

**No. 20-80014**

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

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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-Petitioners,*

v.

HAWAII STATE DEPARTMENT OF EDUCATION and OAHU  
INTERSCHOLASTIC ASSOCIATION,

*Defendants-Respondents.*

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

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**BRIEF OF CIVIL RIGHTS ORGANIZATIONS AS *AMICI CURIAE*  
IN SUPPORT OF PETITIONERS' RULE 23(f) PETITION**

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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: January 21, 2020      PILLSBURY WINTHROP SHAW PITTMAN LLP

/s/ Lee Brand  
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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,
- 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 eight 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.<sup>1</sup>

**ARGUMENT**

The district court manifestly erred in determining that Plaintiffs do not satisfy the numerosity requirement of Federal Rule of Civil Procedure 23(a)(1) and as such Plaintiffs’ 23(f) petition should be granted. If left uncorrected, the district

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<sup>1</sup> 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.

court's error may deny equal participation in athletics to well over a thousand minor female students who attend or will attend James Campbell High School. Such a denial not only deprives them 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. Because this error is manifest and significant, interlocutory review is warranted.

*Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 959 (9th Cir. 2005).

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

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.<sup>2</sup> Girls of color, in particular, receive far fewer opportunities to play school sports than white girls, white boys, and boys of color.<sup>3</sup> Moreover, female athletes often face inequitable treatment and benefits, including being relegated to inferior facilities, assigned to disadvantageous times for practicing and competing, and allocated less funding—resulting in second-class status of girls’ teams.<sup>4</sup>

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<sup>2</sup> 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](https://www.nfhs.org/media/1020412/2018-19_participation_survey.pdf). Across Hawaii, girls also lag behind in high school athletic participation by a 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* 3 (2019), available at <https://www.womenssportsfoundation.org/wp-content/uploads/2019/10/state-of-high-school-sports-report-final.pdf>.

<sup>3</sup> 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>.

<sup>4</sup> *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* 34 (2020) (identifying “access to quality facilities/resources and equal treatment” as a barrier to girls’ participation in sports) available at

(continued...)

Enforcement of Title IX is essential to ensure that schools provide girls with genuine and equal opportunities to participate in sports.

The benefits of such participation cannot be overstated, as girls derive substantial advantages from involvement in high school sports throughout their lives. During high school, female athletes are more likely to graduate, have higher grades, and score higher on standardized tests, and are less likely to smoke cigarettes, use drugs, or become pregnant, compared to their non-athlete peers.<sup>5</sup> Thereafter, women who were high school athletes are more likely to attend and graduate from college, participate in the labor force, and earn higher wages, while they are also less likely to develop heart disease, osteoporosis, and other health problems.<sup>6</sup> Title IX is imperative to preserving and advancing these benefits for girls and young women.

## **II. THE DISTRICT COURT’S ORDER THREATENS THE ENFORCEMENT OF TITLE IX BY AND FOR MINOR STUDENTS**

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

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<https://www.womenssportsfoundation.org/wp-content/uploads/2020/01/Chasing-Equity-Full-Report-Web.pdf>.

<sup>5</sup> *Battle for Gender Equity*, at 2.

<sup>6</sup> *Id.* at 2-3; *see also* Staurowsky, at 7, 24-29; Veliz, at 4.

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.” Order at 16. Further, the district court declined to consider future and potential Campbell students in its numerosity determination because it could not reasonably approximate them. *Id.* at 17. This manifestly erroneous standard is in stark contrast to the longstanding use of the class action vehicle to enforce Title IX rights. *See* Plaintiffs’ Petition at 17 n.11. Moreover, given the relative infrequency of Title IX athletics litigation, the Order would constitute a dangerous outlier that would make it more difficult for *any* students to successfully bring a class claim against their school under Title IX.<sup>7</sup>

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<sup>7</sup> And it would similarly impede the established rights of other vulnerable and transitory populations to bring classwide civil rights claims against specific 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. EDCV 16-00620-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; *see also Hernandez v. Cty. of Monterey*, 305 F.R.D. 132, 139, 164 (N.D. Cal. 2015) (certifying class of  
(continued...)

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 by 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. Many students simply may not be aware of their rights under Title IX or of the available means of enforcing those rights. *See, e.g., Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 181 (2005) (recognizing that “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* Order at 9 (finding instant claims “inherently transitory” due to “necessarily finite duration of a high school student’s time as a student-athlete”).

Students may also be reluctant to speak out about discrimination due to fear of drawing attention to themselves or of negative reactions from school

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“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. C 09-5796 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).

administrators or their peers. This is particularly true where, as here, Plaintiffs allege that Campbell *did* retaliate against them for speaking out. *See* Order at 5. Indeed, for both adults and minors, this Court has repeatedly recognized the “chilling effect of retaliation” in the context of enforcing Title IX and other civil rights. *See 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)); *Ollier v. Sweetwater Union High Sch. Dist.*, 768 F.3d 843, 853 (9th Cir. 2014) (affirming district court’s conclusion “that Plaintiffs’ [Title IX] retaliation claim was not moot after finding that . . . Sweetwater’s actions had caused a ‘chilling effect on students who would complain about continuing gender inequality in athletic programs at the school.’”).

The district court also manifestly erred 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 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.

In sum, the district court has erected an erroneous hurdle of requiring high school students to individually seek remedies to address ongoing program-wide discrimination. This unwieldy, utterly impracticable, and unsupported requirement undermines Title IX’s aims.<sup>8</sup> It is black letter law that class actions are intended to ensure that meritorious civil rights claims for declaratory and injunctive relief can be brought in these types of contexts. *See 1 Newberg on Class 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 &*

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<sup>8</sup> 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).

*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 erroneous Order severely undermines the purposes 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.

### **CONCLUSION**

*Amici* respectfully request that this Court grant Plaintiffs’ petition to file an interlocutory appeal.

DATED: January 21, 2020

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/s/ Lee Brand

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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 2,101 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.

DATED: January 21, 2020      PILLSBURY WINTHROP SHAW PITTMAN LLP

*/s/ Lee Brand*  
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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.

**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 January 21, 2020, 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: January 21, 2020      PILLSBURY WINTHROP SHAW PITTMAN LLP

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