from Sweetwater's retaliatory actions against the students.

action mechanism is especially useful for Title IX cases involving high school athletes because it avoids the often insurmountable hurdle of requiring students to report discrimination individually. *See* Alba Conte & Herbert B. Newberg, *Newberg on Class Actions* § 23:11 (4th ed. 2002) (the “[c]lass action also ‘assures anonymity and prevents the “chilling effect” associated with controversial issues’”).²⁰

Finally, Sweetwater contends (at 70) that plaintiffs must show that they were denied an educational opportunity to demonstrate an adverse action. But *Emeldi* does not include such a requirement. It requires only that the plaintiff show that the defendant’s action “‘might have dissuaded a reasonable [person] from making or supporting a charge of discrimination.’” 698 F.3d at 726 (alteration in original).²¹ Sweetwater’s actions satisfy that standard. Proof of retaliation does

²⁰ Courts have recognized in other contexts that a group of people can collectively engage in protected activity to vindicate their rights. *See, e.g., United Transp. Union v. State Bar of Mich.*, 401 U.S. 576, 585 (1971) (“collective activity undertaken to obtain meaningful access to the courts is a fundamental right” protected by the First Amendment); *Leviton Mfg. Co. v. NLRB*, 486 F.2d 686, 689 (1st Cir. 1973) (“filing of a labor related civil action by a group of employees is ordinarily a concerted activity protected by” labor law). Plaintiffs did so here, through responsible adults voicing complaints about Title IX violations (ER18-ER19), collectively sending a letter to the school (ER26-ER27), and filing this class action under Federal Rule of Civil Procedure 23(b)(2), which was added “primarily to facilitate the bringing of class actions in the civil-rights area,” 7AA Wright et al., *Federal Practice & Procedure* § 1775 (3d ed. 2005).

²¹ Sweetwater relies on *Davis v. Monroe County Board of Education*, but in *Davis*, the Supreme Court noted that denial of an educational opportunity resulting

not require showing the denial of educational opportunity; indeed, as with Title VII, “such a limited construction would fail to fully achieve the ... ‘primary purpose,’” of the statute’s prohibition of retaliation—“namely, ‘[m]aintaining unfettered access to statutory remedial mechanisms.’” *Burlington*, 548 U.S. at 64 (although Title VII’s “substantive provision” concerns injury in “the terms and conditions of employment,” adverse actions may comprise Title VII *retaliation* even if they do not “directly relate[] to ... employment,” and instead “cause [the plaintiff] harm *outside* the workplace”). Regardless, even if Sweetwater’s interpretation of Title IX were correct, its retaliation denied the plaintiffs educational opportunities within the school’s athletics program.

from sexual harassment is only one form of discrimination actionable under Title IX. 526 U.S. 629, 650 (1999) (“[Title IX] makes clear that, *whatever else it prohibits*, students must not be denied access to educational benefits and opportunities on the basis of gender.” (emphasis added)). *Davis* did not concern retaliation, which is “another form of intentional sex discrimination.” *Jackson*, 544 U.S. at 173; *cf. Mansourian*, 602 F.3d at 968-969 (holding that notice requirement applicable in Title IX sexual harassment cases does not apply in athletics effective accommodation cases because schools’ decisions with respect to athletics are by definition intentional).

CONCLUSION

For the foregoing reasons, amici curiae respectfully support affirmance of the district court's judgment.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned hereby certifies that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(i).

1. Exclusive of the exempted portions of the brief, as provided in Federal Rule of Appellate Procedure 32(a)(7)(B), the brief contains 6,944 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman font. As permitted by Federal Rule of Appellate Procedure 32(a)(7)(B), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

/s/ Lauren B. Fletcher

LAUREN B. FLETCHER

May 22, 2013

ADDENDUM

STATEMENT OF INTERESTS FOR AMICI CURIAE

American Association of University Women

For over 130 years, the American Association of University Women (AAUW), an organization of 150,000 members and supporters, has been a catalyst for the advancement of women and their transformations of American society. In more than 1000 communities across the country, AAUW members work to promote education and equity for all women and girls, lifelong learning, and positive societal change. AAUW plays a major role in mobilizing advocates nationwide on AAUW's priority issues, and chief among them is gender equity in education. Therefore, AAUW supports the vigorous enforcement of Title IX, and believes that the expansion of athletic opportunities for girls and women must continue at both the high school and college levels because it is important, not only for the participants themselves, but for the benefit of the greater community as well.

American Civil Liberties Union of San Diego & Imperial Counties

The American Civil Liberties Union of San Diego & Imperial Counties (ACLU-SDIC) is one of the regional affiliates of the American Civil Liberties Union, a nationwide, nonprofit, nonpartisan organization dedicated to the principles of liberty and equality embodied in the Constitution and laws of the United States. The ACLU is committed to upholding equal educational opportunity and has appeared in cases involving Title IX.

Asian American Legal Defense and Education Fund

The Asian American Legal Defense and Education Fund (AALDEF), headquartered in New York City and founded in 1974, is a national organization that protects and promotes the civil rights of Asian Americans. By combining litigation, advocacy, education and organizing, AALDEF's Educational Equity Program promotes the rights of Asian American students in kindergarten through 12th grade public schools and higher education. AALDEF has an interest in the intersection of racial and gender discrimination, and ensuring equal treatment of women and girls in athletics.

California Women Lawyers

California Women Lawyers (CWL) has represented the interests of more than 30,000 women in all facets of the legal profession since 1974. CWL's mission includes advancing women's interests, extending universal equal rights

and eliminating bias. In pursuing its values of social justice and gender equality, CWL often joins amici briefs challenging discrimination by private and governmental entities, weighs in on proposed California and federal legislation, and implements programs fostering the appointment of women and other qualified candidates to the bench.

Clearinghouse on Women's Issues

The mission of the Clearinghouse on Women's Issues is to:

- Provide information on issues relating to women, including discrimination on the basis of gender, age, ethnicity, marital status or sexual orientation with particular emphasis on public policies that affect the economic, educational, health and legal status of women
- Cooperate and exchange information with organizations working to improve the status of women
- Take action and positions compatible with our mission

Connecticut Women's Education and Legal Fund

The Connecticut Women's Education and Legal Fund (CWEALF) is a non-profit women's rights organization dedicated to empowering women, girls and their families to achieve equal opportunities in their personal and professional lives. CWEALF defends the rights of individuals in the courts, educational institutions, workplaces and in their private lives. Since 1973, CWEALF has provided legal education and advocacy and conducted research and public policy work to advance women's rights. Title IX has been a critical tool in advancing the rights of and opportunities for women, and the proper application of the law is vital to ensure it has the intended impact of improving equity in both athletics and academics.

Feminist Majority Foundation

The Feminist Majority Foundation (FMF) is a non-profit organization dedicated to eliminating sex discrimination and to the promotion of gender equality and women's empowerment. FMF programs focus on advancing the legal, social, economic, education, and political equality of women with men; countering the backlash to women's advancement; and recruiting and training young feminists. To carry out these aims, FMF engages in research and public policy development, public education programs, grassroots organizing efforts, and leadership training programs. The FMF Education Equity Program belongs to and works with the

National Coalition for Women and Girls in Education, and is developing Title IX Action Networks to work with the required Title IX Coordinators to end sex discrimination in education.

This amicus brief is congruent with FMF's goals. It supports equal athletic opportunities and reinforces prohibitions against retaliation for complying with Title IX.

Legal Momentum

Legal Momentum, the Women's Legal Defense and Education Fund, is the nation's oldest legal advocacy organization for women, www.legalmomentum.org. Legal Momentum advances the rights of all women and girls by using the power of the law and creating innovative public policy. Among its activities, Legal Momentum has long advocated for educational equity for girls. For example, we have advocated for sports equity in schools, opposed sex segregation, sexual harassment, bullying, and sexual violence in schools. In addition, through our Pipeline Project, we work to create effective recruitment and retention strategies for girls exploring nontraditional career opportunities; provide technical assistance on compliance with the gender equity requirements of Title IX and the Carl Perkins Act; and develop systemic approaches to ending gender segregation in CTE schools and career training tracks. Legal Momentum has also participated in a number of amicus briefs involving Title IX. The briefs focused on a variety of issues, including whether there was a private right of action under Title IX, the existence of a right to sue schools for peer on peer harassment, and whether athletic associations that do not receive federal funding are covered by Title IX. We also provide resources and referrals to college survivors of dating violence and/or sexual assault.

National Association of Social Workers

The National Association of Social Workers (NASW) is the largest professional membership organization of social workers in the world, comprised of 140,000 social workers, with chapters located in all fifty states, the District of Columbia, the Virgin Islands, Guam, Puerto Rico, and internationally. The California Chapter of NASW has 11,000 members. Since its inception in 1955, NASW has worked to develop and maintain high standards of professional practice, to advance sound social policies, and to strengthen and unify the social work profession. Its activities in furtherance of these goals include promulgating professional standards, enforcing the NASW Code of Ethics, conducting research,

publishing materials relevant to the profession, and providing continuing education.

NASW recognizes that discrimination and prejudice directed against any group are not only damaging to the social, emotional, and economic well-being of the affected group's members, but also to society in general. NASW has long been committed to working toward the elimination of all forms of discrimination against women. The *NASW Code of Ethics* directs social workers to “engage in social and political action that seeks to ensure that all people have equal access to the resources, employment, services, and opportunities they require to meet their basic human needs and to develop fully” ... and to “act to prevent and eliminate domination of, exploitation of, and discrimination against any person, group, or class on the basis of ... sex.” NASW policies support “vigorous enforcement of Title IX” and “developing practices and programs that empower women and girls, enabling them to resist gender stereotypes; ... develop positive self-esteem and body image; ... and challenge sexual double standards, so girls and women might develop the power and sense of entitlement that fuels self-advocacy.” National Association of Social Workers, *Women's Issues, in Social Work Speaks* 363, 367 (9th ed. 2012).

National Association of Women Lawyers

The National Association of Women Lawyers (NAWL) is the oldest women's bar association in the United States. Founded in 1899, the Association promotes not only the interests of women in the profession but also women and families everywhere. That has included taking a stand for equal educational opportunity for women and girls, under Title IX and the Equal Protection Clause. NAWL is proud to support high school girls who participate in, or seek to participate in, school athletics and stands behind their right to the benefits of that participation without discrimination.

National Congress of Black Women

The mission of the National Congress of Black Women is:

- To train and educate youth on the responsibilities of good citizenship, and encourage them to register, to vote, and to learn and understand the functions of government.
- To provide opportunities for internships at the local, state and national levels.

- To encourage African American women to engage in political education, voter registration, forums and seminars.
- To educate and encourage African American women to seek elective and appointive offices at all levels of government.
- To engage in research and fact-finding on critical issues uniquely affecting the quality of life of African American women and youth.
- To develop and advocate public policy positions at every level of government.
- To participate in the formation and development of public policy that impacts on African American women, their families and communities.

National Council of Jewish Women

The National Council of Jewish Women (NCJW) is a grassroots organization of 90,000 volunteers and advocates who turn progressive ideals into action. Inspired by Jewish values, NCJW strives for social justice by improving the quality of life for women, children, and families and by safeguarding individual rights and freedoms. NCJW's Principles and Resolutions state that "Equal rights and equal opportunities for women must be granted" and the organization endorses and resolves to work for "The enactment and enforcement of laws and regulations that protect civil rights and individual liberties for all." Consistent with our Principles and Resolutions, NCJW joins this brief.

National Council of Women's Organizations

The National Council of Women's Organizations (NCWO) is a non-profit, non-partisan coalition of more than 240 prominent women's groups that advocates for the 12 million women they represent. While these groups are diverse and their membership varied, all work for equal participation in the economic, social, and political life of their country and the world. The Council addresses critical issues that impact women and their families: from workplace and economic equity to international development; from affirmative action and Social Security to the women's vote; from the portrayal of women in the media to enhancing girls' self-image; and from Title IX and other education rights to affordable access to health care. A focus since the Council's founding has been working for access for women of color to quality education, employment, and healthcare. NCWO strongly supports the rights of educational institutions to use race- and gender-conscious measures to increase diversity and overcome discrimination.

Sargent Shriver National Center on Poverty Law

The Sargent Shriver National Center on Poverty Law (Shriver Center) provides leadership on the national and state level to promote justice and improve the lives and opportunities of people with low income. Through its Women's Law and Policy Project, the Shriver Center works on issues related to girls and women's access to education at all levels that provide fair and equal opportunities both in the classroom and on the playing fields. Discriminatory policies and practices have a negative impact on girls and young women's immediate and long-term educational and employment opportunities. Nondiscrimination in all aspects of education is vital if women are ever to obtain true economic well-being. The Shriver Center has a strong interest in the enforcement of Title IX and the eradication of unfair and unjust policies and practices that limit girls and young women's educational opportunities and serve as a barrier to economic equity.

Southwest Women's Law Center

The Southwest Women's Law Center is a policy and advocacy non-profit law center. We harness the power of law, research and collaboration to create greater opportunities for women and girls by helping them to fulfill their personal and economic potential. For more than seven years, the Southwest Women's Law Center (SWLC) has strongly supported programs and laws that ensure that girls have an equal opportunity to participate in sports and athletic programs in the State of New Mexico. SWLC was instrumental in the passage of the New Mexico School Athletics Equity Act, legislation that requires public schools to report on how many girls are participating in sports, and how schools are expending money on girls' sports programs. SWLC strongly supports the validity and practicality of the three-part participation test utilized by the Office of Civil Rights to determine whether inequities exist for girls and women in sports' programs. We also support the need to allow class retaliation suits, especially given the coach/team relationship.

Union for Reform Judaism, Central Conference of American Rabbis, and Women of Reform Judaism

The Union for Reform Judaism, whose 900 congregations across North America include 1.5 million Reform Jews, the Central Conference of American Rabbis, whose membership includes more than 2,000 Reform rabbis, and the Women of Reform Judaism that represents more than 65,000 women in nearly 500 women's groups in North America and around the world, come to this issue out of our longtime commitment to asserting the principle, and furthering the practice, of

the full equality of women on every level of life. Our Movement has consistently supported the advancement of women in the work force and women's rights in general. As Jews, we are taught in the very beginning of the Torah that God created humans *B'tselem Elohim* (in the Divine Image). We believe that the diversity of creation represents the vastness of the Eternal (Genesis 1:27) and oppose discrimination against all individuals. Since its enactment, Title IX has been an essential tool in the effort to ensure an end to discrimination on the basis of sex.

Women's Law Center of Maryland, Inc.

The Women's Law Center of Maryland, Inc. is a nonprofit, membership organization with a mission of improving and protecting the legal rights of women, particularly regarding gender discrimination, sexual harassment, employment law and family law. Through its direct services and advocacy, the Women's Law Center seeks to protect women and girls from discrimination and ensure that they have equal opportunity to participate in all academic, athletic and employment opportunities.

Women's Law Project

The Women's Law Project (WLP) is a non-profit public interest law firm with offices in Philadelphia and Pittsburgh, PA. Founded in 1974, the WLP's mission is to create a more just and equitable society by advancing the rights and status of all women throughout their lives. To this end, we engage in high-impact litigation, advocacy, and education. The WLP has a strong interest in the eradication of discrimination against women and girls in athletics and the availability of strong and effective remedies under Title IX of the Education Amendments of 1972. The WLP has worked throughout its history to eliminate sex discrimination in athletics and education, representing student athletes, coaches, and other players in the athletic arena in their efforts to achieve equal treatment and equal opportunity, and pursuing public policy and educational initiatives aimed at realizing Title IX's goal of equality in athletics.

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of May, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Lauren B. Fletcher

LAUREN B. FLETCHER