

No. 20-15570

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

A.B. and A.M.B., by their parents and next friends, C.B. and D.B., T.T., by her parents and next friends, K.T. and S.T., and A.P., by her parents and next friends, C.P. and M.P.,

Plaintiffs-Appellants,

v.

HAWAII STATE DEPARTMENT OF EDUCATION and OAHU
INTERSCHOLASTIC ASSOCIATION,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII
No. 1:18-cv-00477-LEK-RT
Honorable Leslie E. Kobayashi

**BRIEF OF CIVIL RIGHTS ORGANIZATIONS AS *AMICI CURIAE*
IN SUPPORT OF PLAINTIFFS-APPELLANTS' OPENING BRIEF**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(a)(4)(A), undersigned counsel certifies that amici curiae each have no parent corporation, and that there is no publicly held corporation that owns 10% or more of the stock of any of them.

DATED: July 17, 2020

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INTEREST OF AMICI CURIAE

Amici curiae are:

- American Association of University Women,
- Atlanta Women for Equality,
- The California Women’s Law Center,
- Champion Women,
- Equal Rights Advocates,
- The National Women’s Law Center,
- The Southwest Women’s Law Center,
- The Women’s Law Project, and
- The Women’s Sports Foundation.

These nine civil rights organizations share a longstanding commitment to Title IX and, more broadly, to equality for all in education and athletics. Each organization is further described in the attached Addendum.¹

ARGUMENT

The district court abused its discretion in determining that Plaintiffs do not satisfy the requirements of Federal Rule of Civil Procedure 23(a). Specifically, the

¹ No counsel for any party authored this brief in whole or in part and no entity or person, aside from *amici* and their counsel, made any monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

district court plainly erred as a matter of law both in determining that Plaintiffs do not satisfy the numerosity requirement of Rule 23(a)(1) at all, and in determining that Plaintiffs do not satisfy the commonality and typicality requirements of Rule 23(a)(2)-(3) with regard to their retaliation claim.

If left uncorrected, the district court's abuse of discretion may deny equal participation in athletics to hundreds of minor female students who attend or will attend James Campbell High School. Such a denial not only deprives such students of the civil rights guaranteed by Title IX, but could also lead to worse health, educational, and professional outcomes throughout their lives. Moreover, the district court's erroneous decision poses an acute threat not only to all class actions aimed at vindicating the Title IX rights of minor students, but to the civil rights of similarly vulnerable populations more broadly, which also depend upon the availability of the class action mechanism generally and classwide retaliation claims in particular. Because the Court has committed clear errors of law, it has abused its discretion and reversal is warranted. *See Senne v. Kansas City Royals Baseball Corp.*, 934 F.3d 918, 926 (9th Cir. 2019).

I. TITLE IX ENFORCEMENT AND COMPLIANCE IS CRITICAL TO ENSURING EQUAL ACCESS TO THE SUBSTANTIAL BENEFITS OF PARTICIPATION IN SPORTS

A. The Ongoing Fulfillment Of Title IX’s Promise

Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq.*, bars sex discrimination in educational programs that receive federal funding. Since its enactment, Title IX has played a vital role in breaking down barriers for girls to participate in interscholastic sports. By prohibiting sex discrimination in school athletics programs, Title IX has enabled millions of girls and young women across the country to participate in and reap the many lifelong benefits of playing sports.

Despite these gains, the equality envisioned and required by Title IX is not yet a reality. Nearly fifty years after Title IX’s enactment, many high schools—as well as middle schools and universities—still fail to provide equal athletic opportunities, treatment, and benefits for female students. In fact, girls’ opportunities today are still not at the level of boys’ opportunities in 1972, and schools are still providing about 1.1 million fewer chances for girls to play high school sports, despite girls’ strong interest in participating in greater numbers.²

² National Federation of State High School Associations, *2018-19 High School Athletics Participation Survey 54* (2019), available at https://www.nfhs.org/media/1020412/2018-19_participation_survey.pdf. Across Hawaii, opportunities afforded to girls also lag behind in high school athletics by a (continued...)

Girls of color, in particular, receive far fewer opportunities to play school sports compared to white girls, white boys, and boys of color.³ Moreover, female athletes often face inequitable treatment and benefits, including being relegated to inferior facilities, assigned to disadvantageous times for practicing and competing, and are allocated less fundraising opportunities—resulting in the second-class status of girls’ teams.⁴ Enforcement of Title IX is essential to ensure that schools provide girls with genuine and equal opportunities to participate in sports.

B. Title IX’s Non-Retaliation Imperative

Title IX’s non-retaliation requirement also remains essential to improving compliance with the law. This aspect of the law aims to encourage reporting of

(continued...)

significant margin. *Id.* at 55; *see also* Philip Veliz et al., Women’s Sports Foundation, *The State of High School Sports in America: An Evaluation of the Nation’s Most Popular Extracurricular Activity* (“*State of High School Sports*”) 3 (2019), *available at* <https://www.womenssportsfoundation.org/wp-content/uploads/2019/10/state-of-high-school-sports-report-final.pdf>.

³ *See* National Women’s Law Center, *The Battle for Gender Equity in Athletics in Elementary and Secondary Schools* (“*Battle for Gender Equity*”) 1 (2017), *available at* <https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2015/08/Battle-for-GE-in-Elementary-and-Secondary-Schools.pdf>.

⁴ *Id.* at 1-2; *see also* Ellen Staurowsky et al., Women’s Sports Foundation, *Chasing Equity: The Triumphs, Challenges, and Opportunities in Sports for Girls and Women* (“*Chasing Equity*”) 34 (2020) (identifying “access to quality facilities/resources and equal treatment” as a barrier to girls’ participation in sports), *available at* <https://www.womenssportsfoundation.org/wp-content/uploads/2020/01/Chasing-Equity-Full-Report-Web.pdf>.

Title IX violations by preventing backlash against those who seek to remedy sex discrimination.⁵ Notwithstanding Title IX's five-decade history, however, the fear of retaliation for reporting Title IX concerns remains pervasive. For example, in a nationwide survey of coaches of intercollegiate women's teams, only 66% of female coaches and 81% of male coaches reported feeling comfortable going to athletic department administrators with concerns about gender equity and Title IX; those number dropped to 58% and 74% respectively with regard to administrators outside the athletic department.⁶ Similarly, 31% of female coaches and 20% of male coaches feared loss of their job if they spoke up about Title IX violations, and 33% and 19% were reluctant to ask for help with a gender bias situation due to fear of retaliation.⁷

This widespread fear of retaliation can be even more harmful at the high school level, where coaches are a critical source of encouragement for girls' involvement with sports. Seeing women in such leadership positions can inspire

⁵ *Chasing Equity*, at 43; see also *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 180 (2005) ("Title IX's enforcement scheme would unravel" absent the prohibition of retaliation because "individuals who witness discrimination would be loath to report it, and all manner of Title IX violations might go unremedied as a result.").

⁶ Don Sabo et al., Women's Sports Foundation, *Beyond X's & O's: Gender Bias and Coaches of Women's College Sports* 9 (2016), available at <https://www.womenssportsfoundation.org/wp-content/uploads/2016/08/beyond-xs-osexecutive-summary-for-web.pdf>.

⁷ *Id.* at 7, 9.

girls to remain involved in sports and help challenge stereotypes about gender and power.⁸ At the same time, the behavior of adult leaders can be detrimental to girls' participation in athletics. Whether intentionally or not, adults can reproduce gender stereotypes by disregarding girls, unfavorably comparing their athletic prowess to that of boys, and blaming gender disparities in participation on baseless critiques of girls' lack of interest, motivation, or effort.⁹ Thus, retaliation by high school officials against girls' coaches and teams that speak out on Title IX issues both deprive girls of key sources of motivation to participate in athletics and reinforce gender stereotypes that diminish such motivation.

⁸ Tucker Center for Research on Girls & Women in Sport, *Developing Physically Active Girls: An Evidence-based Multidisciplinary Approach* (“*Developing Physically Active Girls*”) 16-17 (2018), available at <https://z.umn.edu/tcrr-r3>; see also Nicole Zarrett et al., Women’s Sports Foundation, *Keeping Girls in the Game: Factors that Influence Sport Participation* (“*Keeping Girls in the Game*”) 6-7, 34 (2020), available at <https://www.womenssportsfoundation.org/wp-content/uploads/2020/02/Keeping-Girls-in-the-Game-FINAL-web.pdf>.

⁹ *Developing Physically Active Girls*, at 16 (discussing, *inter alia*, study showing how “coaches and community organizers in Los Angeles constrain underserved girls’ basketball participation by acting in ways . . . that reproduced their beliefs that ‘girls aren’t interested in sports’—which the girls themselves refuted as not accurate”); see also *Keeping Girls in the Game*, at 5 (“Alarming, a third of parents (32.2%) endorsed the belief that boys are better at sports than girls, and this does not vary by youth sport status.”).

C. The Substantial Benefits Of High School Athletics For Girls And Women

The benefits of athletic participation cannot be overstated, as girls derive substantial advantages from involvement in high school sports throughout their lives. High school athletic participation drives lifelong benefits in terms of educational performance, career achievement, and health outcomes. Further, these benefits are amplified for girls and women of color. Title IX is imperative to preserving and advancing these benefits.

1. High School Sports Improve Lifelong Educational Performance, Career Achievement, and Health Outcomes

The educational and professional benefits that girls and women obtain from participation in high school sports are undeniable and remarkable. During high school, female athletes are more likely to have higher grades, higher standardized tests scores, fewer disciplinary problems, increased attendance, a greater desire to attend college, and a higher graduation rate compared to their non-athlete peers.¹⁰ Studies have also shown that female athletes are more likely than other female students to make gains in historically male-dominated academic areas, such as

¹⁰ *Battle for Gender Equity*, at 2; *Developing Physically Active Girls*, at 7; Ellen Staurowsky et al., Women's Sports Foundation, *Her Life Depends on It III: Sport, Physical Activity, and the Health and Well-Being of American Girls and Women ("Her Life Depends on It")* 97 (2015), available at https://www.womenssportsfoundation.org/wp-content/uploads/2015/05/hldoi-iii_full-report.pdf.

math and science.¹¹ After high school, women who were athletes are more likely to attend and graduate from college, and are more likely to participate in the labor force and earn higher wages.¹² For example, a recent survey of 400 women executives in four countries found that 94% of these women played sports and that wages for athletes were 7% higher than wages for non-athletes.¹³

Nor can the academic and professional gains of women in the wake of Title IX be dismissed as merely correlational. Indeed, one particularly rigorous econometric study looked at data on 25 to 34-year-olds from the 1980 Census and the 2000 Census so as to compare those who attended high school entirely before and entirely after Title IX.¹⁴ Carefully “controlling as thoroughly as possible for student’s underlying ability and resources,” the study concluded that “it appears as if sports participation induced by Title IX had a large and statistically significant effect on female educational attainment” and “a statistically significant increase in labor force participation.”¹⁵ Specifically, “Title IX may explain roughly one-fifth of the rise in female educational attainment during this period” and “up to 40% of

¹¹ *Her Life Depends on It*, at 99.

¹² *Battle for Gender Equity*, at 2; see also *Chasing Equity*, at 7, 24-29.

¹³ *Developing Physically Active Girls*, at 7 (discussing 2016 Ernst & Young study).

¹⁴ Betsey Stevenson, *Beyond the Classroom: Using Title IX to Measure the Return to High School Sports*, 92 Rev. Econ. & Stat. 284, 284-301 (2010).

¹⁵ *Id.*

the overall rise in the employment of 25-34 year old women.”¹⁶ This includes “15 percent of the rise in female employment in male occupations,” which are generally higher-earning, and “*all* of the growth in employment of women in sports-related occupations between 1980 and 2000.”¹⁷

Participation in high school athletics also leads to meaningful short-term and long-term improvements in girls’ and women’s physical and mental health. Athletic participation results in higher levels of self-efficacy, confidence, self-esteem, physical competence, self-worth, and body esteem for high school girls.¹⁸ Female athletes are also less likely than non-athletes to smoke cigarettes, use illicit drugs, engage in high-risk sexual behavior, become pregnant, or suffer from depression in high school.¹⁹ Later in life, women who were formerly high school athletes are less likely to develop heart disease, diabetes, osteoporosis, breast cancer, Alzheimer’s disease, and other health problems.²⁰

¹⁶ *Id.*

¹⁷ *Id.* (emphasis in original).

¹⁸ *Developing Physically Active Girls*, at 3; *see also id.* at 5 (listing a host of developmental assets attained by girls through participation in physical activity).

¹⁹ *Battle for Gender Equity*, at 2-3; *Her Life Depends on It*, at 62, 74, 80; *Developing Physically Active Girls*, at 6-7.

²⁰ *Battle for Gender Equity*, 2-3; *Her Life Depends on It*, at 19; *see also Chasing Equity*, at 7, 24-29; *State of High School Sports*, at 4; *Developing Physically Active Girls*, at 6.

2. The Benefits of High School Sports Are Amplified for Girls and Women of Color

High school sports are particularly impactful on the lives of girls and women of color. As set forth below, girls and women of color are both more likely to face impediments to athletic participation and at higher risk for many of the negative outcomes that athletic participation helps alleviate. Thus, the failure to provide equal opportunities in high school athletics to girls of color is more likely to deny them the lifelong academic, economic, and health benefits that athletes enjoy.

Girls of color face myriad barriers to athletic participation, including fewer programs and resources, less access to safe and secure playing areas, domination of available playing areas by boys and men, and lack of cross-cultural sensitivity for families who speak English as a second language or who are religiously observant.²¹ For example, a third of African-American parents report that financial issues ended or precluded their daughters' athletic participation compared with less than a fifth of white parents, and half of African-American and Latinx parents report that their communities offer more sports programs for boys than for girls.²² Further, more than half of white girls are involved with sports at age 6 or younger

²¹ *Developing Physically Active Girls*, at 17-19.

²² Women's Sports Foundation, *Report Brief: Her Life Depends on It III & Girls and Women of Color* ("Girls and Women of Color") 1-2 (2016), available at <https://www.womenssportsfoundation.org/wp-content/uploads/2016/08/her-life-depends-on-it-women-of-color-brief-full-citations-final.pdf>.

compared to less than a third of African-American and Latina girls; white girls are three times more likely to be involved in sports through a private organization than African-American girls; and African-American girls are more likely than white girls to attend schools with higher poverty rates and thus fewer gymnasiums, fields, coaches, and teams.²³ Many girls of color also take care of siblings or have jobs to supplement family income, which further limits their ability to participate in athletics.²⁴

The impact of these barriers is clear in terms of participation levels. More than one-quarter of African American girls, one-fifth of Latina girls, and nearly one-fifth of Asian American girls report not being physically active for at least 60 minutes in the past week, while less than one-sixth of white girls do.²⁵ Declines in physical activity among African American girls from childhood to adolescence are also much greater than their white counterparts.²⁶ Immigrant girls of color are particularly disadvantaged as only 46% of immigrant youth participate in extracurricular activities compared to 65% of U.S.-born youth, and girls in

²³ *Id.* at 2.

²⁴ *Id.*

²⁵ National Women's Law Center and Poverty & Race Research Action Council, *Finishing Last: Girls of Color and School Sports Opportunities* ("Finishing Last") 7 (2015), available at https://www.nwlc.org/sites/default/files/pdfs/final_nwlc_girlsfinishinglast_report.pdf.

²⁶ *Developing Physically Active Girls*, at 21.

immigrant families report lower rates of athletic participation than boys within the same families.²⁷ The limited opportunities for girls of color to play sports before and during high school also plays out at the college level, where women of color make up 25 percent of female college students, but only 15 percent of female college athletes.²⁸

The impact of the participation differential is also exacerbated by the great need among many girls and women of color for the social and health benefits of high school athletics. As an initial matter, given the impact that athletic scholarships can have on the financial ability of many students to go to college, regardless of sex or race, more women of color would no doubt attend college if they had more athletic participation opportunities in high school.²⁹ Further, girls of color report greater levels of depressive symptoms and lower levels of positive self-esteem than their white counterparts,³⁰ but girls of color on sports teams show higher levels of self-esteem and higher rates of participation in other extracurricular activities than minority girls who do not play sports.³¹ Research

²⁷ *Id.* at 22-23.

²⁸ *Finishing Last*, at 8.

²⁹ *Id.* at 7.

³⁰ *Developing Physically Active Girls*, at 25.

³¹ *Finishing Last*, at 7.

also shows that women of color are generally more at risk for health issues like heart disease and diabetes that high school athletics mitigate.³²

II. THE DISTRICT COURT’S ORDER IS AN ABUSE OF DISCRETION THAT THREATENS THE CIVIL RIGHTS OF MINOR STUDENTS AND OTHER SIMILARLY SITUATED VULNERABLE POPULATIONS

A. The District Court Abused Its Discretion In Finding That The Class Lacks Numerosity Because It Is Tied To A Specific Government Institution

In its order denying Plaintiffs’ motion for class certification (“Order”), the district court found that Plaintiffs had “not demonstrated that joinder would be impracticable” because the “proposed class members are limited to the female student population from a single high school” and as such, the class was “geographically tied to one area” and “identifiable through school and athletic records.” ER 16.³³ Further, the district court declined to consider future and potential Campbell students in its numerosity determination because it could not reasonably approximate them. ER 17. This erroneous legal standard is in stark contrast to students’ longstanding use of the class action vehicle to enforce their Title IX rights. Moreover, the Order’s legal holding is inconsistent with analogous case law allowing other vulnerable populations to bring civil rights claims on a class basis against a specific government institution.

³² *Girls and Women of Color*, at 2-3; *Developing Physically Active Girls*, at 25.

³³ Cites to ER refer to Plaintiffs-Appellants’ Excerpts of Record (Dkt. 10).

Notwithstanding the district court's erroneous finding, joinder of all plaintiffs is plainly and particularly impracticable in the context of a Title IX action brought on behalf of hundreds of high school students. Because of their youth, such students often lack the experience, knowledge, and confidence needed to identify and protest discrimination on their own. As the Supreme Court has recognized, many students may be unaware of their rights under Title IX or of the available means of enforcing those rights. *See Jackson*, 544 U.S. at 181 (2005) (“teachers and coaches . . . are often in the best position to vindicate the [Title IX] rights of their students because they are better able to identify discrimination and bring it to the attention of administrators.”). And as the Order itself implicitly recognizes, those older students most likely to have the wherewithal to bring a claim would almost certainly see their action mooted by graduation absent class treatment. *See* ER 9 (finding instant claims “inherently transitory” due to “necessarily finite duration of a high school student’s time as a student-athlete”).

The district court also erred as a matter of law in its failure to consider future and potential students as class members in an action seeking injunctive and declaratory relief under Federal Rule of Civil Procedure 23(b)(2). Under Ninth Circuit law, where “plaintiffs seek injunctive and declaratory relief, the numerosity requirement is relaxed and plaintiffs may rely on the reasonable inference arising from plaintiffs’ other evidence that the number of unknown and future members of

[the] proposed [class] is sufficient to make joinder impracticable.” *Sueoka v. United States*, 101 F. App’x 649, 653 (9th Cir. 2004) (district court “abused its discretion in finding that plaintiffs failed to show the numerosity of [the class] on the ground that they ‘offer no estimate as to the size of this class, nor could they, since it includes only future claimants whose cause of action, if any, has not yet arisen’”). This error is particularly acute here, as it denies representation to the legions of girls who will unquestionably become Campbell students and undermines their chance at the freedom from sex discrimination long promised by Title IX.

Further, the district court ignored the established rights of similar vulnerable and transitory populations to bring classwide civil rights claims against similarly populous institutions, such as immigration detainees challenging the terms of their confinement or inmates challenging prison conditions. For example, in *Hernandez v. Lynch*, plaintiffs challenged the legality of bond setting practices that led to their prolonged detention during immigration removal proceedings due solely to their inability to pay, and the district court certified a class of “[a]ll individuals who are or will be detained . . . in the Central District of California.” No. 5:16-cv-00620-JGB (KKx), 2016 WL 7116611, at *1-2, *20 (C.D. Cal. Nov. 10, 2016), *aff’d sub nom. Hernandez v. Sessions*, 872 F.3d 976 (9th Cir. 2017). The class was sufficiently numerous both because ICE data showed “at least 119 individuals

detained in this District . . . for whom bond had been determined and who had not posted bond” and because, “even if the exact number of detainees currently in the Proposed Class cannot be determined with precision, the Central District contains four immigration detention centers with a collective capacity to hold 3,000 individuals.” *Id.* at *15.³⁴

In sum, the district court has erected the legally erroneous hurdle of requiring high school students to individually seek remedies to address ongoing program-wide discrimination in violation of Title IX. This unwieldy, utterly impracticable, and unsupported requirement undermines Title IX’s aims.³⁵ It is also black letter law that meritorious civil rights claims for declaratory and injunctive relief can generally be brought as class actions. *See 1 Newberg on Class*

³⁴ *See also Hernandez v. Cty. of Monterey*, 305 F.R.D. 132, 139, 164 (N.D. Cal. 2015) (certifying class of “all adult men and women who are now, or will be in the future, incarcerated in Monterey County Jail” in action challenging jail practices regarding “inmate safety, medical care, mental health care and disabilities”); *Ashker v. Governor of Cal.*, No. 4:09-cv-05796-CW, 2014 WL 2465191, at *1, *9 (N.D. Cal. June 2, 2014) (certifying class of “all inmates who are now, or will be in the future, assigned to the Pelican Bay [Security Housing Unit] for a period of more than ten continuous years” in action challenging long-term solitary confinement).

³⁵ Congress intended Title IX to create a broad remedy for sex discrimination. *See North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 520-30 (1982); *Cannon v. University of Chi.*, 441 U.S. 677, 694-703 (1979). As the principal Senate sponsor, Senator Birch Bayh, explained, Title IX was “a strong and comprehensive measure [that would] provide women with solid legal protection from the persistent, pernicious discrimination which is serving to perpetuate second-class citizenship for American women.” 118 Cong. Rec. 5804 (1972).

Actions § 3:12 (5th ed.) (fear of retaliation in civil rights cases “might deter potential plaintiffs from suing individually, making a representative action especially pertinent”); *id.* § 3:15 (“concerns posed by future claimants” such as “how to deal with the impracticality of counting such class members, much less joining them, . . . may make class certification more, not less, likely”); 7AA Wright et al., *Federal Practice & Procedure* § 1775 (3d ed.) (Federal Rule of Civil Procedure 23(b)(2) was added “primarily to facilitate the bringing of class actions in the civil-rights area”). As such, the district court’s Order ignores the well-established purpose and utility of both Title IX and the class action mechanism, which in turn erodes the ability of female students to call out glaring inequities that Title IX was passed to eradicate.

B. The District Court Abused Its Discretion In Finding That The Class Lacks Commonality And Typicality Because It Did Not Face Classwide Retaliation

The district court’s Order wrongly minimizes the Plaintiffs’ retaliation claim as reflecting only “a dispute between Defendants, specifically limited to Campbell administrators, and the water polo team and their parents.” ER 22-23. In its view, because “Plaintiffs do not allege any instances of retaliation against any athletes other than members of the water polo team,” the retaliation claim does not present any “questions of law or fact common among the proposed class,” and it “is not typical of the proposed class; it is unique to the named Plaintiffs.” ER 23. But the

district court's conclusion that "Plaintiffs have not satisfied the Rule 23(a) commonality and typicality requirements," *id.*, is clearly inconsistent with the injuries suffered by the entire class due to Campbell's retaliatory actions. And again, the district court ignores instructive case law addressing other vulnerable populations' similar efforts to vindicate their civil rights.

With regard to both adults and minors, this Court has repeatedly recognized the "chilling effect of retaliation" as a cognizable harm in the context of enforcing Title IX and other civil rights. *Stanley v. University of S. Cal.*, 13 F.3d 1313, 1324 n.5 (9th Cir. 1994) (citing *Garcia v. Lawn*, 805 F.2d 1400, 1405 (9th Cir. 1986)); *see also Ollier v. Sweetwater Union High Sch. Dist.*, 768 F.3d 843, 853 (9th Cir. 2014) (affirming district court's finding that high school's "retaliatory conduct . . . had caused a 'chilling effect on students who would complain about continuing gender inequality in athletic programs at the school.'"). In *Garcia*, for example, this Court explained that an analogous "retaliatory action for the exercise of Title VII rights" is broader than "a claim of harm to the plaintiff and his family" because "the chilling effect of retaliatory activity" implicates "a deleterious effect on the exercise of these rights by others." *Garcia*, 805 F.2d at 1405. As in *Garcia*, Campbell's retaliation against the water polo team plainly had a deleterious effect on the class in terms of its chilling effect. *See* ER 244-45. Moreover, in the high school context in particular, the retaliation also had a deleterious effect on the class

in reproducing the gender stereotypes that inhibit girls' participation in athletics to begin with. *See* Part I.B, *supra*.

Ollier is also particularly instructive in that it expressly rejects the erroneous understanding of Plaintiffs' Title IX retaliation claim advanced by the district court here—*i.e.*, that only the party directly retaliated against can pursue a claim for retaliation. In *Ollier*, a high school coach was allegedly fired for making Title IX complaints on behalf of student athletes, and the defendant school district argued that while he “would have had standing to bring a Title IX retaliation claim himself, the ‘third party’ students cannot ‘maintain a valid cause of action for retaliation under Title IX for their coach’s protected activity and the adverse employment action taken against the coach.’” 768 F.3d at 865. This Court flatly rejected that argument, explaining that it “misunderstands Plaintiffs’ claim, which asserts that Sweetwater impermissibly retaliated against *them*”—the students—“by firing Coach Martinez in response to Title IX complaints he made.” *Id.* (emphasis added). So too here, the district court misunderstands the class retaliation claim, which asserts that Campbell impermissibly retaliated against *them*—“[a]ll present and future James Campbell High School (‘Campbell’) female students and potential students who participate, seek to participate, and/or were deterred from participating in athletics at Campbell”—by, *inter alia*, threatening to eliminate the

water polo team when members of that team made Title IX complaints. *See* ER 5-6, 204-05.

In short, the Supreme Court has “consistently interpreted Title IX’s private cause of action broadly to encompass diverse forms of intentional sex discrimination,” and has left no doubt that “retaliation against individuals because they complain of sex discrimination is intentional conduct that violates the clear terms of the statute.” *Jackson*, 544 U.S. at 183 (internal quotation marks omitted). And the Ninth Circuit has long held that retaliation’s chilling effect harms those beyond the individuals retaliated against. Thus, there is a plain claim of harm due to retaliation here that is both common among and typical of all proposed class members.

CONCLUSION

Like Plaintiffs, *amici* respectfully request that this Court reverse the district court’s denial of class certification and remand with instructions to certify the class, including with regard to the retaliation claim.

DATED: July 17, 2020

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 29(a)(5) because it contains 4,552 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the typestyle requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 in Times New Roman 14-point font.

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ADDENDUM

FURTHER DESCRIPTION OF *AMICI CURIAE*

American Association of University Women (“AAUW”) was founded in 1881 by like-minded women who had challenged society’s conventions by earning college degrees. Since then it has worked to increase women’s access to higher education through research, advocacy, and philanthropy. Today, AAUW has more than 170,000 members and supporters, 1,000 branches, and 800 college and university partners nationwide. AAUW plays a major role in mobilizing advocates nationwide on AAUW’s priority issues to advance gender equity. In adherence with its member-adopted Public Policy Program, AAUW supports equitable educational climates free of harassment, bullying, and sexual assault, and vigorous enforcement of Title IX and all other civil rights laws pertaining to education.

Atlanta Women for Equality (“AWE”) is a 501(c)(3) legal aid organization dedicated to empowering women and girls to assert their legal rights to gender equity in our education system. It does so by providing free legal advocacy for women and girls facing gender discrimination in the educational environment and by protecting and expanding equal educational opportunities for women and girls through public policy advocacy. AWE firmly supports Plaintiffs in this case because equal athletic opportunities for women and girls are a necessary aspect of equal educational opportunities.

The **California Women’s Law Center** (“CWLC”) is a statewide non-profit law and policy center dedicated to breaking down barriers and advancing the potential of women and girls through transformative litigation, policy advocacy, and education. Its issue priorities include gender discrimination, economic justice, violence against women and women’s health. Since its inception, CWLC has placed particular focus on addressing the rights of female students under Title IX to receive equal athletic opportunities, treatment and benefits to their male counterparts. CWLC has successfully represented female students in class action litigation across the state, consistently develops educational resources and regularly conducts trainings for other attorneys and members of the public on the rights of women and girls pursuant to Title IX.

Champion Women, Inc. (“Champion Women”) is a fearless and focused advocate for women’s sports that empowers local constituencies and amplifies the voices of girls and women who may not be able to speak for themselves. It leads targeted efforts to aggressively advocate for equality, accountability, and transparency by educational and athletic institutions that have fallen short in addressing critical gender equity issues under Title IX and otherwise. Champion Women is committed to using sport to improve the lives of girls and women.

Equal Rights Advocates (“ERA”) is a national civil rights organization dedicated to protecting and expanding economic and educational access and

opportunities for women and girls. In service of its mission, ERA litigates class action and other high-impact cases on issues of gender discrimination in employment and education. Landmark cases include *Mansourian v. Regents of the University of California*, 2011 U.S. Dist. LEXIS 46606 (E.D. Cal. Apr. 29, 2011), a case involving female wrestlers; *Doe v. Petaluma City Sch. Dist.*, 830 F. Supp. 1560 (N.D. Cal. 1993), *recon. granted*, 949 F. Supp. 1415 (N.D. Cal. 1996), a case involving sexual harassment of a student wherein the Court applied a Title VII framework to Title IX; and *Dukes v. Wal-Mart*, 474 F.3d 1214 (9th Cir. 2007), a landmark class action employment case. ERA has filed hundreds of suits and appeared as amicus curiae in numerous cases to defend and enforce students' civil rights in state and federal courts, including before the United States Supreme Court, in addition to the legal services provided to hundreds of students throughout the country through its free Advice and Counseling program.

The **National Women's Law Center** ("NWLC") is a non-profit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. Since 1972, NWLC has worked to secure equal opportunities in education for girls and women through the full enforcement of Title IX in all arenas, including interscholastic and collegiate athletics.

The **Southwest Women’s Law Center** (“SWLC”) was founded in 2005 in Albuquerque, New Mexico. Its mission is to create opportunities for women and girls to realize their full economic and personal potential by: eliminating gender bias, discrimination and harassment; lifting women and their families out of poverty; and ensuring that all women and girls have full control over their reproductive lives through access to comprehensive reproductive health services and information. It achieves these goals through impact litigation, policy advocacy and legislative advocacy. The Hawaii State Department of Education and the Oahu Interscholastic Association’s unequal treatment of young female athletes as compared to similarly situated young male athletes violates Title IX of the Education Amendments of 1972. The SWLC has an interest in similarly situated female and male athletes receiving equal treatment under the law with respect to high school athletics.

The **Women’s Law Project** (“WLP”) is a Pennsylvania-based nonprofit public interest legal advocacy organization that seeks to advance the legal, social, and economic status of all people regardless of gender. To that end, WLP engages in impact litigation and policy advocacy, public education, and individual counseling. WLP’s advocacy efforts include reproductive rights, health, education, athletics, employment, insurance, prisoner’s rights, LGBTQ rights, sexual assault, and family law, including domestic violence, custody and support. 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. Throughout its history, the WLP has played a leading role in efforts to eliminate sex discrimination in athletics and education, representing student athletes in their efforts to achieve equal treatment and equal opportunity, including through successfully resolved class actions, as well as pursuing public policy and educational initiatives aimed at realizing Title IX's goal of equality in athletics.

The **Women's Sports Foundation** ("WSF") is a nonprofit educational organization that exists to enable girls and women to reach their potential in sport and life. WSF is an ally, an advocate and a catalyst. Founded by Billie Jean King in 1974, WSF strengthens and expands participation and leadership opportunities through research, advocacy, community programming and a wide variety of collaborative partnerships. The WSF distributes grants to female athletes and girls' sports programs, and is an educational resource answering inquiries concerning Title IX and other women's sports related questions. The Women's Sports Foundation has positively shaped the lives of millions of youth, high school and collegiate student-athletes, elite athletes and coaches.

CERTIFICATE OF SERVICE

I hereby certify that on July 17, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

DATED: July 17, 2020

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