No. 08-16330

UNITED STATE 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
The Honorable Frank C. Damrell, Jr. presiding
Eastern District Civil Case No. 03-cv-02591-FCD-EFB

Brief of American Civil Liberties Union, American Civil Liberties Union of Northern California, and Association for Gender Equity Leadership in Education as *AMICI CURIAE* in Support of APPELLANTS and REVERSAL.

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Dated: February 20, 2009

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, I certify that the American Civil Liberties Union Foundation, the American Civil Liberties Union Foundation of Northern California, and the Association for Gender Equity Leadership in Education do not have a parent corporation and that no publicly held corporation owns 10 percent or more of any stake or stock in them.

Dated: February 20, 2009

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES

STATUTES

ADMINISTRATIVE AND REGULATORY AUTHORITY

OTHER AUTHORITY

INTERESTS OF AMICI

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The ACLU has appeared in this court and courts around the nation in numerous cases involving the application and scope of the Constitution and civil rights laws, both as direct counsel and as amicus curiae. In addition, the ACLU, through its Women's Rights Project, frequently litigates cases concerning gender equity in education, as guaranteed by Title IX and the Constitution. The ACLU of Northern California is the ACLU's local affiliate.

The mission of the Association for Gender Equity Leadership in Education (AGELE) is to provide leadership in the identification and infusion of gender equity in all educational programs and processes, and within parallel equity concerns, including, but not limited to, age, disability, ethnicity, national origin, race, religion, sexual orientation and socio-economic status. AGELE carries out the its work through leadership and advocacy to ensure the infusion of equity principles into educational programs and services; professional development to connect equity research and practice and to broaden the knowledge base and support system for AGELE's members; and collaboration, networking, and

outreach to build broader constituencies and influence other organizations and associations. AGELE has an interest in ensuring the proper use of Title IX's three-part test to determine whether colleges and university are offering equal opportunities to participate in athletics.

Amici submit this brief to provide the Court with essential background information regarding the history and application of Title IX in the realm of intercollegiate athletics. Amici argue that the district court improperly interpreted Title IX and erred in granting Defendants' summary judgment motion on Plaintiffs' Title IX claim. All parties have consented to the filing of this brief.

INTRODUCTION

This case challenges the failure of the University of California at Davis ("UCD") to provide female students with an equal opportunity to participate in varsity intercollegiate athletics, particularly in the sport of wrestling. Women's participation in wrestling has grown tremendously over the past fifteen years, as evidenced by the rapid growth of the United States Girls' Wrestling Association, the California Women's Wrestling Association, and women's membership in USAWrestling -- and even the addition of women's wrestling to the Olympics.

Thousands of females participate in wrestling in California alone.[1] Numerous California high schools offer girls' wrestling teams, while around 1200 California high school girls participate on boys' teams. The California Interscholastic Federation sponsors Northern and Southern California regional girls' wrestling tournaments. Girls from more than 150 California high schools participated in this year's California Girls' State Wrestling Invitational. Several colleges in the state offer women's wrestling programs, while others allow women to participate as individuals alongside their men's teams.

Despite California's leadership in this explosive growth of women's wrestling, UCD has chosen to eliminate women's wrestling opportunities, while maintaining the men's program. UCD also offers proportionally more varsity athletic opportunities for male students than for female students. Yet, when Plaintiffs—female students who previously participated in wrestling at UCD or who chose to attend UCD because of the opportunity to wrestle—asked UCD to continue women's wrestling, with all the same resources provided to men's

[1] *See, e.g.*, United States Girls Wrestling Ass'n, Upcoming Events, *at* http://www.usgwa.com/events/; California Women's Wrestling Ass'n, Tournament Results (2008), *at* http://www.californiawomenswrestling.com/pages/tournament-results.htm; Press Release, California Interscholastic Federation, 2007 CIF Participation Survey Indicates More Than 70,000 High School Student Athletes in California (Aug. 1, 2007), *available at* www.cifstate.org/about/participation/partsurvey07.pdf; Collegiate Women's

wrestling at UCD, UCD refused, eliminating participation opportunities for women. Indeed, UCD still does not provide women with such opportunities. This sex discrimination must end, and Plaintiffs must be compensated for the educational opportunities now forever lost.

ARGUMENT

I. TITLE IX CREATES A DETAILED FRAMEWORK FOR ENSURING THAT SCHOOLS PROVIDE EQUALITY OF ATHLETIC OPPORTUNITIES.

Congress passed Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*, in order to eliminate sex discrimination at institutions that receive federal funds (such as UCD) and to protect individuals from such practices.[2] Over the past 35 years Congress has remained active in preserving the statute's broad remedial purpose by fighting back challenges to the law, actively directing and reviewing its administrative interpretations, and amending it when necessary to respond to court decisions or other changes. Moreover, courts have accorded the administrative interpretation of Title IX substantial deference in the athletics context. This history and interpretation supply crucial context for understanding

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Wrestling Ass'n, Participating Colleges, *at* http://collegiatewomenswrestling.com/colleges.html.

[2] An implied private right of action exists to allow private individuals to serve as "private attorneys general" to enforce this congressional purpose. *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992); *Cannon v. Univ. of*

Plaintiffs' claims in this case.

A. Educational Institutions Like UCD Have An Affirmative Obligation to Ensure and Maintain Title IX Compliance.

Title IX states:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

20 U.S.C. § 1681(a). This mandate applies to *all* educational programs and activities at institutions that receive federal funds, including intercollegiate athletics. 20 U.S.C. §1687. Congress intended that it be interpreted broadly in order to best achieve its purpose. *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982); *Cannon*, 441 U.S. at 698. The statute, as interpreted and enforced by the Office for Civil Rights ("OCR") of the U.S. Department of Education ("DOE") and its predecessor the U.S. Department of Health, Education, & Welfare ("HEW"), requires that universities such as UCD undertake *affirmative* efforts to eliminate discrimination from their athletic programs, to encourage athletic participation by women, and to ensure that male and female athletes have equal opportunities to participate in athletics.

Chicago, 441 U.S. 677, 704 (1979).

From the time of its passage, Congress intended Title IX to reach sex discrimination in athletics. Moreover, it specifically directed HEW to issue regulations to eradicate this discrimination. *See* 20 U.S.C. §1682, as amended by Pub. L. No. 93-380, § 844, 88 Stat. 612 (1974) (the "Javits Amendment"). *See also* Jocelyn Samuels & Kristen Galles, *In Defense of Title IX: Why Current Policies Are Required to Ensure Equality of Opportunity*, 14 Marq. Sports Law Rev. 1, 40-47 (2003). After receiving nearly 10,000 comments, HEW issued final Title IX regulations in 1975, interpreting the statute to require institutions to ensure equal accommodations in athletic programs for boys and girls. 40 Fed. Reg. 24128 (June 4, 1975). The final regulations went into effect in July, 1975, and are now located at 34 C.F.R. Part 106.[3]

This Court – like courts in all eleven of the circuits that have considered the Title IX athletics regulations – have upheld and given substantial deference to the regulations and to OCR's interpretation of them.[4] Despite objections from interest

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[3] The original Title IX regulations were published at 45 C.F.R. Part 86. However, when authority over education issues was transferred from HEW to the newly created DOE, the regulations were republished at 34 C.F.R. Part 106. Dep't of Educ. Organization Act, Pub. L. No. 96-88, 93 Stat. 669 (1979), codified at 20 U.S.C. §§ 3401-3510.

[4] *Neal v. Bd. of Trustees*, 198 F.3d 763, 770-72 (9th Cir. 1999); *McCormick v. School Dist. Mamaroneck*, 370 F.3d 273, 288 (2d Cir. 2004); *Miami Univ. Wrestling Club v. Miami Univ. of Ohio*, 302 F.3d 608, 615 (6th Cir. 2002); *Chalenor v. Univ. of N.D.*, 292 F.3d 1042, 1046-1047 (8th Cir. 2002); *Pederson v. La. State Univ.*, 213 F.3d 858, 877-879 (5th Cir. 2000); *Boulahanis v. Bd. of*

groups and some lawmakers, Congress has also repeatedly and consistently rejected all attempts to exclude athletics or any specific sport from the dictates of Title IX. *See generally Haffer v. Temple Univ.*, 524 F. Supp. 531, 534, 535 (E.D. Pa. 1981) (describing rejected attempts to modify Title IX).

The Title IX regulations impose affirmative obligations on schools that are designed to ensure their compliance with the statute's broad remedial mandate. For example, 34 C.F.R. § 106.3 directs schools to evaluate their own policies, procedures, and actions; to modify any such actions that are discriminatory; to take remedial steps to eliminate the effects of such actions; and, even in the absence of a finding of discrimination, to "take affirmative action to overcome the effects of conditions which resulted in limited participation" by the under-represented sex.[5]

Regents, 198 F.3d 633, 637-639 (7th Cir. 1999); *Cohen v. Brown Univ.*, 101 F.3d 155, 172-173 (1st Cir. 1996) ("*Cohen II*"); *Horner v. Ky. High Sch. Athletic Ass'n*, 43 F.3d 265, 273, 274-75 (6th Cir. 1994); *Kelley v. Bd. of Trustees*, 35 F.3d 265, 270-272 (7th Cir. 1994); *Cohen v. Brown Univ.*, 991 F.2d 888, 895, 899 (1st Cir. 1993) ("*Cohen I*"); *Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824, 828 (10th Cir. 1993); *Williams v. Sch. Dist. of Bethlehem*, 998 F.2d 168, 170-171, 175 (3d Cir. 1993); *Equity in Athletics v. Dep't of Educ.*, 504 F. Supp. 88, 102-105 (W.D.Va. 2007), *aff'd* 291 2008 WL 4104235 (4th Cir. 2008); *Nat'l Wrestling Coaches Ass'n v. U.S. Dep't of Educ.*, 263 F. Supp. 2d 82 (D.D.C. 2003), *aff'd* 366 F.3d 930 (D.C. Cir. 2004); *Gonyo v. Drake Univ.*, 879 F. Supp. 1000, 1003, 1006 (S.D. Iowa 1995); *Favia v. Indiana Univ. of Pa.*, 812 F. Supp. 578, 584-585 (W.D. Pa. 1993), *aff'd* 7 F.3d 332 (3d Cir. 1993).

[5] Importantly, as set out in detail in Appellants' opening brief and in the brief of *amici* National Women's Law Center *et al.*, these mandates apply whether or not anyone has complained about or provided any notice of discrimination.

Id. Such self-evaluation is a necessary to achieve Congress's intention that Title IX remedy ongoing and accepted patterns of discrimination in educational institutions.

Several other Title IX regulations advance this same purpose. For example, schools must adopt, publish, and disseminate nondiscrimination policies to all students and employees. 34 C.F.R. § 106.9. They must devise a grievance procedure for investigating discrimination complaints and must designate an employee to receive and investigate them. They must train and employ a Title IX officer who monitors and coordinates compliance efforts. 34 C.F.R. § 106.8. OCR recently explicitly reminded schools of these obligations in a "Dear Colleague" letter dated April 26, 2004. Open Letter from the Assistant Secretary for Civil Rights, U.S. Department of Education (April 26, 2004), *available at* http://www.ed.gov/about/offices/list/ocr/responsibilities_ix.html.

The affirmative, proactive aspects of Title IX compliance are so important that the Title IX regulations require that all schools sign a Certificate of Assurance each time they apply for federal financial assistance. The certificate is a condition precedent to receipt of the funds. In it, schools must assure DOE that they have taken affirmative efforts to comply with Title IX and that they will continue to do so. It commits schools "to take whatever remedial action is necessary in accordance with §106.3(a) to eliminate existing discrimination on the basis of sex or to eliminate the effects of past discrimination." 34 C.F.R. § 106.4. Obviously,

no school can give such an assurance without first educating itself regarding the law's requirements and undergoing regular self-evaluation to ensure its compliance with those requirements. Thus, schools have an ongoing, affirmative obligation to ensure their compliance with Title IX even in the absence of complaints and whether or not someone provides notice of a specific problem.

B. Title IX Regulations and OCR Policy Interpretations Give Schools Detailed Notice of Their Obligations to Ensure Nondiscrimination in Their Athletic Programs

The Title IX regulations reflect the language of the statute, echoing its broad mandate for nondiscrimination, when they state:

> [N]no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular... or other education program or activity operated by a recipient that receives Federal financial assistance.

34 C.F.R. § 106.31(a). Section 106.31(b) further prohibits denial of access to or different treatment in the provision of "aid, benefits, or services" or "the enjoyment of any right, privilege, advantage, or opportunity." It also further prohibits schools from aiding or assisting any other person or organization "which discriminates on the basis of sex in providing any aid, benefit, or service to students or employees." 34 C.F.R. § 106.31(b)(6).

Two Title IX regulations apply specifically to athletics: 34 C.F.R. §

106.37(c) (which addresses athletic scholarships)[6] and § 106.41 (which addresses equal accommodation and treatment). The latter states, in relevant part:

> (b) General. No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person, or otherwise be discriminated against in any interscholastic, intercollegiate, club, or intramural athletics offered by a recipient....
>
> (c) Equal Opportunity. A recipient which operates or sponsors interscholastic, interscholastic, intercollegiate, club, or intramural athletics shall provide equal athletic opportunity for members of both sexes.

34 C.F.R. § 106.41(a), (c).

In determining whether a school provides equal opportunity in athletics OCR considers, among other things:

> (1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes
> (2) The provision of equipment and supplies
> (3) Scheduling of games and practice time
> (4) Travel and per diem allowance
> (5) Opportunity to receive coaching and academic tutoring
> (6) Assignment and compensation of coaches and tutors
> (7) Provision of locker rooms, practice and competitive facilities
> (8) Provision of medical and training facilities
> (9) Provision of housing and dining facilities and services
> (10) Publicity

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[6] Because Plaintiffs' Title IX athletic scholarship claim was made solely to ensure that UCD offers athletic scholarships to female wrestlers when UCD adds women's varsity wrestling, this brief does not examine the requirements of an independent scholarship claim.

34 C.F.R. § 106.41(c). Thus, there are two aspects to compliance with Title IX: whether a school provides actual participation opportunities as well as whether a school provides female students actually participating in athletics with the same benefits provided to male athletes. *Cohen I*, 991 F.3d at 896; *Roberts*, 814 F. Supp. at 1510-1511; *Favia*, 812 F. Supp. at 584-585.

This Court and others have noted the important goals and remedial purpose of Title IX in athletics, stating that "it would require blinders to ignore that the motivation for promulgation of the regulation on athletics was the historic emphasis on boys' athletic programs to the exclusion of girls' athletic programs in . . . colleges." *Neal*, 198 F.3d at 767, citing *Williams*, 998 F.2d at 175. Indeed, Congress and OCR well understood that "male athletes had been given an enormous head start in the race against their female counterparts for athletic resources, and Title IX would prompt universities to level the proverbial playing field." *Neal*, 198 F.3d at 767.

The urgency of Title IX's mandate to overcome this head start is reflected in the athletic regulation itself, which unambiguously gave colleges like UCD three years – until July 1978 – to reach *full* compliance. Notably, the three-year deadline is the *outer limit* for compliance, as the regulation obligates schools to proceed "as expeditiously as possible but in no event later than three years from the effective

date of this regulation." 34 C.F.R. § 106.41(d).

To help schools reach this deadline and to explain their obligations under the law, in the mid-seventies OCR prepared and sent to all state school officers, school superintendents, and college/university presidents the following publications (in addition to the final Title IX regulations themselves): (1) Elimination of Sex Discrimination in Athletic Programs, Memorandum from Director of Office of Civil Rights, to Chief State School Officers *et al.* (Sept. 1975), *available at* http://www.ed.gov/about/offices/list/ocr/docs/holmes.html (hereinafter the "1975 OCR Memo"), and (2) Competitive Athletics in Search of Equal Opportunity (September 1976), *available at* eric.ed.gov/ERICWebPortal/recordDetail?accno=ED135789 (hereinafter the "1976 OCR Guidance"). The former was also published in the Federal Register. 40 Fed. Reg. 52655 (Nov. 11, 1975).

The 1975 OCR Memo highlighted that the three-year adjustment period set out in 34 C.F.R. § 106.41(d) was *not* a waiting period. Schools were required "to begin now to take whatever steps are necessary to ensure full compliance as quickly as possible." 1975 OCR Memo at 4. Specifically, schools were required to evaluate their entire athletics program, determine which sports students wanted to play, and develop a plan to effectively accommodate those interests and abilities

by July 21, 1976. OCR required that the plan "be fully implemented as expeditiously as possible and in no event later than July 21, 1978." *Id.* at 6.

The 1976 OCR Guidance explained that if a school could not comply immediately,

> it must be able to justify its use of the adjustment period by being able to demonstrate that there are real barriers or obstacles to achieving
> immediate parity for students of both sexes and that the institution is taking steps with *specific timetables* for their implementation to overcome these barriers. . . . Appropriate actions during the adjustment period might include training staff, revising existing programs, rescheduling training and contests, and constructing or remodeling facilities.

1976 OCR Guidance at 15 (emphasis added).

The Guidance emphasized the importance of having each school's chief executive officer and athletic administrators substantially involved in the evaluation of the athletic program and the development of remedial plans in order to establish the necessary climate to achieve equal athletic opportunity. *Id.* at 6. It also provided more than 100 pages of step-by-step instructions for assessing and reaching compliance by the deadline.

Despite the universal dissemination of this information, few schools reached full compliance by the July 1978 deadline, and OCR was swamped with Title IX athletics complaints. Accordingly, in 1978 OCR published additional guidance in

the form of a draft policy on "Title IX and Intercollegiate Athletics." 43 Fed. Reg. 58070 (Dec. 11, 1978). After receiving more than 700 comments, OCR issued a final policy interpretation a year later (the "1979 Policy Interpretation"). 44 Fed. Reg. 71413 (Dec. 11, 1979), *available at* www.ed.gov/about/offices/list/ocr/docs/t9interp.html. OCR intended the publication to further explain the meaning of "equal opportunity" within the unique context of a typically sex-segregated program like athletics. *Id.* at 71414.

The 1979 Policy Interpretation divides Title IX athletics obligations into three separate areas:

(1) participation opportunities (whether a student has an opportunity to play sports at all), 34 C.F.R. § 106.41(c)(1);

(2) treatment and benefits (whether students who already play sports are treated equally), 34 C.F.R. § 106.41(c)(2-10); and

(3) financial assistance (whether schools allocate athletic scholarship money equitably), 34 C.F.R. § 106.37(c).

Id. at 71414; *see also Cohen I*, 991 F.3d at 896; *Roberts*, 814 F. Supp. at 1510-11*; Favia*, 812 F. Supp. at 584-85. The obligation to provide equal athletic participation opportunities is particularly important, because having the opportunity to participate at all "lies at the core of Title IX's purpose." *Cohen I*, 991 F.3d at 897. Whether or not a school treats female students equitably in other areas – including athletic benefits and scholarships – is irrelevant if it does not

provide them an equal opportunity to participate in the activity. *Id.*

The 1979 Policy Interpretation clarified that in determining whether an institution has met its obligation to provide equal participation opportunities by effectively accommodating the interests and abilities of both males and females, consideration must be given to:

> (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 under-represented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or
>
> (3) Where the members of the one sex are under-represented 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 abilities of the members of that sex have been fully and effectively accommodated by the present program.

44 Fed. Reg. at 71418. This analysis is commonly referred to as the "three-part test."

In 1990 OCR developed a Title IX Investigators Manual. Several successful, high-profile lawsuits by female athletes soon followed, including *Cohen v. Brown University*, 879 F. Supp. 185 (D.R.I. 1995), *aff'd in part* 101 F.3d

155 (1st Cir. 1996); *Roberts v. Colorado State University*, 814 F.Supp. 1512 (D.Colo. 1993), *aff'd* 998 F.2d 824 (10th Cir. 1993), and *Favia v. Indiana University of Pennsylvania*, 812 F.Supp. at 578, *aff'd* 7 F.3d 332 (3d Cir. 1993).

Congress reaffirmed its commitment to athletic opportunity in 1994 when it passed the Equity in Athletics Disclosure Act ("EADA"). 20 U.S.C. § 1092(g). The law specifies mechanisms by which post-secondary educational institutions must evaluate their own programs to assure Title IX compliance. It requires colleges to collect detailed information about their athletic programs, including the number of male and female undergraduate students, the number of male and female athletes in each sport, the number of coaches provided to each team, and the allocation of resources within the athletic department. Colleges must collect the data annually and must make a report of it available to the Department of Education and to anyone who requests it. The initial EADA reports were was due in October 1996. In order to provide this information, colleges must collect, verify, and record it, and thus the college administrators that sign these forms are necessarily aware of their contents.[7]

[7] UCD's annual EADA reports are included in the record. ER at 1343-1610. They are signed by UCD athletic administrators. Because the information is broken down by sex, it necessarily reflects UCD's different treatment of male and female athletes – particularly UCD's own allocation of athletic participation opportunities.

In 1996, after more review and comment, OCR published a detailed clarification of the athletic participation requirements of 34 C.F.R. § 106.41(c)(1) and the 1979 Policy Interpretation. Office of Civil Rights, U.S. Department of Education, Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test (Jan. 16, 1996) (hereinafter the "1996 OCR Clarification"), *available at* www.ed.gov/about/offices/list/ocr/title9guidanceFinal.pdf. The 1996 Clarification reaffirms the 1979 Policy Interpretation's "three-part test" and gives clear direction and examples about how to apply it. The 1996 Clarification remains the standard for athletic participation claims and courts have universally given it the same deference accorded the Title IX regulations and the 1979 Policy Interpretation.[8] *See* note 4, *supra.*

II. TITLE IX REQUIRES UCD TO OFFER WOMEN'S WRESTLING OPPORTUNITIES.

Plaintiffs' primary Title IX claim in this litigation is that UCD fails to provide them (and all females) with an equal opportunity to participate in wrestling in particular and varsity athletics in general. As set out in greater detail below, UCD is obligated to provide female students with an opportunity to participate in

[8] DOE convened a Commission to further study Title IX's application to athletics in 2002. After a year of study and public hearings, it reaffirmed its existing policy. Open Letter from the Assistant Secretary for Civil Rights, U.S. Dep't of Education (July 11, 2003), *available at* www.ed.gov/about/offices/list/ocr/**title**9guidanceFinal.pdf.

wrestling because (a) UCD has failed to meet Title IX's three-part test for determining when universities provide equal athletic participation opportunities to both sexes and (b) the particular requirements Title IX sets out for when schools must provide women with a separate team in a particular contact sport are met in this case.

A. UCD Violates Title IX and Discriminates Against Female Students by Failing All Three Prongs of Title IX'S Three-Part Test for Measuring Equal Athletic Participation Opportunities.

UCD has failed to provide female students with an equal opportunity to participate in varsity athletics, when its athletics program is considered as a whole. In order to assess compliance with Title IX, consideration must be given to '[w]hether the selection of spots and levels of competition effectively accommodate the interests and abilities of the sexes." 34 C.F.R. § 106.41(c)(1). The 1979 Policy Interpretation set out the applicable three-part test for determining whether an institution has done so. 44 Fed. Reg. at 71418.

The first prong of the three-part tests considers whether a school has provided each male and each female student with a mathematically equal opportunity to participate in athletics. The second and third prongs of the test acknowledge that in certain circumstances schools may nevertheless comply with Title IX even if they have not achieved this actual equity. Should Defendants fail to provide the mathematically equal opportunities described under prong one, they

-- not Plaintiffs -- have the burden of proof in demonstrating that they have nevertheless complied with Title IX pursuant to prong two or three. *Cohen I*, 991 F.2d at 901*; Roberts*, 998 F.2d at 828; *Horner*, 43 F.3d at 275.

1. UCD fails to provide female students with a substantially proportionate opportunity to participate in varsity athletics.

Athletic competition is unique in that it is both the only educational activity that regularly separates males and females and the only educational activity in which such segregation may be necessary to provide equal opportunities to males and females. Accordingly, when schools decide which sports teams to sponsor, they typically decide how many opportunities they will offer for males and how many for females. The total number of opportunities sponsored does not matter under the law so long as the allocation of those opportunities between males and females is equitable. Title IX assumes that absent discrimination, allocation will be proportional to enrollment. This assumption is the basis for the first prong of the three-part test.

In application, prong one means that if 52 percent of a school's full-time undergraduate enrollment is female, then the school must allocate 52 percent of its athletic opportunities to females. 1996 OCR Clarification at 4. For purposes of prong one, athletic opportunities are counted by determining the actual number of athletes who receive athletic scholarships or who receive coaching and the other

benefits of varsity status as of the first date of intercollegiate competition. 44 Fed. Reg. at 71415; 1996 OCR Clarification at 3; *Cohen II*, 101 F.3d at 173.

Enrollment and participation percentages are still considered "substantially proportionate" if the number of additional opportunities required to raise the participation percentage to actual equity is too small to sustain a viable team. That is, the law recognizes that a small percentage variation in a program that offers a large number of overall opportunities could translate into a large number of lost opportunities, while the same percentage variation at a program that offers a small number of overall opportunities may translate into too few lost opportunities to sustain a viable team. The 1996 OCR Clarification gives two examples of this. In example A, a large school with 600 athletes, 52 percent female enrollment, and 47 percent female athletic participation would have to add 62 more female opportunities to reach equity. Because 62 is more than enough slots to field a team, the large school does not comply with prong one. In example B, a small school with only 60 athletes but the same 52 percent female enrollment and 47 percent female participation rate would have to add only 6 opportunities to reach equity. Because 6 slots are not enough to field an entire new team, the school probably is in compliance with prong one. 1996 OCR Clarification at 5.

The EADA requires all schools, including UCD, to report sex-based enrollment and participation statistics to OCR in October of each year. UCD's

EADA reports demonstrate that UCD does not comply with prong 1 and has not complied with prong 1 during the entire history of EADA statistics. ER at 1961; 1343-1610. While UCD's female enrollment consistently has been 55-56 percent female over the last ten years, UCD has allocated only around 50 percent of its varsity athletic opportunities to females. *Id.* Because of this disparity, UCD would have to add nearly 100 new varsity athletic participation opportunities for women in order to reach substantial proportionality. One hundred slots are sufficient to field several new teams, and thus UCD does not offer opportunities substantially proportionate to female enrollment.

2. UCD does not have a history and continuing practice of program expansion for female athletes.

Prong two examines a school's "past and continuing remedial efforts to provide nondiscriminatory participation opportunities through program expansion." 1996 OCR Clarification at 5. Its assessment requires a review of an athletic program's *entire* history. *Id.* Prong two was devised to measure schools' "good faith remedial efforts" and to account for Congress's expectation that women's interest in athletic participation would expand as discrimination and stereotypes decreased. Schools were expected to reach full compliance by meeting the existing demands of the under-represented sex (female) by 1978. *Id.* at 7. Thereafter, they were supposed to monitor the developing interests and abilities of

their female students and to add new women's teams as those interests matured. *See id*. at 5-8. As this Court noted in Neal, "Title IX is a dynamic statute, not a static one. It envisions continuing progress toward the goal of equal opportunity for all athletes." *Neal*, 198 F.3d at 769.[9]

As set out in Appellants' brief, over the years, UCD has eliminated multiple women's varsity sports, as well as eliminating slots from women's varsity teams.[10] AOB at 9-10. UCD's EADA statistics also show a steady decline in overall opportunities for female athletes in the years preceding this lawsuit. *Id.*; ER at 1961. Schools that cut women's athletic opportunities cannot rely on prong two. Nor can schools that increase the percentage (but not the actual number) of women's athletic opportunities by cutting men's teams instead of adding women's teams. *Cohen*, 809 F. Supp. at 987; *Roberts*, 814 F. Supp. at 1514 (prong two requires expansion of women's opportunities, not the reduction of men's opportunities). UCD has failed to provide such expanding opportunities and thus cannot rely on prong two.

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[9] The *Cohen II* court cautioned against a Title IX interpretation that "disadvantages women and undermines the remedial purposes of Title IX by limiting required program expansion for the under-represented sex." *Cohen II*, 101 F.3d at 174.

[10] OCR measures participation opportunities separately at each competitive level, such as intramurals, club sports, and intercollegiate. 44 Fed. Reg. at 71417; OCR Manual at 21.

3. UCD does not fully and effectively accommodate the interests and abilities of its female students in varsity athletics

Prong three measures whether a school fully and effectively accommodates the athletic interests and abilities of its female students. In passing Title IX Congress intended to encourage women to participate in sports and "to remedy the discrimination that results from stereotyped notions of women's interests and abilities." *Neal*, 198 F.3d at 768. As the First Circuit has emphasized in this context, "[I]nterest and ability rarely develop in a vacuum; they evolve as a function of opportunity and experience." *Cohen II*, 101 F.3d at 178-179. Thus, schools must encourage females to participate in varsity athletics by fully and effectively accommodating their interests and abilities as these interests and abilities continue to develop and expand. "Had Congress intended to entrench rather than change the status quo -- with its historical emphasis on men's participation opportunities to the detriment of women's opportunities -- it need not have gone to all the trouble of enacting Title IX." *Id.*

Schools cannot avoid adding women's opportunities by putting their heads in the sand and refusing to recognize growing female interest in sports.[11] They must "remain vigilant, upgrading the competitive opportunities available to the

[11] Moreover, a school's ignorance about its own compliance status does not excuse its failure to equally allocate athletic opportunities. *Pederson*, 213 F.3d at 880.

historically disadvantaged sex as warranted . . . until the opportunities for, and levels of competition are equivalent by gender." *Cohen I*, 991 F.2d at 898; *see also* 44 Fed. Reg. at 71418. So long as schools fail to reach equity under prong one, they must monitor interest and "fully and effectively" accommodate it as soon as possible.[12] Moreover, they cannot rely on the absence of comparable women's teams at other schools and a resulting absence of competition opportunities in defending any failure to fully and effectively accommodate women's interests. The 1979 Policy Clarification and the 1996 Policy Clarification emphasize that a lack of competition in any given sport is often caused by the historical, *collective* discrimination of schools. Thus, OCR requires that schools make affirmative efforts to encourage other schools to encourage interest, to create teams, and to create competition. 44 Fed. Reg. at 71418; 1996 Clarification at 12.

As set out in Appellants' brief, Plaintiffs and other female UCD students have requested and been denied varsity athletic participation opportunities in wrestling, bowling, badminton, equestrian, horse polo, rugby, and field hockey. AOB at 11. Moreover, even if female students had not asked UCD to create particular varsity teams, UCD had an affirmative obligation to monitor the interests

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[12] Prong three "demands not merely some accommodation, but full and effective accommodation. If there is sufficient interest and ability among members of the statistically under-represented gender... an institution necessarily fails this

of both its own students and prospective students. The focus on prospective students as well as current students makes sense, because schools like UCD do not typically solicit varsity athletes from its existing student body. Rather, they recruit them to campus for the purpose of playing sports. *Cf. Cohen II*, 101 F.3d at 177 (because recruiting is at the discretion of the college, there is always a risk that colleges will recruit women only to fill existing opportunities in a program that already under-represents women). For this reason, OCR urges colleges to survey and/or monitor the actual participation of females in not only their own club, intramural, and physical education classes, but also in high school sports, club sports, community sports, and similar programs, as today's high school wrestlers, bowlers, and fencers will be looking for college participation opportunities tomorrow. 1990 OCR Manual at 25; 1996 OCR Clarification at 9-11. UCD has failed to fulfill these obligations.

B. Given Its Failure to Provide Equal Athletic Participation Opportunities to Female Students, UCD Violates Title IX by Providing Males but not Females the Opportunity to Participate in Wrestling.

As the result of its failure to comply with the three-part test, UCD is obligated to add athletic participation opportunities for women to comply with Title IX. Because wrestling is a contact sport and because women at UCD,

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prong of the test." *Cohen I*, 991 F.2d at 899.

including Plaintiffs, have expressed interest in participating, under Title IX rules, UCD is obligated to provide opportunities for women's wrestling specifically. While UCD eventually announced that it would permit female students to compete for a spot on the men's wrestling team, UCD eliminated preexisting opportunities for women to compete against other women at the intercollegiate level. By providing theoretical rather than actual opportunities for female students to compete in the sport, UCD has denied female students an equal opportunity to participate in wrestling.

Athletics are a unique educational program, because, as Title IX regulations and agency interpretation expressly recognize, under federal law sports teams can and sometimes must be separated by sex in order to ensure equal opportunity for females to participate -- especially after puberty. Indeed, that is the very reason every co-ed college typically offers separate athletics teams for men and women.[13] If colleges, especially those like UCD that compete at the NCAA Division I level, offered only one varsity team in each sport, in many instances very few female students would have a real opportunity to participate in any given sport because of average physical differences between the sexes in size, strength, and speed.

In setting out schools' obligations to effectively accommodate women's

[13] *Cohen II*, 101 F.3d at 176-177 (athletics is distinctly different from admissions or other programs and requires a different analysis).

interests and abilities, the Title IX regulations account for these differences by mandating that if a sport is a contact sport (like wrestling) or is a sport for which team membership is chosen by skill level, then "separate teams in that sport *will be required* if both men and women express interest in the sport." 34 C.F.R. 106.41(b) (emphasis added); *see also* 1975 OCR Memo at 6. The requirement that an institution offer a separate team for women in these circumstances makes practical sense, as it prevents women from being effectively crowded out of a meaningful opportunity to participate in athletics. Indeed, the 1975 OCR Memo expressly states, "[A]n institution would not be effectively accommodating the interests and abilities of women if it abolished all its women's teams and opened up its men's teams to women, but only a few women were able to qualify for the men's team." 1975 OCR Memo at 7. Thus, the 1976 OCR Guidance explains that if "an institution offers basketball for men and the only way it can accommodate the interests and abilities of women is to offer a separate basketball team for women, then the institution must offer the separate team for women." 1976 OCR Guidance at 20.

The 1979 Policy Interpretation clarifies that Title IX does not require a school to offer the same sports to men and women if men and women want to play different sports. "However, where an institution sponsors a team in a particular sport for members of one sex, it may be required either to permit the excluded sex

to try out for the team or to sponsor a separate team for the previously excluded sex." 44 Fed. Reg. at 71418-71419. It goes on to state that schools *must* do the latter if (1) women's athletic participation opportunities historically have been limited at the institution,[14] (2) there are women who want to participate in the particular sport,[15] and (3) the sport is either a contact sport or a non-contact sport for which "members of the excluded sex do not possess sufficient skill to be selected for a single, integrated team or to compete actively on such team if selected."[16] *Id.* at 71419. Because each of these prongs is satisfied in the present case, *see* notes 14-16, *supra*, UCD must provide female students an equal

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[14] As set forth in Part II(A) above, UCD does not offer women and has never offered women an equal or substantially proportionate opportunity to participate in varsity athletics.

[15] Plaintiffs, of course, wanted to participate in wrestling, prompting this lawsuit. In addition, more than 3,000 other females currently wrestle in the state of California alone, and many California high schools have girls' wrestling teams. These are UCD's prospective students. Moreover, because wrestling is an individual sport, it can include a team of one.

[16] College varsity wrestling is both a contact sport and a sport for which team members are chosen by competitive skill. *See* 34 C.F.R. § 106.41(b) (wrestling is contact sport). In regard to the latter prong, it is worth noting that the lowest men's wrestling class is 125 pounds -- more than 25 pounds heavier than the weight of Plaintiff Christine Ng. In general, college wrestling offers different weight classes of competition, typically separated by only 7-8 pounds, so that athletes of similar sizes compete against one another. That is, competition is designed so that even male athletes do not compete against other males who are more than a few pounds heavier. Average weight differences between men and women thus greatly reduce the likelihood of women making the team.

opportunity to wrestle by offering them a team of their own. It is undisputed that it has failed to do so.

CONCLUSION

Amici urge this Court to reverse the summary judgment order in this case and to remand the matter for a full inquiry of the facts and claims consistent with the analysis set out above.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 20, 2009, 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.

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.

s/Emily J. Martin_____
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