No. 23-15265

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

TAYLOR ANDERS, HENNESSEY EVANS, ABBIGAYLE ROBERTS, MEGAN WALAITIS, TARA WEIR, and COURTNEY WALBURGER,
Individually and on behalf of all those similarly situated,
Plaintiffs-Petitioners,
v.
CALIFORNIA STATE UNIVERSITY, FRESNO, and
BOARD OF TRUSTEES OF CALIFORNIA STATE UNIVERSITY,
Defendants-Respondents.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA
FRESNO DIVISION
1:21-CV-00179-AWI-BAM
Honorable Judge Anthony W. Ishii

BRIEF OF *AMICI CURIAE* EQUAL RIGHTS ADVOCATES; AMERICAN ASSOCIATION OF UNIVERSITY WOMEN; AMERICAN CIVIL LIBERTIES UNION OF NORTHERN CALIFORNIA; AMERICAN CIVIL LIBERTIES UNION OF RHODE ISLAND; CALIFORNIA WOMEN'S LAW CENTER; END RAPE ON CAMPUS; FAMILY VIOLENCE APPELLATE PROJECT; FAMILY VIOLENCE LAW CENTER; LEGAL AID AT WORK; LEGAL MOMENTUM, THE WOMEN'S LEGAL DEFENSE AND EDUCATION FUND; NATIONAL ORGANIZATION FOR WOMEN; PUBLIC COUNSEL; SOUTHWEST WOMEN'S LAW CENTER; THE DRAKE GROUP, INC.; VOICEINSPORT; VOICEINSPORT FOUNDATION; WOMEN'S LAW PROJECT; WOMEN'S SPORTS FOUNDATION IN SUPPORT OF PLAINTIFFS-APPELLANTS' APPEAL

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INTEREST OF *AMICI CURIAE*

Amici curiae are a group of national, state, and local civil rights organizations that share a commitment to the principles and enforcement of Title IX and, more generally, to equality for all in education and athletics. Each organization is further described in Appendix A. No party or party's counsel authored this brief in whole or in part, and no entity or person made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief.

ARGUMENT

On August 16, 2022 and November 22, 2022, the District Court for the Eastern District of California issued orders denying Plaintiffs' motion for class certification. The district court held that the plaintiffs from the Fresno State lacrosse team could not be adequate representatives of the putative class of women athletes that spanned across different sports teams, because there was an inherent conflict among women on different teams. The district court's analysis and conclusion run contrary to decades of case law, including case law in the Ninth Circuit, congressional intent, and federal agency guidance.

While the district court allowed for the possibility that the women's lacrosse team alone could be certified as a class, this theoretical possibility conflicts with Title IX's broader purpose, to ensure overall equity in athletics programs, and

would likely have unintended consequences for future women student-athletes.[1] Without reversal, the district court's order is a death-knell to Title IX class actions challenging an inequitable distribution between men and women of scholastic sports opportunities, benefits, and treatment.

Title IX's application to federally-funded education programs and activities, including school athletics, was intended to be broad and far reaching. The district court's decisions would narrow its application improperly by limiting the use of class actions in Title IX litigation, contrary to the statute's purpose, and will ultimately reduce the participation of women in sports programs at educational institutions. The district court's holding and reasoning strips Title IX of its history and the class action vehicle of its efficiency.

For these reasons, this Court should reverse the district court's orders denying Plaintiffs' motion for class certification.

I. The Significance and Challenges of Title IX Athletics Enforcement

Since Title IX's inception in 1972, girls have gone from 7 percent representation on high school sports teams to 43 percent.[2] In college in 1972, men had over 170,000 NCAA sport opportunities while women held a mere 29,977

[1] For example, some single women's teams would likely not meet the Rule 23 requirement for numerosity, because of the small size of many women's sports teams.

[2] WOMEN'S SPORTS FOUND., 50 YEARS OF TITLE IX: WE'RE NOT DONE YET 12 (May 2022).

nationwide.[3] In 2022, 50 years after the passage of Title IX, there were 298,109 NCAA opportunities for men and 230,518 opportunities for women.[4] Although the impact of Title IX is clearly evident, parity between women and men in school sports has yet to be achieved. For example, the number of opportunities for high school girls has still not reached that which was afforded to boys before the passage of Title IX, even though girls are roughly 49.6 percent of the current overall high school population.[5] At the college level, there are still nearly 70,000 more collegiate sport opportunities for men than for women, even though women make up 58.4 percent of the overall undergraduate college population.[6]

While Title IX provides critical protections to women athletes, Title IX athletics cases are rare because it is challenging for women student athletes to bring a lawsuit against their school.[7] For instance, women student athletes are often unaware of the significant benefits male athletes receive compared to women. The members of one women's team may become aware of gender-based inequities not

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[3] NAT'L COLLEGIATE ATHLETIC ASS'N, NCAA SPORTS SPONSORSHIP AND PARTICIPATION RATES REPORT 129 (2022).
[4] *Id.* at 87-88.
[5] U.S. Census Bureau, *School Enrollment Information in the United States: October 2020- Detailed Tables*, Table 1 (Oct. 19, 2021), https://www.census.gov/data/tables/2020/demo/school-enrollment/2020-cps.html.
[6] NAT'L STUDENT CLEARINGHOUSE RESEARCH CTR., OVERVIEW: SPRING 2023 ENROLLMENT ESTIMATES 10 (2023), https://nscresearchcenter.org/wp-content/uploads/CTEE_Report_Spring_2023.pdf.
[7] Elizabeth Kristen, *Reflection on Progress without Equity: Title IX K-12 Athletics at Fifty,* 30 AM. UNIV. J. OF GENDER, SOCIAL POLICY & THE LAW 227, 236 (2023).

known to members of other women's teams, prompting them to come forward to fight for all women and girls at their school. *See, e.g.*, *A.B. v. Haw. State Dep't of Educ.*, 30 F.4th 828 (9th Cir. 2022) (holding that the district court erred when it barred a class of present and future female high school students related to a Title IX retaliation claim based on threats made against members of the girls' water polo team when they complained about inequity within the school athletic program). *See also Ollier v. Sweetwater Union High Sch. Dist.*, 768 F.3d 843 (9th Cir. 2014) (affirming the district court's decision to grant injunctive relief to a class of all female high school student athletes on a Title IX retaliation claim. Because of these challenges, it is common for only a few brave girls or young women to come forward and bring a class action on behalf of their peers and courts have consistently certified such classes. The district court's holding ignores these realities and this precedent.

II. The District Court's Holding that Class Representatives from One Sports Team Cannot Adequately Represent Athletes on Other Sports Teams is Contrary to Established Case Law, Including Case Law in the Ninth Circuit.

In reaching its conclusion that class representatives from one sports team could not represent student athletes on other teams, the district court ignored binding Ninth Circuit precedent. In *A.B. v. Haw. State Dep't of Educ.*, 30 F. 4th 828, 831 (9th Cir. 2022), the Ninth Circuit reversed the district court's denial of class certification under Rule 23(a) for plaintiffs seeking declaratory and injunctive

relief under Title IX. The Ninth Circuit's reasoning in *A.B.* is applicable to the questions presented here. In *A.B.* the defendant argued that the plaintiffs failed to show that all current women student-athletes had been subjected to violations, and that the retaliation claim was "centered on the water polo program rather than on female student athletes as a whole." *Id.* at 839. In its reversal, this Court found that "the district court failed adequately to consider Plaintiffs' contention that those actions had a class-wide effect" . . . and "the district court failed to properly consider the legal principles that govern a retaliation claim of this nature under Title IX." *Id*. at 840. This Court rightfully understood that "[s]ome aspects of Plaintiffs' [. . .] cause of action [. . .] explicitly [rest] on allegations of systemic discrimination [. . .] that, if proved, would necessarily apply to all current female student athletes." *Id.* at 837

Moreover, the district court itself has already held that women from one team can represent women from multiple teams, including in *Brust v. Regents of the Univ. of California*, a case against another California public university. No. CIV2071488FCDEFB, 2008 WL 11512299 (E.D. Cal. Oct. 24, 2008). As in this case, the defendants in *Brust* argued that the plaintiffs' interests as members of the school's field hockey team rendered them inadequate representatives of a class including members of other sports teams. *Id*. at *7. The district court, however, found that "[Plaintiffs'] claim is not based upon [the University's] failure to add a

field hockey team, but rather, the alleged failure to provide equal athletic opportunities to interested female athletes." *Id*. at *6. Ultimately, the district court granted class certification for "all current, prospective, and future women students at the University of California at Davis who seek to participate in and/or are deterred from participating in intercollegiate athletics at UCD." *Id*. at *8.

Brust is consistent with decisions from other district courts holding that the possibility that members of the class may have an interest in participating in different sports does not defeat class certification when the predominant interest of class members is to: 1) establish a Defendant's liability under Title IX due to its program-wide policy of failing to equally accommodate female interest in varsity athletics; 2) to ensure a Defendant's compliance with Title IX; and 3) to obtain equal opportunities overall for female athletes. *See Cmtys. for Equity v. Mich. High Sch. Athletic Ass'n*, 192 F.R.D. 568, 574 (W.D. Mich. 1999) (finding named plaintiffs to be adequate representatives despite seeking unique remedies, stating: "[t]o the extent that the underlying issue in this case is one of unequal treatment and discrimination, the matter of whether to sanction a particular sport appears to be one relating to relief, rather than liability"); *Cohen v. Brown Univ.*, 991 F. 2d 888, 893 (1st Cir. 1993) (involving members of the women's gymnastics and volleyball teams representing class of "all present and future Brown University women students and potential students who participate, and/or are deterred from

participating in intercollegiate athletics funded by Brown"); *Favia v. Ind. Univ. of Pa.*, 7 F.3d 332, 335-36 (3d Cir. 1993) (affirming that members of the women's gymnastics and field hockey team were adequate representatives of a class of "all present and future women students at I.U.P. who participate, seek to participate, or are deterred from participating in intercollegiate athletics at the University."); *McClain v. Lufkin Indus., Inc.*, 187 F.R.D. 267, 281 (E.D. Tex. 1999) (noting that "[t]he requirement of common interests with the class does not preclude unique interests, only adverse interests"); *Int'l Woodworkers of Am., etc. v. Chesapeake Bay Plywood Corp.*, 659 F.2d 1259, 1269 (4th Cir. 1981) (noting that "[m]ere speculation as to conflicts that might develop at the remedy stage is insufficient to support denial of initial class certification" (quoting *Social Servs. Union, Local 535 v. Cnty. of Santa Clara*, 609 F.2d 944, 948 (9th Cir. 1979)); *Meyer v. Macmillan Pub. Co.*, 95 F.R.D. 411, 416-17 (S.D.N.Y. 1982) (holding that potential conflicts which do not go to the subject matter of the litigation do not impact certification).

Class action lawsuits are appropriate and have been efficient vehicles for enforcement and redress in Title IX athletics cases for decades. Indeed, Title IX claims are "particularly well suited to class treatment" because compliance with Title IX must be assessed at the program-wide (and therefore class-wide) level. *Brust*, No. CIV-2-07-1488-FCD-EFB, at *6 (quoting *Cmtys. for Equity*, 192 F.R.D. at 574). *See also*, *Biediger v. Quinnipiac Univ.*, No. 3:09-CV-621, 2010 WL

2017773, at *8 (D. Conn. May 20, 2010) (certifying class of "present, prospective, and future female students at Quinnipiac University" regarding declaratory and injunctive relief on Quinnipiac's allocation of athletic opportunities, allocation of athletic financial assistance, and allocation of benefits to varsity athletes); *Portz v. St. Cloud State Univ.*, 297 F. Supp. 3d 929, 957 (D. Minn. 2018) (certifying class of "present, prospective, and future female students at St. Cloud State University who are harmed by and want to end St. Cloud State University's sex discrimination" under Title IX); *Haffer v. Temple Univ.*, 678 F. Supp. 517, 521 (E.D. Pa. 1987) (certifying class of "all current women students at Temple University who participate, or who are or have been deterred from participating because of sex discrimination in Temple's intercollegiate athletic program."). *See also Paton v. N.M. Highlands Univ.*, 275 F.3d 1274, 1276 (10th Cir. 2002); *Ridgeway v. Mont. High Sch. Ass'n*, 633 F. Supp. 1564, 1567 (D. Mont. 1986), *aff'd* 858 F.2d 579 (9th Cir. 1988); *Bucha v. Ill. High Sch. Ass'n*, 351 F. Supp. 69 (N.D. Ill. 1982); *Leffel v. Wis. Inter-Scholastic Athletic Ass'n*, 444 F. Supp. 1117, 1119 (E.D. Wis. 1978). Compliance with Title IX's requirement of equal treatment and benefits is not assessed sport-by-sport, but instead is "based on an overall comparison of the male and female athletic programs." *Ollier*, 858 F. Supp. 2d at 1110 (citing 34 C.F.R. § 106.41(c)), *aff'd* 768 F. 3d 843 (9th Cir. 2014). *See also Ollier v. Sweetwater Union High Sch. Dist.,* 251 F.R.D. 564, 566

(S.D. Cal. 2008) (stating that "[a] certified class action is the proper method for class-wide injunctive relief." (citing *Zepeda v. INS*, 753 F.2d 719, 728 n.1 (9th Cir. 1983)).

Moreover, these class action cases are often filed in response to the elimination of one or more women's sports teams. *See Balow v. Mich. State Univ.*, 24 F.4th 1051, 1053 (6th Cir. 2022) (arising from elimination of women's swimming and diving team and on behalf of multi-sport athletes); *Bernsden v. N.D. Univ. Sys.*, 7 F.4th 782, 783 (8th Cir. 2021) (arising from elimination of women's ice hockey team on behalf of multi-sport class); *Biediger v. Quinnipiac Univ.*, 728 F. Supp. 2d 62, 64 (D. Conn. 2010) (holding in favor of multi-sport class based on claims arising from elimination of women's volleyball team).

Instead of turning to this robust caselaw and this Court's own recent decisions for instruction, in its analysis, the district court erroneously relied on several cases outside of the Ninth Circuit, including *Robb v. Lock Haven Univ. of Pa.*, No. 4:17-CV-00964, 2019 WL 2005636 (M.D. Pa. May 7, 2019). The reasoning in the cases the District Court relied upon is flawed and not applicable in the Ninth Circuit.[8] However, even the *Robb* court acknowledged that "Title IX, to some

[8] In all of these cases, the courts denied class certification because of potential conflicts over remedies. The law in this Circuit, however, is that the potential conflicts over remedies are speculative as a matter of law and do not preclude certification. *See Boucher v. Syracuse Univ.*, 164 F.3d 113 (2d Cir. 1999); *S.G. by Gordon v. Jordan Sch. Dist.*, No. 2:17-CV-00677, 2018 WL 4899098 (D. Utah

extent, does not care *who* receives [] benefits, as long as they go to the underrepresented sex." *Id*. The court went on to say that "[t]he specific team chosen for creation or expansion can be irrelevant for effective accommodation purposes." *Id.*

By not allowing the class plaintiffs in this case to represent all women athletes at Fresno State University in a single class to correct violations of Title IX, the district court has distorted the framework necessary to fulfill the purpose of the statute in a way which runs contrary to applicable case law.

III. Congressional Intent Makes Clear that the Enforcement of Title IX Requires Assessing and Addressing Gender Inequities in Athletics Generally at an Educational Institution Across all Athletics Offerings.

Congress enacted Title IX of the Education Amendments of 1972, codified at 20 U.S.C. §1681 et seq., to prevent sex discrimination in educational institutions that receive federal funding and to create a broad remedy for the same. *See, e.g.,* 20 U.S.C. § 1681(a); *Cannon v. Univ. Of Chi.*, 441 U.S. 677, 704-709 (1979). Title IX's Senate sponsor, Senator Birch Bayh, confirmed Congress's intention that Title IX serve as "a strong and comprehensive measure [to] provide women with solid legal protection from the persistent, pernicious discrimination which is

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Oct. 9, 2018); *Bryant v. Colgate Univ.*, No. 93-CV-1029, 1996 WL 328446 (N.D.N.Y. June 11, 1996); *Miller v. Univ. of Cincinnati*, 241 F.R.D. 285 (S.D. Ohio 2006).

serving to perpetuate second-class citizenship for American women." 118 Cong. Rec. 5804 (1972) (Statement of Sen. Birch Bayh).

Indeed, Congress's promulgation of the Civil Rights Restoration Act of 1987 (CRRA), Pub. L. 100-259, § 2, 102 Stat. 28, 29; S. Rep. No. 100-64, at 3-4 (1998), was a direct response to an increasing judicial trend of narrowly interpreting the application of Title IX, best exemplified by the United States Supreme Court's decision in *Grove City College v. Bell*, 465 U.S. 555, 573 (1984). There, the Court found that, as written, the law only required the specific programs within an institution that received federal funding to comply with Title IX, as opposed to the institution overall. *Id*.

To correct *Grove City College*, Congress swiftly promulgated the CRRA. Congress did this, in part, by adding the statutory definitions of "program" and "program or activity" to Title IX and companion civil rights statutes[9] in order to restore the "effectiveness and vitality" of those laws and "reaffirm pre-*Grove City College* judicial and executive branch interpretations and enforcement practices which provided for broad coverage of the anti-discrimination provision of these civil rights statutes." S. Rep. No. 100-64, at 3-4 (1998).

[9] *See* 20 U.S. Code § 1681(a). *See also, e.g.,* 42 U.S.C. § 2000d (prohibiting discrimination on the basis of race, color, or national origin under Title VI); 29 U.S.C. § 794 (prohibiting discrimination on the basis of disability under Section 504 of the Rehabilitation Act of 1973); 29 U.S.C. § 621 (prohibiting age discrimination in employment).

Senator Edward Kennedy, one of the sponsors of the CRRA, stated in a congressional hearing before the Committee on Labor and Human Resources that the CRRA was designed to restore the civil rights laws "so that they can become effective tools again, in the battle against discrimination" after their effectiveness had been "severely eroded" by judicial interpretations narrowing their application. Civil Rights Restoration Act of 1987: Hearing Before the Comm. on Labor and Human Resources, 100th Cong. 1-2 (1987) (Statement of Sen. Edward Kennedy); s*ee also Id*. at 3 (1987) (Statement of Sen. Paul Simon) (stating that the passage of the CRRA was a "practical and necessary step of restoring the broad civil rights protections" prior to the *Grove City College* decision). The concerns and reasoning presented by Congress when passing the CRRA and its response of explicitly defining "program or activity" under Title IX directly bear on, and answer, the questions presented here.

In the CRRA, Congress defined "program" and "program or activity" to include "*all the operations of* [] a college, university, or other postsecondary institution, or [] local education agency." 20 U.S.C. § 1687 (emphasis added). *See also* 42 U.S.C. § 2000 d-4a (defining "program or activity" under Title VI); 29 U.S.C. § 794 (defining "program or activity" under Section 504 of the Rehabilitation Act of 1973). These definitions reflect Congress's intent for compliance to be broadly assessed in the education civil rights context. It cannot

follow that such an assessment can be mandated to only include a single academic class, club, or sports team when students seek to represent others like them who are suspected to be suffering from the systemic Title IX violations.

The CRRA defined the scope of Title IX to clarify that "if one department of an educational institution is not in compliance with the law, then the entire institution should be considered out of compliance." Civil Rights Restoration Act of 1987: Hearing before the Committee on Labor and Human Resources, 100th Cong. 367 (1987) (Statement of Gregory Humphrey, Am. Fed'n of Teachers Dir. of Legislation). It therefore follows that it is not possible for an athletics department to be in or out of compliance with regards to one single women's team but not likewise with regards to the rest of the women's athletics offerings. It is by evaluating all women's athletics offerings that a program-wide concern is settled and addressed. This is especially true when, as here, the allegations are that the institution cut women's sports when it was out of compliance overall for women's sports. *See* Complaint, *Anders v. Cal. State Univ., Fresno*, No. 1:21-CV-00179, 2021 WL 568809, at *3 (E.D. Cal. Feb. 12, 2021).

Congress enacted the CRRA to eliminate situations in which "institutions would be allowed to pick and choose federal aid programs but ignore the requirements for equal access and protection of women, students, and faculty which is incorporated in Title IX." Civil Rights Restoration Act of 1987: Hearing

before the Committee on Labor and Human Resources, 100th Cong. 369 (1987) (Statement of Gregory Humphrey, Am. Fed'n of Teachers Dir. of Legislation). Refusing to allow class representatives from one sport to represent women's sports as a whole or even any other women's athletic teams at an institution would effectively allow institutions to pick and choose components of their athletics program to comply with Title IX, neglecting those sports least likely to produce durable litigants and class representatives.[10] Because athletes would be unable to bring class actions on behalf of teams that they are not a part of in conjunction with their own teams, institutions could contrive to comply with Title IX requirements only within sports teams whose members are most likely and able to bring a class suit or "push back" in other ways, and not in those with members least likely to do so. This would have the perverse effect of preventing widespread redress and instead prolonging ongoing violations of Title IX.

There is no need and, indeed, no justification for weakening the class action vehicle in Title IX cases. The broad "program or activity" framework of Title IX is fundamentally betrayed by the single-sport class requirement devised by the district court. Congress sought to craft a tangible education civil right in which the

[10] For example, recipients may target small teams, sports with relatively limited scholarship opportunities, or those affiliated with or interested in pursuing future professional opportunities. Sports that are likely to have more prospective students or graduating student athletes would also be vulnerable.

complaint of a single student, or class of students, of discrimination on the basis of sex could throw open the door to an evaluation of a recipient's *entire* program and, if necessary, provide both specific and program-wide relief to all impacted students.[11]

IV. Agency Guidance Comports with Congressional Intent as to Efficient Program-Wide Enforcement of Title IX Across Sports Teams.

Any federal agency that provides or oversees federal funding to an educational program or activity has Title IX enforcement and interpretation powers.[12] Agency guidance, including "interpretations [. . .] contained in policy statements, agency manuals, and enforcement guidelines" warrant *Skidmore* deference. *Christensen v. Harris Cnty.,* 529 U.S. 576, 587 (2000); *see Skidmore* v. *Swift & Co.,* 323 U.S. 134, 140 (1944).

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[11] In the context of complaints to the U.S. Department of Education's Office for Civil Rights ("OCR"), relief is granted through Voluntary Resolution Agreements. A student complaint to OCR triggers an investigation which seeks to resolve issues with the recipient's compliance and Title IX practices overall as opposed to focusing on resolution of the individual complaint. *See* OCR, U.S. DEP'T OF EDUC., CASE PROCESSING MANUAL 18 (2022) ("The agreement must include action steps that, when implemented, will remedy . . . any systemic discrimination.").

[12] Section 902 of Title IX "authorize[s] and direct[s]" each agency empowered to extend financial assistance to any educational program or activity "to effectuate the provisions of section 901 with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken." 20 U.S.C. § 1682.

Under *Skidmore*, agency guidance is "entitled to respect," to the extent that the agency interpretations have the "power to persuade." *Skidmore*, 323 U.S. at 140. The weight of agency guidance in a particular case depends upon the "thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Id.* When agency guidance interprets the agency's own regulatory terms, if such terms are ambiguous, then that guidance must be deferred to by a court if the agency's interpretation is reasonable. *See Auer v. Robbins*, 519 U.S. 452, 461 (1997) (establishing *Auer* deference, in which a court must defer to an agency's interpretation of its own ambiguous regulation if that interpretation is reasonable).

Congress assigned the principal functions of Title IX oversight and rulemaking to the U.S. Department of Education in the 1979 Department of Education Organization Act.[13] This agency has consistently affirmed and echoed Congress's "all programs" — and necessarily therefore "all teams" — intent for the evaluation

[13] The Education Amendments of 1974 provided that the Secretary of the Department of Health, Education, and Welfare (HEW) had to publish regulations implementing the provisions of Title IX. Education Amendments of 1974, Pub. L. 93-380, 88 Stat. 612 (1974). That Agency was later divided into the Department of Health and Human Services ("HHS") and the Department of Education ("DOE") by the Department of Education Organization Act, Pub. L. No. 96-88, 93 Stat. 669 (1979) (codified at 20 U.S.C. §§ 3401-3510). *See N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 517 n. 4 (1982) ("HEW's functions under Title IX were transferred . . . to the Department of Education").

of athletics programs for Title IX Compliance. This is evidenced through decades of agency guidance and the agency's enforcement approach. From the beginning, the Department of Education's predecessor agency, the Department of Health, Education, and Welfare (HEW), repeatedly instructed that the proper measure of compliance with Title IX was "equivalence for men and women." OCR, A Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71413, 71415-17 (Dec. 11, 1979). This standard remains.[14]

In a 1979 memorandum to chief school officers, superintendents, and college and university presidents, HEW's Office for Civil Rights stated that "[a]n institution's evaluation of its athletic program must include *every area* of the program covered by the regulation. *All sports* are to be included in this overall assessment." U.S. Dep't of Health, Educ., and Welfare, Office for Civil Rights, Memorandum on the Elimination of Sex Discrimination in Athletic Programs, at 4 (1975) (*Emphasis added*). The memo went on to clarify that "[t]he equal opportunity emphasis in the regulation addresses the totality of the athletic program of the institution rather than each sport offered." *Id.* at 8. In response to a public comment calling for equal opportunity to be measured using sport-specific

[14] In spite of the sweeping guidance rollbacks effectuated the Department of Education administration between 2016 and 2020, as of June 2023 this document was not rescinded and is still valid. *See* 34 C.F.R. § 106.

comparisons, HEW explained that the sport-specific model overlooks two key elements of Title IX:

> First, the regulation states that the selection of sports is to be representative of student interests and abilities (86.41(c)(1)). A requirement that sports for the members of one sex be available or developed solely o[n] the basis of their existence or development in the program for members of the other sex could conflict with the regulation where the interests and abilities of male and female students diverge. Second, the regulation frames the general compliance obligations of recipients in terms of program-wide benefits and opportunities (86.41(c)) . . . Title IX protects the individual as a student-athlete, not [as] a basketball player, or swimmer. 44 Fed. Reg. at 71422.

In another response during this public comment period, HEW explained that:

> No subgrouping of male or female students (such as a team) may be used in such a way as to diminish the protection of the larger class of males and females in their rights to equal participation in educational benefits or opportunities. *Id*.

In 1990, the U.S. Department of Education's Office for Civil Rights ("OCR") explained that in determining compliance, the agency uses an "overall approach to review the total athletics program." VALERIE BONNETTE & LAMAR DANIEL, U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, TITLE IX ATHLETICS INVESTIGATOR'S MANUAL 7 (1990). *See also id.* at 2 ("The decision regarding compliance involves determining which benefits and services are provided to men and which are provided to women, whether there are any differences between benefits and services for men and women, and whether these [] differences have a negative impact on athletes of one sex, and thus, may result in noncompliance.").

As repeatedly recognized by the implementing agency, consistent with congressional intent, Title IX is meant to be enforced across programs and activities, such as those of an athletics department. In the athletics context, this has required program-wide assessments involving all sports and balancing the opportunities of women and men.[15]

V. The District Court Incorrectly Assumed that Limited Finances Results in an "Inherent Conflict" Between Various Women's Sports Teams and Improperly Relied on that Assumption to Deny Class Certification.

The district court stated that the plaintiffs were inadequate representatives of the class because of an "inherent conflict" between women student-athletes of differing teams within an athletic department with limited finances. *Anders v. California State Univ., Fresno*, No. 1:21-CV-179-AWI-BAM, 2022 WL 17156145 (E.D. Cal. Nov. 22, 2022). The reality of finite school resources is not new. Title IX was enacted and has been implemented in the very same environment that exists today, in which schools must decide which sports to sponsor based on their resources for both men's and women's sports. And yet, Title IX does not include any consideration of resources in its directives regarding Title IX athletics

[15] If the district court is concerned that class representatives and defendants will not enter into a settlement that benefits all women athletes at the university, the court may remember that it has the authority to approve any class settlement. Fed. R. Civ. P. 23(e) ("The claims, issues, or defenses of a certified class [. . .] may be settled [. . .] only with the court's approval."). Class members have an opportunity to object to the settlement. Fed. R. Civ. P. 23(e)(5)(A).

compliance, but rather it requires consideration of students' interests, abilities, and treatment. *See* 44 Fed. Reg. at 71422 ("[I]nstitutions remain obligated by the Title IX regulation to accommodate effectively the interests and abilities of male and female students with regard to the selection of sports and levels of competition available. ln most cases, this will entail development of athletic programs that substantially expand opportunities for women to participate and compete at all levels . . . [T]he regulation states that the selection of sports is to be representative of student interests and abilities (86.41(c)(1))"; (Clarifying the meaning of "equal opportunity" in intercollegiate athletics, and stating that the "governing principle [of Title IX compliance in program areas other than financial assistance and accommodating athletic interest, such as equipment, coaching, facilities, and publicity] is that male and female athletes should receive equivalent treatment, benefits, and opportunities."). *See also* OCR, U.S. Dep't of Health, Educ., and Welfare, Memorandum on the Elimination of Sex Discrimination in Athletic Programs, at 5 (1975) ("In order to comply with the various requirements of the regulation addressed to nondiscrimination in-athletic programs, educational institutions operating athletic programs above the elementary level should: . . . determine the interests of both sexes in the sports to be offered by the institution"); 39 Fed. Reg. 22227, 22230 (June 20, 1974) ("Recipients must determine in what sports students of both sexes desire to participate (§ 86.38(b)) . . . § 86.38(d)

requires that a recipient make affirmative efforts to provide athletic opportunities in such sports and through such teams as will most effectively equalize opportunities for members of both sexes, and in so doing consider the determinations of student interest made pursuant to § 86.38(b)").

Title IX accounts for the fact that school resources are finite because it does not require that recipients provide an infinite offering of sports or create a specific women's team for every specific men's team in a 1:1 formula. Instead, Title IX merely requires that the sports offerings for women be proportional to the student population, expanding or adjusting in response to the interests of students, accommodating the interests and abilities of the underrepresented sex, or correcting the inequitable treatment of the underrepresented sex. *See* OCR, U.S. Dep't of Educ., Clarification of Intercollegiate Athletics Policy Guidance: The Three–Part Test (Jan. 16, 1996). *See also* ROD PAIGE, THE SECRETARY OF EDUCATION'S COMMISSION ON OPPORTUNITY IN ATHLETICS, "OPEN TO ALL" TITLE IX AT THIRTY 25 (2003) ("Title IX does not limit an institution's flexibility in deciding how budgets will be allocated among sports or teams. This flexibility should not be subjected to government interference, as long as those decisions are not discriminatory.").

While addressing finite resources may be part of the job of school administrators, it is not an appropriate consideration with which to burden students

when they seek to vindicate their education civil rights. *See Mansourian v. Bd. of Regents of the Univ. of Cal.*, 816 F. Supp. 869, 923 n. 42 (E.D. Cal. 2011) ("[F]inancial concerns cannot justify gender discrimination."). *See*, *e.g.*, *Cohen v. Brown Univ.*, 101 F.3d 155, 176 (1st Cir. 1996) (holding that a school must "fully and effectively accommodate the underrepresented gender's interests and abilities, even if that requires it to give the underrepresented gender . . . what amounts to a larger slice of a shrinking athletic-opportunity pie."). *See also Favia v. Ind. Univ. of Pa.*, 812 F. Supp. 578, 585 (W.D. Pa. 1993) (holding that "[f]inancial concerns alone cannot justify gender discrimination . . ."") (citation omitted); *Barrett v. West Chester Univ.*, No. Civ. A. 03-CV-4978, 2003 WL 22803477, at *15 (E.D. Pa. Nov. 12, 2003) (recognizing that the defendants were in a "difficult economic situation, " but nevertheless holding that defendants "could have . . . avoided this problem," as they "intentionally made the decisions that brought them to this courtroom, knowing full well the potential implications.").

In assuming an "inherent conflict" between women's sports teams, the court fails to recognize that the true conflict lies between the university and the athletes against whom it is discriminating, or between the resources allotted to men's sports instead of to women's sports, not between separate women's teams. Indeed, the fundamental allegation of a Title IX athletics claim is that, as in the instant matter, women are not receiving equitable treatment and opportunities when compared to

men, not that one women's team is more-worthy than another women's team to prevail in the school's allocation of limited resources. The adequacy of representation prong of Rule 23 must be read in light of the underlying purpose of Title IX and the purpose and spirit of civil rights in our country's legal system. The bounds of available resources at any given institution is outside of the Title IX analysis and irrelevant to civil rights adherence. Here, the court has shut the door on collective civil rights action by and among multiple women's sports acting in concert to correct their institutions' violations, which is in conflict with the intent of Title IX and contravenes well-established case law.

As set forth herein, courts have consistently recognized that there is no "inherent conflict" in allowing members of one women's sports team to represent student athletes from other teams at their school and/or potential athletes. As the First Circuit stated in *Cohen v. Brown,* there is no risk of an intra-class conflict that presents "an actual and substantial risk of skewing available relief in favor of some subset of class members." 16 F.4th 935, 950 (1st Cir. 2021) (reviewing decisions which required subclassing to limit any conflict).

CONCLUSION

Regardless of their specific sport, student athletes pursuing Title IX claims share a common goal: to address gender inequity within their school's athletic program. Undermining the ability of these athletes to represent each other as a

class and seek redress for discrimination is not only contrary to relevant agency guidance and case law, it betrays the foundational principles of Title IX.

Amici respectfully request that this Court reverse the district court's orders denying class certification.

Dated July 14, 2023

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the length requirement of Fed. R. App. P. Rule 29(a)(5) because it is 5,832 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman type.

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