No. 08-16330

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AREZOU MANSOURIAN, et al.,
Plaintiffs-Appellants,

v.

REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

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

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The National Women's Law Center (NWLC) 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, NWLC has worked to secure equal opportunity in education for girls and women through full enforcement of constitutional protections and Title IX in all areas, including intercollegiate athletics. NWLC has represented plaintiffs and prepared or participated in the preparation of numerous amicus briefs in Title IX cases before the Supreme Court and the Courts of Appeals. It is joined in filing this brief by 14 organizations that share its longstanding commitment to ending sex discrimination in education, including giving girls and women the full opportunity to participate in sports to which they are entitled under Title IX and the Equal Protection Clause of the Constitution. (Statements of interest of the other amici are attached.) *Amici* submit this brief to further demonstrate that the district court erred in applying the standard for awarding damages in Title IX sexual harassment cases to this athletics case.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs here were competitive high school wrestlers who chose to attend the University of California at Davis (UCD) because they knew it had a strong

[1] All parties have consented to the filing of this brief.

women's varsity wrestling program, and they wished to continue wrestling. However, not long after Plaintiffs arrived, UCD decided to remove the women from the wrestling team. After numerous complaints they were reinstated, but unlike their previous situation, in which the men and women wrestled against their respective sexes, the women were forced to compete against the men to remain on the team. They also faced a new coach who was hostile to the women. Under these conditions, none of the plaintiffs was able to continue wrestling. Angry at the discrimination they faced and injured by the loss of their status as varsity athletes, the women filed suit under Title IX[2] and 42 U.S.C. § 1983, seeking reinstatement of the team and damages, along with injunctive relief on behalf of a class of all women students, to end UCD's discrimination in its athletics program.

Unfortunately, the failure to allow women to wrestle is just a small part of UCD's history of discrimination against women in athletics. Ever since the enactment of Title IX in 1972, the university has failed to comply with its obligation to provide women with an equal opportunity to participate in its athletics program. In violation of Title IX's regulations and policies, UCD has not met any one of the three prongs of Title IX's three-part test for determining whether women have an equal opportunity to participate in sports: (1) the

[2] Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et seq., prohibits discrimination in education programs and activities that receive federal funds.

percentage of women athletes has always been well below the percentage of women students, (2) UCD has no history and continuing practice of increasing women's participation opportunities, and (3) it does not fully and effectively accommodate women's interest in playing sports. On the contrary, UCD has consistently ignored the requests of women who were and are willing and able to form varsity teams. Appellants' Opening Brief (AOB) at 7-18, 51-59.

Despite this clear evidence of discrimination, the district court here dismissed Plaintiffs' claims at the summary judgment stage based on its erroneous decision to impose upon plaintiffs the actual notice and deliberate indifference standard established for Title IX sexual harassment damages claims in *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998). Nearly every circuit court in the country has heard cases involving claims that schools are not providing their students with equal opportunities to play sports and/or equal benefits and services. In some cases, as here, women claim that their teams were unlawfully cut; in others, men make the same claim. Significantly, none of these courts, except the one outlier decision by the Eighth Circuit that the district court relies on here, applies the *Gebser* standard to athletics cases. Instead, the courts simply review the Title IX regulations and policies that govern athletics claims and decide

whether the defendants have complied with the law.[3] Ignoring this pattern, which includes a Fifth Circuit case that declines to apply the *Gebser* standard in a similar context, *Pederson v. Louisiana State University*, 213 F.3d 858 (5th Cir. 2000), the district court improperly applied the *Gebser* standard and in so doing undermined the Title IX framework that has existed for decades.

The district court utterly failed to understand the purpose of the *Gebser* standard. In part, this error stems from its failure to distinguish between two different concepts of notice. The first type of notice is that which the Supreme Court has held is required under Spending Clause statutes, whereby recipients of federal funds must have notice that a type of conduct – such as sexual harassment, retaliation, or the unequal provision of athletic opportunities – subjects them to money damages. *See Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17 (1981). Defendants here clearly had that type of notice and knew that they must comply with the more than 30 year-old Title IX athletics regulations and policies.

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[3] *See Cohen v. Brown University*, 101 F.3d 155 (1st Cir. 1996); *McCormick v. School District of Mamaroneck*, 370 F.3d 275 (2d Cir. 2004); *Williams v. School District of Bethlehem*, 998 F.2d 168, 171 (3d Cir. 1993); *Equity in Athletics v. Department of Education*, 291 Fed. Appx. 517 (4th Cir. 2008); *Pederson v. Louisiana State University*, 213 F.3d 858 (5th Cir. 2000); *Horner v. Kentucky High School Athletic Association*, 43 F.3d 265 (6th Cir. 1994); *Boulahanis v. Board of Regents*, 198 F.3d 633 (7th Cir. 1999); *Chalenor v. University of North Dakota*, 291 F.3d 1042 (8th Cir. 2002); *Neal v. Board of Trustees of the California State Universities*, 198 F.3d 763 (9th Cir. 1999); *Roberts v. Colorado State Board of Agriculture*, 998 F.2d 824 (10th Cir. 1993).

The second type of notice is "actual notice," which the Supreme Court has required in sexual harassment cases for money damages in order to ensure that a recipient will be liable in damages only for its own actions, not for the independent actions of a teacher or student who engages in sexual harassment of which the institution might be unaware. *See Gebser*, 524 U.S. at 287-88*; Davis v. Monroe County Board of Education*, 526 U.S. 629, 633 (1999). This type of actual notice is not applicable to athletics cases because athletics programs necessarily involve schools' *own* decisions to allocate a certain quantity and quality of participation opportunities and benefits/services to men and women. Decisions about how to structure an athletics program are inherently institutional ones: they involve an allocation of money, staff and other resources that necessitate approval from top officials or a delegation of authority to make decisions that bind the institution. Moreover, schools have an affirmative obligation, including continuous monitoring and adjustments, to ensure that their athletics programs provide equal opportunities for both sexes. Therefore, unlike the sexual harassment complaints that the Supreme Court was concerned about in *Gebser*, claims of discrimination in the provision of athletic opportunities or benefits pose no danger that an institution could be liable for the independent actions of its employees taken without institutional imprimatur.

The district court's unwarranted application of the *Gebser* standard is antithetical to both the letter and the spirit of Title IX. It would blunt an institution's affirmative obligation to end sex discrimination, and wrongly impose obstacles to women's assertion of their right to equal opportunities in athletics. As stated by this Court:

> Title IX has enhanced, and will continue to enhance, women's opportunities to enjoy the thrill of victory, the agony of defeat, and the many tangible benefits that flow from just being given a chance to participate in intercollegiate athletics.

Neal v. Board of Trustees of the California State Universities, 198 F. 3d 763, 773 (9th Cir. 1999). It is those benefits that plaintiffs seek here, and the decision of the district court that would improperly and unnecessarily stand in the way of women achieving their full opportunities should be reversed.[4]

ARGUMENT

I. UCD HAS A CONTINUING AND AFFIRMATIVE OBLIGATION TO PROVIDE ITS FEMALE STUDENTS WITH EQUAL OPPORTUNITIES TO PARTICIPATE IN SPORTS.

Title IX clearly requires a recipient of federal funds such as UCD to affirmatively and continuously monitor its provision of athletic opportunities to ensure that it does not discriminate on the basis of sex. In particular, the Department of Education has established a three-part test for determining compliance with the regulatory requirement that "the selection of sports and levels

[4] Appellants convincingly demonstrate in their brief that even if actual notice is required, UCD had such notice here. AOB at 43-50. Amici fully support their position, and will not address that factual question in this brief.

of competition effectively accommodate the interests and abilities of members of both sexes." 34 C.F.R. § 106.41(c)(1). The test, which has been in effect since 1979, lists three factors for assessing compliance in this area:

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

United States Department of Education, Office for Civil Rights, *Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics*, 44 Fed. Reg. 71,413, 71,418 (December 11, 1979).[5]

A recipient of federal funds is therefore under a continuing obligation to ensure that its athletics program meets one of the prongs of the three-part test. If it

[5] In addition, the Title IX regulations require recipients to take other affirmative steps to ensure compliance with the law. *See, e.g.*, 34 C.F.R. § 106.3 (directing schools to evaluate their policies, modify any that are discriminatory, and take affirmative and remedial steps to overcome the effects of discrimination); *id.* at § 106.8 (requiring recipients to adopt and publish grievance procedures for resolution of complaints and to designate a Title IX officer to coordinate compliance efforts).

does not meet the first prong because the percentages of its male and female athletes are not approximately equal to the percentages of male and female students, it must examine and satisfy the second or third prongs.

The obligation not to discriminate on the basis of sex in the provision of athletic opportunities and benefits is reinforced by another federal law, the Equity in Athletics Disclosure Act (EADA), 20 U.S.C. § 1092(g), which requires universities to calculate and report certain gender equity data from their athletics programs every year, including information that demonstrates whether or not they are in compliance with prong one of the three-part test. The EADA was enacted in 1994, based on congressional findings that female athletes continued to face blatant discrimination in intercollegiate athletics. Pub. L. 103-382, § 360B(b).[6] It applies to UCD and to every other coeducational institution of higher education that receives federal funding through Title IV of the Higher Education Act and operates an intercollegiate athletics program. 20 U.S.C. § 1092(g)(1).

Under the EADA, colleges and universities are required to prepare an annual report that must be submitted to the Department of Education and made available to students and the public. 20 U.S.C. § 1092(g) (3) and (4). The report includes the information needed to determine compliance with the proportionality prong of

[6] The EADA was enacted as part of the Improving America's Schools Act of 1994, which amended the Higher Education Act of 1965. Pub. L 103-382, § 360B; 108 Stat. 3518, 3967-71 (1994).

the three-part test: the "number of male and female full-time undergraduates that attended the institution," along with a "listing of the varsity teams that competed in intercollegiate athletic competition" and the total number of participants on each team. 20 U.S.C. § 1092(g)(1)(A) and (B). It must also include the total operating expenses for each team, information on the gender and salaries of the coaches and assistant coaches, the total amount and ratio of athletic scholarship dollars awarded to male and female athletes, expenditures for recruiting, and revenue generated. 20 U.S.C. § 1092(g)(1)(B)-(I).

These institutional obligations confirm the ongoing responsibility of each university – including UCD – to ensure that its athletics program is in compliance with one of the prongs of the three-part test.

II. THE *GEBSER* STANDARD FOR SEXUAL HARASSMENT CASES IS NOT APPLICABLE TO ATHLETICS CASES.

A. The Purpose of The *Gebser* Standard Is to Ensure That Recipients Will Be Liable Only for Their Own Actions, a Concern Not Present in Athletics Cases.

In *Gebser,* which involved sexual harassment of a student by a teacher, the Court held that "damages may not be recovered in those circumstances unless an official of the school district who at a minimum has authority to institute corrective measures on the district's behalf has actual notice of, and is deliberately indifferent to, the teacher's misconduct." 524 U.S. at 277; *see Davis*, 526 U.S. at 633

(extending the *Gebser* standard to student-on-student sexual harassment).[7] In adopting this standard for the unique context of sexual harassment, the Court rejected liability based on agency principles of *respondeat superior* (that the teacher's authority over the student, given to the teacher by the institution, facilitates the harassment) and constructive notice (that the school is liable if it knows or should have known of the harassment). *Gebser*, 524 U.S. at 282-83.

The Supreme Court explained that it was rejecting these agency principles and establishing a new standard for two reasons.[8] The first reason is that as a Spending Clause statute, Title IX has a "contractual framework" – it "condition[s] an offer of federal funding on a promise by the recipient not to discriminate, in what amounts essentially to a contract between the Government and the recipient of funds." 524 U.S. at 286; *see Pennhurst*, 451 U.S. at 17. Thus, in all Title IX cases, the recipient must know the kind of conduct in which it is promising not to engage.

There was no dispute in *Gebser* that schools knew by the mid-1990's that sexual harassment is unlawful discrimination on the basis of sex under Title IX. 524 U.S. at 283; *see Davis*, 526 U.S. at 649-50 (citing *Gebser*, 524 U.S. at 281)

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[7] As shown by this language, the actual notice standard applies only to Title IX sexual harassment claims for damages, not claims for injunctive relief.

[8] The two different aspects of the notice requirements set forth in the Supreme Court decisions are clearly and helpfully summarized in *Simpson v. University of Colorado Boulder*, 500 F.3d 1170, 1175 (10th Cir. 2007), a Title IX sexual harassment case.

("We have elsewhere concluded that sexual harassment is a form of discrimination for Title IX purposes and that Title IX proscribes harassment with sufficient clarity to satisfy *Pennhurst*'s notice requirement and serve as a basis for a damages action.").[9] This contractual aspect of notice is similarly not an issue in this case. UCD cannot seriously contend that it was unaware that failure to provide equal athletics opportunities to male and female students would subject it to liability under Title IX.

The second reason that the Supreme Court established the actual notice and deliberate indifference standard in *Gebser* was to ensure that a recipient would be held liable in damages only for its own actions, not for its "employees' independent actions." *Gebser*, 524 U.S. at 290-91; *Davis*, 526 U.S. at 643. The Court rejected the theory of vicarious liability, which would have resulted in a school's liability simply by virtue of its authority over the teacher.

These concerns are simply not present in athletics cases because decisions about how to structure an athletics program are inherently institutional ones: they involve an allocation of money, staff and other resources that necessitate approval from top officials or a delegation of authority to make decisions that bind the

[9] The Supreme Court similarly has held that a school board is liable in damages for retaliation because it had notice that Title IX prohibits such conduct: "A reasonable school board would realize that institutions covered by Title IX cannot cover up violations of that law by means of discriminatory retaliation." *Jackson v. Birmingham Board of Education*, 544 U.S. 167, 183-84 (2005).

institution. Thus, in this case, there is no question that UCD is being sued for its own actions in deciding what teams would be part of its athletics program and how many participation opportunities would be provided for male and female students. Accordingly, the actual notice standard is not necessary or applicable. *See Pederson*, 213 F.3d at 882. [10]

Moreover, sexual harassment is never in furtherance of the purposes of an education program or activity, nor should it ever be condoned by a recipient. It is conduct of an individual carried out on his or her own initiative for his or her own purposes, and it is in the perpetrator's interest to hide that conduct. While a recipient can "anticipate that the very operation of a school would be accompanied by sexual harassment, . . . that is simply because, unfortunately, some flawed humans will engage in such misconduct when they are in the company of others." *Simpson*, 500 F.3d at 1177. In contrast, in an athletics case, even though an individual coach may decide whether, for example, a particular woman will receive an athletic scholarship, that decision is made to further an educational purpose–the forming of a varsity team—and with authority delegated to the coach by the institution to make such decisions on its behalf.

[10] The actual notice and deliberate indifference standard is not even applicable in all sexual harassment cases, only in those "that do not involve official policy of the recipient entity." *Gebser*, 524 U.S. at 290. Thus, in *Simpson*, the Tenth Circuit did not apply the *Gebser* standard because the harassment was part of an official school policy for recruiting football players. 500 F.3d at 1177.

The Supreme Court discussed Title IX's administrative enforcement scheme, 20 U.S.C. § 1682, as part of its discussion of the need to ensure that the recipient would only be liable for its own actions. *See Gebser*, 524 U.S. at 288-89; *Simpson*, 500 F.3d at 1175. Under this scheme, recipients are given notice of a possible violation and an opportunity to come into voluntary compliance with the law before they can be sanctioned by the Department of Education. In that way, if the recipient itself did not commit the violation, it could learn about the problem and have the opportunity to take action to remedy it. If it did not do so, it would be held liable for its own inaction.

Here, however, there is no need for actual notice of a particular violation because the school's own actions are at issue, and its affirmative and continuous obligations under the Title IX regulations and policies are clear.[11] Therefore, the district court erred in applying the *Gebser* actual notice standard to this athletics case.

B. The Purpose of Requiring Deliberate Indifference Further Demonstrates that the *Gebser* Standard Is Not Applicable to Athletics Cases.

An examination of the other half of the *Gebser* standard–the requirement of deliberate indifference to the actual notice of sexual harassment–further

[11] Looked at another way, even if there is an actual notice requirement, it is necessarily met in contexts outside of sexual harassment, including athletics, and no special inquiry is necessary.

demonstrates the standard's inapplicability to athletics cases. In *Gebser*, the Supreme Court held that a school cannot be held liable in damages for the sexual harassment engaged in by an employee or a student unless it is being held liable for its own conduct in being deliberately indifferent to the harassment. As with the actual notice requirement, the Court was concerned that "[u]nder a lower standard, there would be a risk that the recipient would be liable in damages not for its own official decision but instead for its employees' independent actions." 524 U.S. at 290-91. The Supreme Court further explained that a recipient is deliberately indifferent when its "response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances." *Davis*, 526 U.S. at 648. The deliberate indifference requirement is not discussed at all by the district court.

The Supreme Court borrowed the deliberate indifference standard from cases brought under § 1983 "alleging that a municipality's actions in failing to prevent a deprivation of federal rights was the cause of the violation." 524 U.S. at 291. An examination of these § 1983 cases further demonstrates why the standard established in *Gebser* is not applicable to athletics cases. The deliberate indifference standard ensures that liability under § 1983 can be found "only where the municipality *itself* causes the constitutional violation at issue. *Respondeat superior* or vicarious liability will not attach under § 1983." *City of Canton v.*

Harris, 489 U.S. 378, 385 (1989) (citing *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978)).

This principle is illustrated by *Board of Comm'rs of Bryan County. v. Brown*, 520 U.S. 397, 403 (1997), which is cited in *Gebser* along with *City of Canton v. Harris.* There, plaintiff Jill Brown was injured when a Reserve Deputy Sheriff dragged her out of her car and spun her to the ground. Brown claimed that the County was liable for the alleged use of excessive force because the Reserve Deputy had been hired without an adequate review of his background, which included pleas to misdemeanors including assault and battery. The Supreme Court, reversing the courts below, held that it was not liable because the hiring of the Reserve Deputy had not been done with "'deliberate indifference' . . . as to its known or obvious consequences." 520 U.S. at 407 (citing *Canton*, 489 U.S. at 388). "[A] municipality may not be held liable under § 1983 solely because it employs a tortfeasor." 520 U.S. at 403.

Here, by contrast, the issue is not whether UCD is liable for the actions of someone else, but rather whether UCD itself has complied with Title IX's three-part test in structuring its athletics program. Thus, the deliberate indifference standard is not necessary or applicable because there is no danger that UCD will be held liable for someone else's independent actions.

In addition, applying the deliberate indifference standard to an ineffective accommodation claim like the one at issue here would create a direct conflict with the Title IX legal framework, which imposes affirmative and continuous compliance obligations on recipients. An application of the deliberate indifference standard would suggest that a recipient could only be liable in damages if its response to an ineffective accommodation claim was clearly unreasonable in light of the circumstances. It is not at all clear what this standard would mean in the context of an athletics case. What is certain, however, is that such a standard falls far short of the affirmative obligations imposed on recipients under Title IX's three-part participation test. It would effectively allow them to sit back and wait for a complaint before taking action to end sex discrimination. Therefore, importing the *Gebser* standard into athletics cases would only serve to undermine the longstanding Title IX requirements that the federal appellate courts have unanimously upheld and applied.

III. THE DISTRICT COURT APPLIED THE *GEBSER* STANDARD ERRONEOUSLY.

The district court here improperly applied the *Gebser* standard to an athletics case, turning what should have been a straightforward case into a confusing, complicated one.[12] Nearly every circuit court in the country has heard cases filed

[12] The impact of its error is particularly harsh because it used *Gebser* to deny plaintiffs the opportunity even to proceed on their claims.

by plaintiffs who claim that their schools are not providing them with equal opportunities to play sports. Significantly, none of these courts, except the one outlier decision that the district court relies on here, imposes the *Gebser* standard. *See* fn.1, *supra*.. The district court's decision in this case creates obstacles to women's assertion of their rights to equal opportunities in athletics that are contrary to Title IX and its regulations and policies.

A. The District Court Ignored the Purpose of the *Gebser* Standard.

The reason that the *Gebser* standard is not applicable to cases outside the sexual harassment area is succinctly set forth in *Pederson,* in which female students who sought, but were not allowed, to participate in varsity sports at LSU requested injunctive and monetary relief for LSU's violation of Title IX. To attempt to support its argument that "it was either ignorant of or confused by Title IX and thus cannot be held intentionally to have discriminated" on the basis of sex, LSU turned to the then recent *Gebser* and *Davis* decisions. The Fifth Circuit properly concluded that those Title IX sexual harassment cases "have little relevance" to the case before it, because "[i]n the instant case it is the institution itself that is discriminating. The proper test is not whether it knew of or is responsible for the actions of others, but is whether [LSU] intended to treat women differently on the basis of their sex by providing them unequal athletic opportunity…." 213 F.3d at 882.

Ignoring *Pederson* as well as the numerous other circuit court decisions applying the Title IX athletics requirements, *see* n.3, *supra,* the district court relied solely on *Grandson v. University of Minnesota*, 272 F.3d 568 (8th Cir. 2001), in deciding to apply the *Gebser* standard here. However, *Grandson* is an outlier, and is not well-reasoned or persuasive. Indeed, it is not even clear that the Eighth Circuit continues to follow *Grandson's* approach. *See Chalenor v. University of North Dakota*, 291 F.3d 1042 (8th Cir. 2002). To begin with, *Grandson* simply assumed that the *Gebser* standard was applicable, and the plaintiffs in that case do not appear to have argued otherwise. More importantly, in applying *Gebser*, the court in *Grandson* misconstrued the purpose of the actual notice requirement. The district court here therefore erred in following *Grandson*.

The facts in *Grandson* are not entirely clear from the decision, but in relevant part, plaintiff Julie Grandson claimed that she was discriminated against in violation of Title IX when she was not awarded a soccer scholarship. Another group of plaintiffs alleging more general violations of Title IX sought to amend their complaint to add a claim for damages. During the course of the litigation, defendant University and OCR entered into an agreement to resolve a complaint with OCR involving unspecified allegations of non-compliance with the Title IX athletics regulations and policies. The Eighth Circuit upheld the denial of the motion to amend as futile because the amendments did not include allegations of

notice and deliberate indifference, and upheld the grant of summary judgment against Grandson because she had not satisfied those requirements.

The court in *Grandson* ignored the no "vicarious liability" purpose of the *Gebser* standard and focused only on the fact that the Supreme Court had referred to the explicit administrative remedy in Title IX. In doing so, it effectively imposed an exhaustion requirement and required deference to the outcome of the administrative proceedings in all Title IX cases. As the Eighth Circuit stated: "We construed these remedial provisions [in the Clean Water Act] to mean that an informal administrative enforcement agreement precludes a citizen suit for inconsistent civil penalties. . . . We read *Gebser* as requiring that an implied private action for systemic Title IX relief must likewise take a back seat to an agency proceeding that has led to satisfactory voluntary compliance." 272 F.3d at 573 n.3. However, as set forth above, this reading of the Supreme Court's discussion of the administrative requirements is not correct. *See Fitzgerald v. Barnstable School Committee,* 129 S.Ct. 788 (2009).

The district court here perpetuated *Grandson's* error, reading *Gebser* as creating a "remedial scheme for private plaintiffs [that would] mirror the remedial scheme mandated for federal enforcement agencies." ER 000017. But, the effect of the district court's decision is to improperly add an exhaustion requirement, rather than recognizing that "under [Title IX's] implied private right of action,

plaintiffs can file directly in court, *Cannon v. University of Chicago*,441 U.S. 677, 717 (1979), and can obtain the full range of remedies, see *Franklin v. Gwinett County Public Schools*, 503 U.S. 60, 72 (1992)." *Fitzgerald*, 129 S.Ct. at 795-96.

The district court here also fundamentally misunderstood Title IX's three-part test. Relying on *Gebser*, it stated that "When an institution's athletic program is out of compliance with Title IX, knowledge of the violation cannot be imputed to the institution simply because it oversees the program." ER 00014. However, for the reasons discussed above, that statement is simply not accurate. Decisions about allocation of opportunities and benefits are necessarily made by the institution or officials who have been clearly delegated the authority to make them. Each year UCD must compile the statistics that show whether its athletics program meets the first prong of the three-part test. If it does not, Title IX requires it to determine whether the program meets either of the other two prongs. If it is complying with the law, a university cannot be unaware of a Title IX equal accommodation violation in its athletics program. Therefore, there is no need to establish that the recipient itself has acted–the stated purpose of the *Gebser* standard.

In addition, the district court seemed to be concerned that without the actual notice requirement, an institution could be held liable under one prong of the three-prong test when it was complying with another prong. ER 000014-15**.** But, that

scenario is not possible. As discussed above, the three parts of the test work together. If a recipient does not meet the proportionality prong, the Title IX policies require it to satisfy one of the other prongs. No separate notice from an athlete who seeks the opportunity to participate in varsity sports is required to make a recipient aware of its obligation to satisfy at least one prong of the three-part test.

B. The Litigation of Athletics Cases is Straightforward and Well-Established and Should Not be Altered

Under the prevailing law, all the district court had to do was to evaluate whether UCD was in compliance with the three-part test, and if it was not, it should have assessed its liability for damages for violating Title IX.[13] However, the district court chose to ignore the body of Title IX athletics cases that have been litigated. It stated that "plaintiffs fail to recognize that there are less than two dozen reported Title IX cases, and *Grandson* is the only reported case to address the specific issue of notice and opportunity to cure presented by this case." ER 000020. However, as discussed above, there is another case, *Pederson*. To the extent that the district court believed its statement that there are no other reported cases to be accurate, its failure to see the significance of the holding that Title IX

[13] There are no Supreme Court cases concerning a school's compliance with the Title IX athletics regulations and policies. The seminal case discussing the three-part test, which has been followed by the other circuits, is *Cohen v. Brown University, 101 F.3d 155 (1st Cir. 1996).*

sexual harassment cases "have little relevance" to athletics cases because "[i]n the instant case it is the institution itself that is discriminating," *Pederson*, 213 F.3d at 882, shows the district court's misunderstanding of the *Gebser* test.

Second, the district court fails to note that all the other court of appeals Title IX athletics cases are consistent in their approach to litigating these cases and show that, regardless of the relief sought, they can readily be resolved by applying the three-part test or other applicable parts of the Title IX regulations and policies. *See* n 2, *supra*. In the case decided in this Circuit, *Neal v. Board of Trustees of the California State Universities*, 198 F.3d 763 (9th Cir. 1999), members of the men's wrestling team filed suit alleging that the university's capping the size of their team violated Title IX and the Equal Protection Clause of the Constitution. The Court did not, and did not need to, examine any notice issues because the recipient itself had made the decision to cap the team. Rather, it looked at the merits of the claim.

Here, there is no dispute that UCD did not meet the first prong of the three-part test because it did not provide proportional participation opportunities to its female students. UCD also admits that it did not meet the third prong, since it was not accommodating the interests and abilities of the women who wanted to wrestle or of other women who wanted to establish varsity teams. The remaining means of compliance was for UCD to show a history and continuing practice of program expansion for women. It did not make such a showing here, or, at a minimum, the

facts are in dispute as to whether it did. AOB at 51-59. Therefore, the district court erred in granting summary judgment for UCD.

CONCLUSION

For the reasons set forth above and in Appellants' Opening Brief, the district court's decision should be reversed.

Respectfully submitted,

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INTEREST OF THE AMICI

For over 125 years, the *American Association of University Women* (AAUW) has been a catalyst for the advancement of women and their transformation of American society. AAUW's more than 100,000 members belong to a community that breaks through educational and economic barriers so all women have a fair chance. With more than 1,300 branches across the country, AAUW works to promote equity for all women and girls through education, research, and advocacy. AAUW supports civil rights laws such as Title IX that promote and enforce equal opportunities for women and girls. AAUW endorses Title IX's protection of equal athletic opportunities for female students in all public schools, including higher education.

The *Asian American Justice Center* is a national non-profit, non-partisan organization whose mission is to advance the human and civil rights of Asian Americans. Collectively, AAJC and its Affiliates, the Asian American Institute, Asian Law Caucus, and the Asian Pacific American Legal Center of Southern California, have over 50 years of experience in providing legal public policy, advocacy, and community education. AAJC and its Affiliates have a long-standing interest in ensuring equal opportunity in education through the protections guaranteed by Title IX and by the Constitution, and this interest has resulted in AAJC's participation in a number of amicus briefs and before the courts.

The *California Women's Law Center* (CWLC) is a private, nonprofit public interest law center specializing in the civil rights of women and girls. The California Women's Law Center was established in 1989 to address the comprehensive civil rights of women and girls in the following priority areas: Gender Discrimination, Women's Health, Reproductive Justice and Violence Against Women. Since its inception, the CWLC has placed a strong emphasis on advancing the rights of women and girls in education, particularly the issues of discrimination, and access to equal opportunities in athletic programs and activities. The issues raised in this case will have an enormous impact on the rights of women and girls to participate fully in educational and athletic programs free of the terrible consequences of discrimination. Thus, this case raises questions within the expertise and concern of the California Women's Law Center; and the California Women's Law Center has the requisite interest and expertise to be heard by the Court in this appeal.

The *Connecticut Women's Education and Legal Fund (CWEALF)* is a non-profit women's rights organization dedicated to empowering women, girls and their families to achieve equal opportunities in their personal and professional lives.

CWEALF defends the rights of individuals in the courts, educational institutions, workplaces and in their private lives. For the past three decades, CWEALF has provided legal information and conducted public policy and advocacy to ensure the spirit of Title IX is implemented and enforced in educational and athletic opportunities.

Dads & Daughters® materials provide resources and inspiration to fathers and stepfathers with daughters across the nation. The fathers in our network are deeply concerned about the opportunities available to our daughters now and into the future. We know the profound and positive impact that sports and physical activity have on our daughters' health and well-being. The well-being of daughters and our country (not to mention the pursuit of justice) mean that Title IX must be vigorously enforced by the courts and enthusiastically embraced by institutions of learning. It is for these reasons that DadsandDaughters.com joins this amicus brief.

The *Legal Aid Society – Employment Law Center* ("LAS-ELC") is a non-profit public interest law firm whose mission is to protect, preserve, and advance the rights of individuals from traditionally under-represented communities in cases involving access to education and employment non-discrimination. Since 1970, the LAS-ELC has represented plaintiffs in cases of special import to communities of color, women, recent immigrants, individuals with disabilities, and the working poor. The LAS-ELC's Title IX K-12 Equality Project's focus is bringing claims on behalf of female athletes denied equal participation opportunities and equal treatment and benefits in violation of Title IX. Such cases include *Cruz v. Alhambra*, CV 04-1460 CV ABC (Mcx) (C.D. Cal.) and *Ollier v. Sweetwater*, 07cv714-L (WMc) (S.D.Cal.). The LAS-ELC's interest in vigorously enforcing this country's antidiscrimination laws is longstanding.

Legal Momentum (formerly NOW Legal Defense and Education Fund) advances the rights of women and girls by using the power of the law and creating innovative public policy. It is the nation's oldest legal advocacy organization devoted to women's rights. From 1974 to 1992, Legal Momentum pioneered the implementation of Title IX with PEER, its nationwide Project on Equal Education Rights. It was co-counsel in *Doe v. Petaluma School District*, 949 F. Supp. 1415 (N.D. Cal 1996), the first case to recognize that a school's failure to respond to peer sexual harassment may violate Title IX. Legal Momentum also has appeared as *amicus* in numerous cases concerning educational equity, including equal opportunity in athletics, such as *Brentwood Academy v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288 (2001) and *NCAA v. Smith*, 525 U.S. 459 (1999).

Founded in 1971, the *National Partnership for Women & Families* 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 in education and in the workplace. The National Partnership has devoted significant resources to combating sex and race discrimination and has filed numerous amicus curiae briefs in the federal circuit courts of appeal to advance women's opportunities.

The *Northwest Women's Law Center* (NWWLC) is a regional, non-profit, public interest organization that, since its founding in 1978, has worked to advance the legal rights of women and girls in the five Northwest states (AK, ID, MT, OR, WA). NWWLC has been involved in litigation and legislation aimed at ending all forms of discrimination against women, as well as public education and the provision of legal information and referral services. In particular, NWWLC has worked to protect and ensure women's and girls' rights to equal opportunities in education. NWWLC's first case, *Blair v. Washington State University*, successfully challenged discrimination in college athletic programs, and it has litigated or participated as *amicus* in numerous other cases involving gender equity in athletics. NWWLC serves as a regional expert and leading advocate on Title IX and gender equity.

People For the American Way Foundation ("People For") is a nonpartisan citizens' organization established to promote and protect civil and constitutional rights. Founded in 1981 by a group of civic, religious, and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty, People For has hundreds of thousands of members nationwide. People For has been actively involved in efforts to combat discrimination and promote equal rights, including efforts to protect the rights of women, issues which are directly involved in this case.

The *Southwest Women's Law Center* is a nonprofit women's legal advocacy organization based in Albuquerque, New Mexico. Its mission is to create the opportunity for women to realize their full economic and personal potential by eliminating gender discrimination, helping to lift women and their families out of poverty, and ensuring that women have control over their reproductive lives. The Southwest Women's Law Center is committed to eliminating gender discrimination in all of its forms and ensuring broad and meaningful enforcement of anti-discrimination laws in public education.

The *Union for Reform Judaism* (URJ), founded in 1873, is the central body of the Reform Movement in North America including 900 congregations encompassing 1.5 million Reform Jews. The URJ comes to this issue out of our longtime commitment to asserting the principle, and furthering the practice, of the full equality of women on every level of life. Our Movement has consistently supported the advancement of women in the work force and women's rights in general. As Jews, we are taught in the very beginning of the Torah that God created humans *B'tselem Elohim* (in the Divine Image). We believe that the diversity of creation represents the vastness of the Eternal (Genesis 1:27) and oppose discrimination against all individuals. Since its enactment, Title IX has been an essential tool in the effort to ensure an end to discrimination on the basis of sex.

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

The *Women's Law Project (WLP*) is a non-profit public interest legal center with offices in Philadelphia and Pittsburgh, PA. Founded in 1974, the 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 has a strong interest in the eradication of discrimination against women and girls in athletics and the availability of strong and effective remedies under Title IX of the Education Amendments of 1972. The WLP has worked throughout its history to eliminate sex discrimination in athletics and education, representing student athletes, coaches, and other players in the athletic arena in their efforts to achieve equal treatment and equal opportunity. Application of the proper standard for liability in athletic discrimination cases is essential to realizing Title IX's goal of equality in athletic

CERTIFICATE OF COMPLIANCE
PURSUANT TO CIRCUIT RULE 32-1

Pursuant to Fed. R. App. P. 32 (a)(7)(C) and Circuit Rule 32-1, I certify that the attached Brief of Amici Curiae National Women's Law Center *et al.* in Support of Appellants' Brief Urging Reversal is proportionately spaced, has a typeface of 14 points or more and contains 5,604 words.

DATED: February 20, 2009

/s/ Dina R. Lassow
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PROOF OF SERVICE

I hereby certify that on February 20, 2009, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED: February 20, 2009 By: */s/ Dina R. Lassow*
DINA R. LASSOW