No. 00-1624

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Deborah Gleason,
Plaintiff-Appellant,

v.

Board of Trustees of Salem State College,
Dr. Adeleke O. Atewologun, Professor,
Dr. Nancy Harrington, President Salem State College,
Defendants-Appellees

Interlocutory Appeal from the United States District Court
for the District of Massachusetts
Civil Action No. 99-11636-WGY

BRIEF OF *AMICI CURIAE* NATIONAL WOMEN'S LAW CENTER *ET AL.* IN SUPPORT OF PLAINTIFF-APPELLANT'S BRIEF URGING REVERSAL

(additional *amici* listed on the inside cover)

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INTEREST OF AMICI CURIAE[1]

Amici curiae are organizations concerned about equal educational opportunities and have a particular focus on eliminating discrimination against girls and young women in the nation's schools.[2] *Amici* submit this brief to address the important issue of whether Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688 ("Title IX"), precludes a plaintiff from bringing a constitutional claim under 42 U.S.C. § 1983 (1994) ("§ 1983").

SUMMARY OF ARGUMENT

Deborah Gleason alleges that she was sexually harassed by one of her professors at Salem State College and that the College and its president not only failed to take corrective action, but even encouraged his conduct. She has asserted a claim under Title IX against the College, as well as claims against the professor and the college president under § 1983 based upon the violation of her constitutional right to Equal Protection. The court below dismissed her § 1983 claims without discussion based upon the reasoning provided in an earlier case, *Canty v. Old Rochester School District*. *See* 54 F. Supp. 2d 66 (D.Mass. 1999).

The *Canty* court held that Title IX precluded the plaintiff's § 1983 claims

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[1] *Amici's* motion for leave to file this brief is attached.

[2] Statements of interest of the *amici* are set forth in Appendix A.

alleging deprivation of her substantive due process rights against the school district and the individual defendants. Approximately two weeks later, in a case presenting claims very similar to Canty's, a different district court judge ruled that Title IX does not foreclose remedies under § 1983. *Compare Canty v. Old Rochester Reg'l Sch. Dist., 54* F. Supp. 2d 66 (D.Mass. 1999) *with Doe v. Old Rochester Reg'l Sch. Dist.*, 56 F. Supp. 2d 114 (D.Mass. 1999). Additionally, two other district court opinions in this Circuit have found that Title IX precluded § 1983 claims against educational institutions, but not against individual defendants. *See Doe v. School Admin. Dist. No. 19*, 66 F. Supp. 2d 57 (D. Me. 1999); *Nelson v. University of Me. Sys.*, 914 F. Supp. 643, 647-48 (D. Me. 1996). Thus, there is a split among the district courts in this Circuit.

In *Canty*, the court relied on *Middlesex County Sewerage Authority v. National Sea Clammers Association,* 453 U.S. 1 (1981) (*Sea Clammers*), and *Smith v. Robinson*, 468 U.S. 992 (1984), to conclude that, because Title IX includes an implied right of action, its remedial scheme is sufficient to justify § 1983 preclusion. *See Canty*, 54 F. Supp. 2d 66, 77. However, the *Canty* court's analysis of Title IX under *Sea Clammers* and *Smith* is erroneous.

Smith v. Robinson is the only instance in which the Supreme Court has found a statute to preclude a §1983 claim based on the Constitution. For

preclusion of a constitutionally-based § 1983 claim, *Smith* requires both (1) that the constitutional claims and the statutory claims be "virtually identical" and (2) that Congress intended to preclude § 1983 claims. 468 U.S. at 1009. In neither the *Canty* case nor the instant case did the lower court consider whether the plaintiff's constitutional claim was "virtually identical" to her Title IX claim. Indeed, it is clear that Ms. Gleason's Title IX claim is wholly distinct from her § 1983 claim and therefore should not be precluded.

The second prong of the *Smith* test also indicates that preclusion is inappropriate in this case. For preclusion to be appropriate, the defendant must show that Congress intended the statutory remedies to be exclusive. Under *Sea Clammers*, courts may infer a congressional intent to supplant § 1983 actions if the statute provides for "unusually elaborate enforcement mechanisms." 453 U.S. at 13. In subsequent decisions, the Supreme Court has refined this standard, holding that a statute will be deemed sufficiently comprehensive under the *Sea Clammers* doctrine only if allowing a parallel § 1983 claim would be incompatible with the statutory remedial scheme. *See Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103 (1989) (holding that the National Labor Relations Act did not preclude a § 1983 claim); *Blessing v. Freestone*, 520 U.S. 329 (1997) (holding that the remedial scheme of Title IV-D of the Social Security Act was not

sufficiently comprehensive to preclude remedies under § 1983).

The lower court's conclusion that Ms. Gleason's § 1983 claim is precluded under the *Sea Clammers* doctrine is erroneous. *Sea Clammers* addressed only the question of whether a plaintiff may assert both a §1983 claim based on a statute and a claim based directly on the same statute, which is not at issue in this case. 453 U.S. 1 (1981). In fact, the lower court in this case, as well as in *Canty*, failed to recognize that *Smith* imposes a higher bar for preclusion of § 1983 claims to enforce constitutional rights than does *Sea Clammers*, as the Supreme Court's post-*Sea Clammers* preclusion cases, such as *Blessing* and *Golden State*, make evident. A rigorous analysis of Title IX under these precedents shows that its remedial scheme is not sufficiently comprehensive to infer Congressional intent to preclude independent § 1983 claims.

Finally, Title IX was modeled on Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.* ("Title VI") which for decades has been applied in conjunction with § 1983 to redress claims of race discrimination. Title IX, just as Title VI, its legislative antecedent, was passed in order to facilitate access to equal educational opportunities, not to preempt constitutional claims. Barring § 1983 claims would leave women and girls with no ability to assert their Constitutional rights in educational settings.

For the reasons that follow, *amici* submit that the lower court erred in precluding the § 1983 claim in the instant case, and in so doing, inappropriately restricted Appellant Deborah Gleason's ability to assert her constitutional rights.

STATEMENT OF THE CASE

Amici adopt Appellant's Statement of the Case.

ARGUMENT

II. APPELLANT'S CONSTITUTIONAL CLAIM AGAINST INDIVIDUAL DEFENDANTS IS DISTINCT FROM HER TITLE IX CLAIM AGAINST THE COLLEGE AND THEREFORE SHOULD NOT BE PRECLUDED.

Deborah Gleason has alleged a violation of her constitutional rights, which is wholly distinct from her Title IX claim. In the only Supreme Court case to find preclusion of a §1983 constitutional claim, the Court indicated that constitutional claims under § 1983 may be precluded by another statute if the claims are "virtually identical." *Smith v. Robinson,* 468 U.S. 992, 1009 (1984). In *Smith*, the statutory claim was found to be "virtually identical" to the § 1983 claim because the statute at issue, like § 1983 itself, was created expressly to enable litigants to enforce their constitutional rights, which is not the case with respect to Title IX. *Id.*

In *Smith*, the Court determined that the statutory claims and the

constitutional claims of denials of due process and equal protection were "virtually identical" because the Education of the Handicapped Act ("EHA"), 20 U.S.C. § 1400 *et seq.*, was passed in order to protect handicapped children's constitutional due process and equal protection rights. 468 U.S. at 1008-11. The Court held that the EHA, like § 1983 itself, was designed as a vehicle for individuals to protect their constitutional rights, concluding that "[t]he EHA is a comprehensive scheme set up by Congress to aid the States in complying with their constitutional obligations to provide public education for handicapped children." *Id.* at 1009. The EHA was, like § 1983, a means of asserting equal protection rights and therefore "the [§ 1983] equal protection claim added nothing to petitioners' claims under the EHA." *Id.* at n. 12. Because the EHA provided a satisfactory alternative for presenting these constitutional claims, a § 1983 equal protection claim was superfluous.[3] As the Sixth Circuit correctly noted in *Lillard v. Shelby County Board of Education*, *Smith* stands for the proposition that "Congress may create a statutory vehicle as an alternative to section 1983, and intend for parties to bring their constitutional claims through the alternative

[3]It should be noted that, even in *Smith*, not all §1983 claims were precluded. The *Smith* plaintiff's § 1983 procedural due process claim was deemed to be "entirely separate" from his EHA claim and therefore was not foreclosed. *Id.* at 1008.

statute." 76 F.3d 716, 723 (6th Cir. 1996) (holding that Title IX does not preclude §1983 claims). *Smith* also makes clear that the Court did "not lightly conclude that Congress intended to preclude reliance on § 1983 as a remedy for a substantial equal protection claim" *id.* at 1012, and emphasized that federal courts must in all cases continue to have the power to hear constitutional claims and grant the necessary relief. *Id.* at 1012, n. 15. Thus, under *Smith*, preclusion of a §1983 constitutional claim is an extraordinary measure. *See also Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 107 (1989) *Wright v. City of Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418, 423-24 (1987). Title IX is not such a statute as would merit such an extraordinary measure.

In contrast to the statute at issue in *Smith*, Title IX was not intended to be a statutory vehicle for constitutional claims. Therefore, the two claims at issue here cannot be viewed as "virtually identical." Title IX established separate, complementary rights, which should not be used as a justification to deny a plaintiff the opportunity to assert her basic constitutional rights. *See Lillard*, 76 F.3d at 716 (finding that §1983 constitutional claims have "contours distinct from" Title IX claims, even if they arise out of the same facts). *See also Crawford v. Davis*, 109 F.3d 1281, 1284 (8th Cir. 1997); *Seamons v. Snow*, 84 F.3d 1226, 1234 (10th Cir. 1996); *Carroll K. v, Fayette County Bd. of Educ.*, 19 F. Supp. 2d

618, 623 (W.D. Va. 1998).

To begin with, the scope of a litigant's statutory rights under Title IX differs in important respects from the scope of her rights under constitutional law. Specifically, a violation of the Constitution may occur even when there has been no violation of Title IX. For example, in *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982), the Supreme Court struck down a female-only nursing school as violative of the Equal Protection Clause, noting that Title IX explicitly allows single-sex admissions policies in certain instances. *Id.* at 732-33. Similarly, the Court held that the Virginia Military Institute's (VMI) single-sex admission policy violated the Equal Protection clause. *United States v. Virginia*, 518 U.S. 515 (1996). But under the theory of preclusion articulated by the *Canty* court, a female plaintiff denied admission to VMI or MUW would not be allowed to assert her constitutional claim under § 1983. Instead, she would be limited to a Title IX claim, which would fail because of Title IX's statutory exception for historically single-sex admissions policy. Thus, the constitutional violation would go unredressed.[4] 20 U.S.C. § 1681(a)(4).

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[4] *United States v. Virginia* was brought by the United States Department of Justice, which did not allege a Title IX violation due to the statutory exceptions. *See* F. Supp. 1407, 1408 (W.D. Va. 1991), *vacated* 976 F.2d. 890 (4th Cir 1992), *aff'd* 518 U.S. 515 (1996).

Precluding § 1983 claims would foreclose other potentially worthy constitutional claims. For example, a girl who wishes to challenge her school's exclusion of girls from playing a contact sport, such as basketball, probably would not have a valid Title IX claim, because Title IX exempts sports involving bodily contact from certain non-discrimination requirements. 34 C.F.R. 106.41. Thus, Title IX would not require a public school to permit a girl to try out for the boys' basketball team under Title IX, even if the school fields no such team for girls. *Id.* However, female students have successfully used § 1983 to assert their right to Equal Protection in challenging school policies that exclude them solely on the basis of their sex. *See e.g.*, *Saint v. Nebraska Sch. Activities Ass'n.*, 684 F. Supp. 626 (D. Neb. 1988); *Lantz v. Ambach*, 620 F. Supp. 663 (S.D.N.Y. 1985). Again, under the lower court's theory of preclusion, these plaintiffs would not even be able to present their constitutional claims.[5] Such substantive exemptions from Title IX's scope indicate that Title IX was not intended to be a vehicle for guaranteeing constitutional rights.

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[5] Title IX and its implementing regulations contain various other exceptions that may make Title IX inadequate for challenging violations of the equal protection clause. *See e.g.*, 20 U.S.C. 1681(a)(5) (exempting military schools); 20 U.S.C. 1681(a)(9) (exempting scholarships awarded pursuant to single-sex "beauty" pageants); 34 C.F.R. 106.34 (allowing sex segregation of students for physical education classes or activites that involve bodily contact).

Furthermore, Title IX and § 1983 allow for different types of relief against different parties. Under § 1983, individual officials may be held liable for damages if their conduct violated clearly established norms of which a reasonable person should have known. *See Harlow v. Fitzgerald*, 457 U.S. 800, 817 (1982). Most courts to address this issue under Title IX, however, have concluded otherwise. For example, in *Lipsett v. University of Puerto Rico*, a panel of this Court suggested that plaintiffs asserting claims under Title IX may be able to obtain damages only from educational institutions and programs, and not from individual wrong-doers. *See Lipsett*, 864 F.2d 188, 190 (1st Cir. 1998). In the *Lipsett* case, which presented facts similar to the instant case, this Court stated that "the separate liability of the supervisory officials at the University must be established, if at all, under Section 1983, rather than under Title IX." *Id.* *See also Soper v. Hoben*, 195 F.3d 845, 853 (6th Cir. 1999), *cert. denied* 120 S. Ct. 2719 (2000); *Hartley v. Parnell*, 193 F.3d 1263, 1270 (11th Cir. 1999); *Smith v. Metropolitan Sch. Dist.*, 128 F.3d 1014, 1019-21 (7th Cir. 1997). *But see Mennone v. Gordon*, 889 F. Supp. 53, 56 (D.Conn. 1995) (finding that individuals, in their official capacity, may be held liable under Title IX). In accordance with *Lipsett*, Ms. Gleason has filed her claims against the individual defendants under § 1983. To hold that Title IX preempts all § 1983 claims, including her claims

against individuals, would immunize state educational officials from any responsibility for violations of the Constitution.

Accordingly, because the scope and the reach of Title IX and constitutional claims under §1983 are very different, the two claims could in no way be considered "virtually identical," even if the violations arise out of the same set of facts. In cases involving sex discrimination in education, § 1983 claims add an important dimension to a plaintiff's case, allowing the plaintiff to challenge discriminatory actions and individuals which may not be covered by Title IX. *Compare Smith*, 468 U.S. at 1012 (stating that §1983 claim "added nothing to petitioners' claims"). Thus, preclusion of a constitutionally-based § 1983 claim is inappropriate.

III. CONGRESS DID NOT INTEND FOR TITLE IX TO SUPPLANT THE AVAILABILITY OF REMEDIES UNDER § 1983.

Even if this Court were to find that the plaintiff's Title IX and §1983 claims are "virtually identical" for purposes of *Smith*, it still must proceed to the second part of the inquiry and determine whether Congress intended for Title IX to preempt § 1983 claims. *Smith*, 468 U.S. at 1009. Congressional intent to preclude § 1983 claims can be demonstrated in two ways: (1) expressly, when Congress specifies within the statute its purpose of foreclosing § 1983 as a remedy, *see id.* at

1012; or (2) impliedly, when Congress has enacted a statute with such a comprehensive remedial scheme that allowing a § 1983 claim would be inconsistent with that scheme. *Smith*, 468 U.S. at 1012-13; *Sea Clammers*, 453 U.S. at 20[6]. While an express statement is straightforward and easily identified, a determination regarding the comprehensiveness of the statute's remedial mechanisms requires a careful examination of the legislative history of the statute and its provisions for an administrative and judicial mechanism. *Smith*, 468 U.S. at 1009. It is the defendants' burden to demonstrate this Congressional intent to preclude claims under § 1983. *See Blessing v. Freestone*, 520 U.S. 329, 346 (1997). Appellees cannot meet that difficult burden in this case. With respect to Title IX, there is no indication - express or implied - that Congress intended for

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[6] Although *Sea Clammers* sets out a standard for preempting a § 1983 claim that courts have repeatedly used, it is important to note a critical distinction between *Sea Clammers* and the case at hand. In *Sea Clammers*, the plaintiffs sought to use § 1983 to remedy violations of statutory rights established in two environmental statutes. 453 U.S. at 19. In the instant case, the plaintiff has asserted one claim under Title IX against the institution and wholly separate claims under § 1983 against individual defendants alleging a violation of her constitutional rights. In other words, the plaintiff does not seek to show a violation of Title IX under her § 1983 claim. Thus, as the Sixth Circuit has explained, *Sea Clammers* "speaks only to whether federal statutory rights can be enforced both through the statute itself and through § 1983" and does not "stand for the proposition that a federal statutory scheme can preempt independently existing constitutional rights, which have contours distinct from the statutory claim." *Lillard v. Shelby County Bd. of Educ.,* 76 F.3d 716, 723 (6th Cir. 1996).

Title IX to preclude remedies under other statutes. Neither the legislative history nor its express remedial scheme evinces a purpose on the part of lawmakers that Title IX should be the exclusive remedy for the claim at issue.

A. Congress Did Not Expressly Foreclose § 1983 as a Remedy When it Enacted Title IX.

There is nothing within Title IX's legislative history or within the law itself which suggests that Congress intended to preclude § 1983 claims. Even the *Canty* court, whose decision formed the basis of the lower court's holding, recognized that there was "not one word" to indicate an intent to preclude. *See e.g., Canty v. Old Rochester Reg'l Sch. Dist.*, 54 F. Supp. 2d 66, 73 (D.Mass. June 21, 1999).

B. Congress Did Not Impliedly Foreclose § 1983 as a Remedy When it Enacted Title IX.

An examination of Title IX demonstrates that Congress did not implicitly intend to preclude 1983 claims. Even a cursory comparison of the statutes at issue in *Sea Clammers* and *Smith*, the only two cases where the Supreme Court has precluded a § 1983 claim, to Title IX demonstrates clearly that its structure differs vastly from that of the statutes the Supreme Court has deemed to have preclusive effect, as discussed below. Moreover, in cases following *Sea Clammers*, the

Supreme Court has indicated that a statute's remedial scheme will be deemed sufficiently comprehensive to warrant preclusion only if a § 1983 claim would be incompatible with the statutory remedies, which is not the case here. *See Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103 (1989); *Blessing v. Freestone*, 520 U.S. 329 (1997).

1. Title IX Lacks the "Unusually Elaborate Enforcement Provisions" that Would Suggest Congress Intended to Supplant § 1983 Remedies.

In *Sea Clammers*, the Supreme Court held that a court may infer Congressional intent to preclude § 1983 claims when the statute has an "unusually elaborate" comprehensive remedial scheme, 453 U.S. at 13, which is not the case for Title IX.

Sea Clammers presented the question of whether plaintiffs could seek relief for alleged violations of two environmental statutes by asserting direct claims under those statutes and by seeking to enforce their rights under § 1983 for violations of the same statute. The Court noted that the provisions at issue, the Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.*, and the Marine Protection, Research, and Sanctuaries Act, 33 U.S.C. §§ 1401 *et seq*., provided "unusually elaborate enforcement provisions" that give both the government and private citizens the right to enforce their mandates. *See id.* at 13 -14.

Administrative remedies under the statutes included compliance orders and enforcement actions, as well as civil and criminal penalties. *See id.* at 13. Additionally, specific provisions authorized private persons to initiate enforcement actions. *See id.* at 13-14. Because of the unusual breadth of remedies available under these statutes, the Court barred a § 1983 claim to enforce them, concluding that there was no evidence that Congress intended to authorize private action under the Acts "apart from the expressly authorized citizen suits" provided for within their respective enforcement schemes. *Id.* at 17.

Smith v. Robinson presented similar issues. In that case, the Court held that the Education of the Handicapped Act precluded a § 1983 equal protection claim, relying on the fact that the statute established an "elaborate procedural mechanism to protect the rights of handicapped children." *Smith,* 468 U.S. at 1009 - 1011. The EHA provided for fair and adequate hearings by the State and a process for meeting individual educational needs that "begins on the local level and includes ongoing parental involvement, detailed procedural safeguards, and a right to judicial review." *Id.* at 1010-1011. Congress enacted these provisions, the Court noted, as part of its effort to provide individuals with a means to address "each child's individual educational needs . . . ." *Id.* at 1011.

Title IX lacks the "unusually elaborate enforcement provisions" of the

statutes at issue in *Sea Clammers* and *Smith*, which demonstrates that Congress did not intend that alternative remedies be preempted. Title IX's sole express means of enforcement is an administrative scheme delegated to agency discretion, with no express provisions governing a private right of action. *See* 20 U.S.C. § 1682 (1994); *see also Cannon v. University of Chicago*, 441 U.S. 677, 683 (1979). While the Supreme Court held in *Cannon* that an implied right of action exists under Title IX, it noted that the only enforcement mechanism specifically provided for in the statute is "a procedure for the termination of federal financial support" for education programs violating Title IX. *Cannon,* 441 U.S. at 683; *see also* 20 U.S.C. § 1682 (1994). This administrative scheme allows an educational institution to obtain judicial review of any action taken by a federal agency to enforce Title IX. *See* 20 U.S.C. § 1683. Although the administrative enforcement scheme is important, there are limitations within Title IX's administrative process of Title IX that render it incomplete for purposes of fully protecting and enforcing the rights of an individual. Title IX's statutory scheme itself does not even provide for a mechanism for individuals to file a complaint. Although the Title IX regulations do provide a procedure for individuals to file a complaint with the Department of Education ("Department"), 34 C.F.R. § 106.71, they do not allow an individual to force or require the government to handle the claim, or require the

government to enforce the law by filing a suit in federal court.

Additionally, the complainant is unable to demand that the Department seek a specific remedy tailored to that individual. For example, in investigating and resolving complaints under Title IX, the Department has not generally sought damages on behalf of aggrieved complainants. Clearly, within this administrative enforcement scheme, the specific redress for individuals is limited. Therefore, "[t]he availability of administrative mechanisms to protect the plaintiff's interests" should not foreclose a remedy under § 1983 because those enforcement mechanisms lack the comprehensive features the Court has held indicate a congressional intent to bar other remedies. *Golden State Transit,* 493 U.S. at 106; *Blessing,* 520 U.S. at 347.

In other contexts, the Supreme Court has held that the mere existence of administrative remedies is insufficient to indicate congressional intent to foreclose a § 1983 claim. For example, the Supreme Court has held that the United States Housing Act of 1937, 42 U.S.C. § 1401 *et seq*., and the Brooke Amendment, 42 U.S.C. § 1437a, do not preclude a private cause of action for § 1983 enforcement because the Department of Housing and Urban Development's authority to audit, enforce annual contributions contracts, and cut off federal funds are "generalized powers" that are insufficient to indicate Congressional intent to foreclose a 1983

remedy. *Wright v. City of Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418, 428 (1987).[7] Similarly, the Department of Education's generalized enforcement authority under Title IX, which provides for the termination of funds, is insufficient to indicate Congressional intent to foreclose § 1983 remedies.

Additionally, the judicially implied private right of action and the right to recover damages under Title IX demonstrate clearly "that the sole express enforcement mechanism contained in Title IX is not exclusive." *Crawford v. Davis*, 109 F.3d 1281,1284 (8th Cir. 1997). *See also Franklin v. Gwinett County Pub. Sch.,* 503 U.S. 60, 76 (1992); *Cannon,* 441 U.S. at 694. In *Cannon*, the Supreme Court determined that implying a private right of action would "provide effective assistance to achieving the statutory purposes" of ending sex discrimination. 441 U.S. at 707; *see also Lillard*, 76 F.3d 716, 723 (6th Cir. 1996) (the judicially implied cause of action and the recognition of a damages remedy, are a "complement to the public remedy explicitly created in the statute"). But it should be noted that the Supreme Court has ruled that, because Title IX's cause of action is judicially implied, its remedial scheme may be limited by the judiciary. *See Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 284 (1998) (stating that

[7] Additionally, the Court was unpersuaded that an action under § 1983 should be barred because tenants may sue on their lease in state courts and enforce their Brooke Amendment rights in that forum. *Wright*, 479 U.S. at 429.

"[b]ecause the private right of action under Title IX is judicially implied, we have a measure of latitude to shape a sensible remedial scheme" and noting that Congress did not "contemplate unlimited recovery" in damages under Title IX). The Court stated that the focus of Title IX, unlike other civil rights statutes, is not on "compensating victims of discrimination . . . [but on] 'protecting' individuals from discriminatory practices carried out by recipients of federal funds." *Id.* at 286. Therefore, even when one considers the implied right of action together with the remedial provisions contained within the statute, Title IX's remedial framework is neither so "unusually elaborate" nor so comprehensive as to warrant § 1983 preclusion under *Smith* and *Sea Clammers*. *See Crawford*, 109 F.3d at 1284; *Seamons*, 84 F.3d at 1234; *Lillard*, 76 F.3d 716, 723; *Alston v. Virginia High Sch. League*, 176 F.R.D. 220 (W.D. Va. 1997) (Title IX does not preempt §1983 Equal Protection claims); *Oona R.-S. v. Santa Rose City Schs.*, 890 F. Supp. 1452, 1460 (N.D. Cal. 1995) (no preemption of §1983 claims based on rights arising Title IX).

2. Section 1983 Claims Are Entirely Consistent with the Title IX Remedial Scheme.

In subsequent cases that elaborated on the *Sea Clammers* doctrine, the Supreme Court has made clear that courts should not infer that Congress intended

preclusion of § 1983 claims unless recognizing such claims would frustrate, or be incompatible with, the statutory remedial scheme at issue. *See Blessing*, 520 U.S. at 346; *Smith*, 468 U.S. at 1012; *Golden State Transit*, 493 U.S. at 107. In these cases, the Supreme Court has indicated that, in order to be deemed sufficiently comprehensive to merit preclusion, "the statutory framework must be such that 'allowing a plaintiff' to bring a § 1983 action 'would be inconsistent with Congress' carefully tailored scheme.' " *Golden State Transit*, 493 U.S. at 107 (citing *Smith*, 468 U.S. at 1012).[8] *See also Blessing,* 520 U.S. at 346. Because § 1983 provides an important complement to Title IX's enforcement, recognizing such claims in no way undermines, frustrates, or is inconsistent with the

[8]*See also Kendall v. City of Chesapeake*, 174 F.3d. 437, 443 (4th Cir. 1999) (finding no § 1983 remedy under FLSA because a parallel § 1983 action would frustrate FLSA provision mandating that private causes of action be terminated when the Secretary of Labor initiates an enforcement action); *Cablevision of Boston, Inc. v. Public Improvement Comm'n*, 38 F. Supp. 2d 46, 55-56 (D. Mass. 1999) ("[T]he defendants may be able to prove that Congress has impliedly and specifically foreclosed a remedy under § 1983 by adopting a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983.") (finding no federal right conferred by Telecommunication Act that would give rise to a § 1983 claim); *National Telecommunication Advisors, Inc. v. City of Chicopee*, 16 F. Supp. 2d 117, 121 (D. Mass. 1998) (stating that Congress can preempt § 1983 by explicit statement or "by creating within the statute itself a comprehensive enforcement mechanism that is incompatible with enforcement via § 1983") (finding § 1983 preempted under Telecommunications Act).

framework of Title IX.[9]

As discussed *supra* Part II.B.1, Title IX, unlike the statutes deemed to have preclusive effect, lacks the "unusually elaborate enforcement provisions," *Blessing*, 520 U.S. at 347 (quoting *Sea Clammers*, 453 U.S. at 13), and "specific statutory remedies," *id*. at 347, that would frustrate or be inconsistent with a § 1983 constitutional claim. For example, in *Smith*, the Supreme Court determined that allowing a § 1983 claim to proceed would contravene Congressional intent in creating the Education of the Handicapped Act (EHA). *Id.* at 1011-1012. The Court concluded that allowing litigants to bring § 1983 claims would permit them

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[9] Section 1983 preclusion can be seen as a variant of implied statutory repeal, as both doctrines provide guidance on when courts may infer that a more recent statute has supplanted rights granted by an older statute. In the area of implied statutory repeal, the rule has long been that courts will not infer that a statute has repealed rights granted by a pre-existing statute, unless there is an unavoidable inconsistency between the two laws. *See, e.g., Morton v. Mancari*, 417 U.S. 535, 551 (1974) ("The courts are not at liberty to pick and chose among Congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."); *United States v. Borden Co.*, 308 U.S. 188, 198 (1939) ("When there are two acts upon the same subject, the rule is to give effect to both if possible."). The *Smith* Court used language that evokes this broader doctrine of implied statutory repeal when it held that preemption was only appropriate where there was a comprehensive statutory scheme that was inconsistent with a § 1983 claim. 468 U.S. at 1012. Therefore, *Smith* creates a doctrine for §1983 preclusion that is consistent with the doctrine for implied statutory repeal: under both doctrines, pre-existing statutory rights remain in effect unless expressly repealed by Congress, or implicitly precluded by the passage of an irreconcilable later statute.

to "circumvent the EHA administrative remedies" and therefore would "run counter to Congress' view that the needs of handicapped children are best accommodated by having the parents and the local education agency work together to formulate an individualized plan for each handicapped child's education." *Id.* at 1012. The Court's concern was that any form of direct litigation could render the statutory remedies meaningless, as aggrieved parents could simply use a § 1983 suit to bypass the solution intended by Congress, which required initial negotiations with school officials. Additionally, since the express goal of the *Smith* plaintiffs was to seek attorney's fees, allowing a § 1983 suit would enable parents to frustrate the Congressional decision that no attorneys' fees be awarded in EHA suits. *See id.* at 1005, 1020-21. Thus, the § 1983 claims directly conflicted with Congress's goals in enacting the statute at issue.

Similarly, in *Sea Clammers*, the Court found that the plaintiffs were attempting to invoke § 1983 in order to bypass the specific requirements that Congress had established for citizen suits, such as the mandated sixty days notice to defendants. *See* 453 U.S. at 14. Therefore, in *Sea Clammers*, as in *Smith*, § 1983 claims were precluded because they were being used to frustrate the comprehensive statutory remedial scheme.

In contrast, allowing a complementary § 1983 claim to proceed in the

instant case is not incompatible with the remedial scheme of Title IX. In fact, the Supreme Court has indicated clearly that the Title IX statutory enforcement provisions are in no way threatened by the direct and immediate pursuit of private causes of action. *See Cannon*, 441 U.S. at 711 (finding implied right of action in Title IX); *Franklin*, 503 U.S. at 76 (holding that implied right of action in Title IX encompassed awards of compensatory damages). Title IX has no exhaustion requirement nor any other requirements that an individual must follow before filing a private cause of action under Title IX. Rather, individuals who believe that they have been discriminated against may file suit in federal court immediately. *See Cannon*, 441 U.S. 677. Thus, the Supreme Court's articulated concern that individuals would use § 1983 to bypass mandatory administrative procedures provided for in a statute, does not arise in this context. Similarly, the Court's expressed concern in *Smith* that individuals would use § 1983 as a way of obtaining attorneys' fees where none were intended by Congress is irrelevant to Title IX, as Congress has allowed attorneys' fees for Title IX plaintiffs. *See* 42 U.S.C. § 1988.

Other courts of appeals have examined Congressional intent and determined correctly that Title IX is in no way incompatible with a companion § 1983 claim. The Sixth Circuit Court of Appeals explained that a "section 1983 action does not

attempt either to circumvent Title IX procedures, or to gain remedies not available under Title IX." *Lillard*, 76 F.3d at 722-23 (6th Cir. 1996). The Tenth Circuit Court of Appeals emphasized that "Title IX plaintiffs who bring a § 1983 action predicated on constitutional provisions do not circumvent Title IX procedures or gain access to remedies not available under Title IX." *Seamons v. Snow*, 84 F.3d 1226, 1233 (10th Cir. 1996). See also *Crawford,* 109 F.3d at 1284. All three of these Circuit Courts found that because there was no inconsistency between the two claims, the Title IX statutory scheme was not sufficiently comprehensive to create an exclusive remedy. Thus, these courts concluded that there was no basis to determine that Congress intended to preclude independent § 1983 claims. *See Crawford*, 109 F.2d at 1284; *Seamons*, 84 F.2d at 1233-34; *Lillard*, 76 F.2d at 722-24.

In contrast, those courts that have held that Title IX precludes a § 1983 claim summarily concluded that Title IX's enforcement scheme was "comprehensive" without even considering whether the §1983 claims were incompatible with the enforcement of Title IX. *See Bruneau v. South Kortright Central Sch. Dist.*, 163 F.3d 749 (2nd Cir. 1998), *cert. denied*, 1195 S.Ct. 2020 (1999); *Waid v. Merrill Area Pub. Schs.*, 91 F.3d 857 (7th Cir. 1996); *Pfeiffer v. Marion Ctr. Area Sch. Dist.*, 917 F.2d 779 (3rd Cir. 1990). By failing to inquire

whether the two claims were inconsistent, these appeals courts ignored the elaboration of the *Sea Clammers* doctrine provided by subsequent cases. *See Blessing*, 520 U.S. at 346; *Smith*, 468 U.S. at 1012; *Golden State Transit*, 493 U.S. at 107.

Allowing the § 1983 claim to proceed in the instant case will not interfere with or bypass the remedial scheme established by Congress for Title IX. Section 1983 provides a vehicle for plaintiffs to assert an independent violation of their constitutional rights, which furthers Congress's goal of addressing sex discrimination in education. Because Congress has not stated its intent that Title IX preclude a § 1983 claim, either expressly in the statute or its legislative history, or impliedly, by providing for "unusually elaborate provisions" that are incompatible with § 1983 claims, a finding of preemption in this case would be inappropriate. Defendants simply cannot meet their burden of proof in showing that Congress intended for Title IX to supplant § 1983 remedies. Absent such a showing, the district court erred when it dismissed the plaintiff's § 1983 constitutional claims.

III. TITLE IX WAS MODELED ON TITLE VI, WHICH HAS HISTORICALLY BEEN USED TOGETHER WITH § 1983 CLAIMS.

Congress modeled Title IX after Title VI of the Civil Rights Act of 1964, 42

U.S.C. § 2000d *et seq.* ("Title VI"), which prohibits race discrimination in programs that receive federal funds. In the Supreme Court's words, "the drafters of Title IX explicitly assumed that it would be interpreted and applied as Title VI had been." *See Cannon*, 441 U.S. at 694-96. There is nothing in the legislative history of Title VI that demonstrates a Congressional intent to preclude constitutional claims under § 1983 against programs which fell under the purview of both Title VI and the Constitution.

After the landmark decision of *Brown v. Board of Education*, 347 U.S. 483 (1954), Congress became concerned "with the lack of progress in school desegregation," *Green v. County Sch. Bd.*, 391 U.S. 430, 435 n.2 (1968). Title VI was passed to address that concern by facilitating African-Americans' access to educational programs, not to preempt constitutional claims. *See id*. For decades, plaintiffs have asserted both Title VI and constitutional claims in education programs and other federally funded programs. *See e.g.*, *United States v. Fordice*, 505 U.S. 717, 723-24 (1992) (race discrimination case in higher education where plaintiffs alleged both Title VI and Equal Protection clause violations); *Blackshear Residents Org. v. Housing Auth.*, 347 F. Supp. 1138 (W.D. Tex. 1971) (discussing possibility of remedies under both Title VI claim and § 1983 Equal Protection claim); *Gautreaux v. Chicago Hous. Auth.*, 265 F. Supp. 582 (N.D. Ill. 1967)

(rejecting defendant's motion to dismiss Title VI claim and § 1983 Equal Protection claim). This Court may presume that Congress was aware of this history of parallel enforcement when it enacted Title IX in 1972. *See Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185 (1988). Congress's expressed desire to model Title IX on Title VI, combined with the lack of any express intent to preclude § 1983, indicates that there was no intent to preclude. Moreover, the continued parallel enforcement of Title VI and constitutional claims under § 1983 indicates that § 1983 constitutional claims are completely compatible with statutory civil rights claims.[10]

Indeed, the district court in *Doe v. Old Rochester School District* was persuaded by the history of Title VI and noted that, "[b]ecause of the similarity in structure between [Title VI and Title IX], a strong argument can be made that since § 1983 remedies may be 'an alternative and express cause of action' under Title VI, they are also permissible under Title IX." 56 F. Supp. 2d 114, 119 (D. Mass.) (holding that Title IX does not preclude § 1983 claims) (citing *Cannon*,

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[10]The Third Circuit has held that even § 1983 claims based upon Title VI and the Title VI regulations are not preempted by Title VI. *See Powell v. Ridge*, 189 F.3d 387 (3d Cir. 1999) *cert. denied sub nom. Ryan v. Powell*, 120 S. Ct. 579 (1999). *But see Boulahanis v. Board of Regents*, 198 F.3d 633 (7th Cir. 1999), *cert. denied on other grounds*, 120 S. Ct. 2762 (2000) (summarily finding that Title VI preempts §1983 constitutional claims).

441 U.S. at 697, n.21).

Foreclosing § 1983 claims in cases of sex discrimination in education would cut off an important range of judicial relief for women and girls, leaving them with no way to assert their rights to due process and equal protection under the Constitution in their schools. This was clearly not what Congress intended when it enacted Title IX.

CONCLUSION

For the foregoing reasons, *amici* urge this Court to reverse the district court's judgment in this case.

Respectfully Submitted,

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Dated:

CERTIFICATE OF COMPLIANCE

This brief complies with the Federal Rule of Appellate Procedure 32(a)(7). It contains 6497 words.

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Verna L. Williams, Esq.

CERTIFICATE OF SERVICE

I hereby certify that on September 1, 2000, two copies of the Brief for the National Women's Law Center *et al.* as Amicus Curiae in Support of Plaintiffs-Appellants Urging Reversal were served by federal express on the following counsel:

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APPENDIX

APPENDIX
INTEREST OF THE AMICI

The National Women's Law Center ("Center") is a nonprofit 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, the Center has worked to secure equal opportunities for girls and women through full enforcement of Title IX. In particular, the Center has consistently sought active enforcement of Title IX with respect to sexual harassment, including filing the lead *amicus* brief in *Franklin v. Gwinett County Pub. Sch.,* 503 U.S. 60 (1992). The Center is counsel for the plaintiff in *Davis v. Monroe County Bd. of Educ.,* 119 S. Ct. 1661 (1999), and successfully argued before the Supreme Court that Title IX requires schools to address student-to-student sexual harassment. The Center has a deep and abiding interest in ensuring that women and girls have access to a school environment that is free from sexual harassment and abuse.

ACLU – The American Civil Liberties Union (ACLU) is a national, nonpartisan organization of more than 300,000 members dedicated to protecting fundamental rights, including the right to equal treatment under the law. The ACLU Women's Rights Project is nationally recognized as one of the premier litigation arms of the movement for women's equality. The Women's Rights Project has participated, both directly and as *amicus curiae*, in the litigation of virtually every sex discrimination case before the United States Supreme Court, as well as many such cases in the lower federal courts. One of the Women's Rights Project's priorities is to solidify the protections of key civil rights statutes such as Title IX.

American Association of University Women (AAUW), an organization of 150,000 members, for well over a century, has been a catalyst for the advancement of women and their transformations of American society. In more than 1,500 communities across the country, AAUW members work to promote education and equity for all women and girls. AAUW plays a major role in activating advocates nationwide on AAUW's priority issues. Current priorities include gender equity in education, reproductive choice, and workplace and civil rights issues. AAUW believes that Title IX is essential for continuing the advancement of women and girls in education.

Center for Women Policy Studies is an independent, national, multiethnic and multicultural feminist policy research and advocacy institution, founded in 1972. The Center's work to ensure educational equity for women and girls and our work to address girls and violence in school will be directly impacted by the ruling in this case.

Clearinghouse on Women's Issues was established some 25 years ago to provide a channel for dissemination of information on a variety of issues of special concern to women. Advancement of educational opportunities for women and girls and elimination of discrimination in all areas of society are major issues to which we have given sustained attention. The full implementation and enforcement of Title IX has long been of great concern to our members.

Connecticut Women's Education and Legal Fund (CWEALF) is a nonprofit women's rights organization dedicated to empowering women, girls and their families to achieve equal opportunities in their personal and professional lives. CWEALF was founded in 1973 and has a membership of over 1,400 individuals and organizations. CWEALF has worked on the issue of Title IX for over 25 years.

Equal Rights Advocates ("ERA") is a public interest law center dedicated to the empowerment of women and girls through litigation, advocacy, and public education. Since its inception in 1974, ERA has specialized in litigating cases and pursuing public policy initiatives designed to assure women equal access to all of society's benefits including employment, education, and public accommodations. ERA has litigated cases involving Title IX, including *Doe v. Petaluma City Sch. Dist.*, 830 F. Supp. 1560 (N.D. Cal. 1993), *reconsid. granted*, 949 F. Supp. 1415 (N.D. Cal. 1996), as well as participating as *amicus curiae* in Title IX cases, such as *Gebser v. Lago Vista*, 118 S. Ct. 1989 (1998) and *Davis. V. Monroe County*, 119 S. Ct. 1661 (1999).

9 to 5, National Association of Working Women is a 26-year old nonprofit organization dedicated to the elimination of all forms of discrimination. On our toll-free hotline and from our members, we hear thousand's of stories every year about sexual misconduct at work and school. 9 to 5 produces resources, support,

training and expert witness testimony to prevent and eliminate sexual harassment.

National Coalition for Sex Equity in Education is an organization of educators across the United States (pre-school through postsecondary) and community activists working to assure equal opportunity in education based on gender. The organization is concerned with the implementation of Title IX, including the issue of sexual harassment.

National Council of Jewish Women, Inc. (NCJW) is a volunteer organization, inspired by Jewish values, that works through a program of research, education, advocacy and community service to improve the quality of life for women, children and families and strives to ensure individual rights and freedoms for all. Founded in 1893, the National Council of Jewish Women has 90,000 members in over 500 communities nationwide. Given NCJW's early and active involvement in passage of the Title IX program, we join this brief.

National Partnership for Women & Families, founded in 1971, formerly the Women's Legal Defense Fund, is a national advocacy organization that develops and promotes public policies to help women achieve equal opportunity, quality health care, and economic security for themselves and their families. The National Partnership has a longstanding commitment to equal opportunity for women and to monitoring the enforcement of antidiscrimination laws. The National Partnership has devoted significant resources to combating sex and race discrimination in education and has filed numerous briefs *amicus curiae* in the United States Supreme Court to advance women's opportunities in education.

NOW Legal Defense and Education Fund (NOW LDEF) is a leading national nonprofit civil rights organization that performs a broad range of legal and educational services in support of women's efforts to eliminate sex-based discrimination and secure equal rights. NOW LDEF was founded in 1970 by leaders of the National Organization for Women. A major goal of NOW LDEF is the elimination of barriers that deny women and girls equal opportunity, including sex discrimination in intercollegiate athletic programs. For years, NOW LDEF has fought for educational equity for girls and the full enforcement of Title IX. NOW LDEF has appeared as *amicus* in numerous cases concerning girls' rights to be free from sex discrimination in education programs under Title IX, and joins

this case because of its importance to securing equal opportunity in education.

Trial Lawyers for Public Justice (TLPJ) is a national public interest law firm that specializes in precedent setting civil litigation and is dedicated to using trial lawyers' skills and strategies to advance the public good. TLPJ prosecutes cases designed to advance civil rights and civil liberties, environmental protection and safety, consumers' and victims' rights, occupational health and employees' rights, the preservation and improvement of the civil justice system, and the protection of the poor and powerless. Supported by a nationwide network of over 1,500 trial lawyers, TLPJ has litigated numerous cases under federal civil rights laws, including Title IX of the Education Amendments Act of 1972 and Title VI of the Civil Rights Act of 1964. TLPJ has also been involved as litigants and *amici* in numerous cases involving questions of statutory preemption. TLPJ believes that, unless Congress explicitly says otherwise, the statutory remedies Congress provides to victims of discrimination should be read to supplement, rather than replace, the other remedies available. Thus, in this case, the plaintiff's bringing of a Title IX claim should not preempt her from seeking remedies under Section 1983.

Wider Opportunities for Women (WOW) works nationally and in its home community of Washington, D.C. to achieve economic independence and equality of opportunity for women and girls. For more than 30 years, WOW has helped women learn to earn, with programs emphasizing literacy, technical and nontraditional skills, the welfare-to-work transition and career development. Since 1964, WOW has trained more than 10,000 women for well paid work.

Women Employed is a national association of working women based in Chicago, with a membership of 2000. Since 1973, the organization has assisted thousands of working women with problems of sex discrimination. Women Employed works to empower women and minorities to improve their economic status and to remove barriers to economic equity through advocacy, direct service and public education. Women Employed strongly believes that educational opportunity is one of the most fundamental guarantees to which women and minorities are entitled.

Women's Law Project (WLP) is a Philadelphia-based nonprofit public interest legal center located in Philadelphia, PA. Founded in 1974, WLP works to abolish discrimination and injustice and to advance the legal and economic status of women and their families through litigation, public policy development, public

education and individual counseling. The WLP is committed to ending sexual abuse and harassment of women and children and to safeguarding the legal rights of women and children who experience sexual abuse. Toward that end, the WLP is interested in insuring that the law provides comprehensive remedies for students who are subject to sexual harassment.

YWCA of the USA is the oldest women's membership organization in the nation. Founded in 1858, it currently serves over two million girls, women and their families through over 325 YWCAs in 4,000 locations across the country. Strengthened by diversity, the Association draws together members who strive to create opportunities for women's growth leadership and power in order to attain a common vision: peace, justice, freedom and dignity for all people. The YWCA of the USA supports this brief because it strongly believes in the benefits sports offer young women, and because of its conviction that young women are equally deserving of opportunities to benefit from athletic activities.