No. 07-1125

IN THE

Supreme Court of the United States

LISA RYAN FITZGERALD and ROBERT FITZGERALD,

Petitioners,

—v.—

BARNSTABLE SCHOOL COMMITTEE and RUSSELL DEVER,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF *AMICI CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE NATIONAL WOMEN'S LAW CENTER, *et al.* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI*[1]

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 before this Court 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 by the Constitution, both as direct counsel and as *amicus curiae*.

The National Women's Law Center (NWLC) is a nonprofit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. Since 1972, the NWLC has worked to secure equal opportunity in education for girls and women through full enforcement of constitutional rights and Title IX. The NWLC has appeared either as counsel or as *amicus curiae* in every Title IX case that has been before this Court, and has also participated as *amicus curiae* in many of the Equal Protection cases that have been heard.

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

The ACLU and the NWLC are joined by 39 other organizations that are dedicated to the achievement of equality of opportunity for all students, free from unlawful discrimination. Individual statements of these *amici curiae* are set forth in Appendix A.

Amici submit this brief to show that the right to equal protection of the law enshrined in the Constitution is historically and presumptively enforceable through the Fourteenth Amendment's civil enforcement statute, 42 U.S.C. § 1983, and that the statutory protection against discrimination on the basis of sex that Congress added in Title IX was intended to expand upon, not to limit, the constitutional right to equal protection. Therefore, the court below erred in reading Title IX to preclude enforcement of equal protection rights through § 1983 and its decision should be reversed.

SUMMARY OF ARGUMENT

Amici adopt the Statement of the case contained in the Brief for Petitioners at 2-12.[2]

Congress enacted what is now 42 U.S.C. § 1983 shortly after the Civil War in order to enforce the Fourteenth Amendment's guarantee of equal protection of the laws. Since then, § 1983 has served

[2]Petitioners state that the district court's dismissal of their claims under § 1983 "had the effect of precluding the development of [their] constitutional disparate treatment claims . . . ." (Brief at 10). *Amici* note that disparate treatment claims also may be pursued under Title IX. With limited exceptions not relevant to this point, Title IX bars all forms of discrimination on the basis of sex, not only sexual harassment.

to make real the Constitution's promises of equal protection, due process, and other rights enumerated in the Bill of Rights and the Fourteenth Amendment. In particular, § 1983 has played a critical role in combating unconstitutional discrimination in education. However, while substantial progress has been made, women and girls still face serious discrimination in education. Against this background, the Court should recognize that, in passing Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, Congress did not intend to eliminate the historic ability to enforce the Constitution's right to equal protection through § 1983, but rather to enhance that right.

An analysis of Title IX's structure, text, and history further demonstrates that Title IX was not intended to preclude constitutional claims brought under § 1983. First, when it enacted Title IX, Congress made clear that it wanted to preserve such claims by adding protection against sex discrimination to a statute that strengthens enforcement of the Fourteenth Amendment by allowing the Attorney General to intervene in cases brought under § 1983. Second, the substantive rights protected by Title IX are not identical with those protected by the Constitution. Title IX does not reach certain forms of sex discrimination in education, but that discrimination may nonetheless violate the Constitution. Moreover, Title IX reaches only federal funding recipients, while all state actors are subject to the non-discrimination requirements of the Fourteenth Amendment as historically enforced through § 1983. Finally, Congress did not build a

comprehensive enforcement mechanism into Title IX of the kind that this Court held, in *Smith v. Robinson*, 468 U.S. 992 (1984), indicated Congress's intent to require plaintiffs to pursue their constitutional rights through a new statute's enforcement scheme.[3]

ARGUMENT

I. THE COURT SHOULD PRESUME THAT CONGRESS DID NOT INTEND TO DISPLACE § 1983'S LONGSTANDING PROTECTION OF CONSTITUTIONAL RIGHTS WHEN IT ENACTED MODERN CIVIL RIGHTS LEGISLATION.

Congress enacted § 1983 three years after ratifying the Fourteenth Amendment, with the express purpose of providing a federal judicial remedy for violations of that Amendment's protections. Since then, the statute has served as a mechanism for vindicating the Amendment's core guarantees, including, in particular, the constitutional guarantee of equal protection of the law and freedom from discrimination under color of state law. The Court has analyzed the provision's

[3] If the Court does not uphold the rights of *students* to pursue their claims under § 1983, it should make clear that its holding does not apply to claims of employment discrimination in the education field. The determination whether an employee's claims are preempted requires an analysis of the complex interplay among three statutes: Title VII, Title IX and § 1983. *See, e.g.*, *Johnson v. City of Fort Lauderdale*, 148 F.3d 1228, 1230-31 (11th Cir. 1998); *Waid v. Merrill Area Pub. Sch.*, 91 F.3d 857, 863 (7th Cir. 1996).

application guided by a strong presumption that later-enacted statutes do not displace or preempt relief previously available under § 1983. This approach also governed the Court's assessment of modern civil rights statutes, which the Court generally has found not to displace the rights or remedies provided by their nineteenth-century precursors. The presumption is nowhere stronger than where, as here, the Court considers whether a modern civil rights statute displaces an historic remedy for constitutional violations. In such a case, the Court should presume that Congress intended to preserve the traditional route for redressing constitutional violations, unless Congress has made clear its intent to eliminate it.

A. Congress Passed § 1983 to Enforce the Fourteenth Amendment.

Three years after the Fourteenth Amendment's ratification, Section 1983 was enacted into law as Section 1 of what was known as the Ku Klux Klan Act of 1871. The title of the legislation was "An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes." Act of Apr. 20, 1871, ch. 22, § 1, 17 Stat. 13. The Court has recognized that § 1983 was enacted as an exercise of Congress's authority under § 5 of the Fourteenth Amendment to enforce that Amendment's provisions. *See Monroe v. Pape*, 365 U.S. 167, 171 (1961). As the Chairman of the Senate Committee on the Judiciary, Senator Edmunds, explained when the bill was under consideration, the legislation was to "carr[y] out the principles of the civil rights bill, which has

since become a part of the Constitution." *Monroe*, 365 U.S. at 171 & n.5 (quoting Cong. Globe, 42d Cong., 1st Sess., 568 (1871)). Section 1, which is now § 1983, created a civil remedy for deprivations, under color of state law, of any "rights, privileges, or immunities secured by the Constitution." Ch. 22, § 1, 17 Stat. 13.

The Court has called § 1983 part of "a vast transformation" whose "very purpose" was to establish "the federal courts . . . as guardians of the people's federal rights – to protect the people from unconstitutional action under color of state law." *Mitchum v. Foster*, 407 U.S. 225, 242 (1972). Although the Court moved quickly to limit and strike down as unconstitutional many provisions of the late nineteenth century's Reconstruction Amendments and civil rights acts,[4] of which § 1983 was a part, it did not expressly limit § 1983's civil remedies provision. And while the provision was "largely forgotten"[5] during the reign of Jim Crow in the early part of the twentieth century, the Court continued to use it to grant relief for constitutional violations in

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[4] *See Slaughter-House Cases*, 16 Wall. 36 (1873) (limiting the Fourteenth Amendment's Privileges and Immunities Clause); *United States v. Cruikshank*, 92 U.S. 542 (1875) (invalidating an indictment under the 1870 Civil Rights Act because it did not concern state action); *Civil Rights Cases*, 109 U.S. 3 (1883) (striking down the 1875 Civil Rights Act's ban on private race discrimination in public accommodations and conveyances because it lacked a state action component).

[5] Harry A. Blackmun, *Section 1983 and Federal Protection of Individual Rights – Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L. REV. 1, 10 (1985).

important cases,[6] including, in 1954, *Brown v. Board of Education*, 347 U.S. 483 (brought under § 1983 to combat racial segregation and discrimination in public education).[7] Following *Brown*, the Court, in *Monroe v. Pape*, held that § 1983 encompassed even unauthorized acts undertaken under color of state law. 365 U.S. at 184.

Since this Court's opinion in *Monroe*, § 1983 has stood as a bulwark guaranteeing the enforceability of constitutional rights, including the Equal Protection right to be free from discrimination in education.[8] Section 1983 has been a critical tool in the noble and difficult work of dismantling this Nation's infrastructure of state-sanctioned racial segregation. Section 1983 also has been the avenue through which plaintiffs have brought cases vindicating the First Amendment's guarantee of

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[6] *See, e.g.*, *Nixon v. Herndon*, 273 U.S. 536 (1927) (granting relief under § 1983 and the Fourteenth Amendment against enforcement of a racially discriminatory state voting statute); *Lane v. Wilson*, 307 U.S. 268 (1939) (ruling under § 1983 and the Fifteenth Amendment against officials in a case related to Oklahoma's "grandfather" voting restrictions); *see generally*, Blackmun, *supra* note 5, at 12 & nn.44-48 (discussing cases).

[7] *See id.* at 19 (discussing *Brown*).

[8] *See*, *e.g.*, *McNeese v. Bd. of Educ. for Cmty. Unit Sch. Dist. 187*, 373 U.S. 668 (1963) (§ 1983 challenge to segregated schools); *Brown*, 347 U.S. 483 (same); *see also Monell*, 436 U.S. at 663 n.5 (listing cases brought under § 1983 against school boards); *id.* at 711 (Powell, J., concurring) (observing that "the exercise of § 1983 jurisdiction over school boards" in cases addressing segregation of students by race "has been longstanding" and "predated *Monroe*").

freedom of expression,[9] challenging other violations of the Bill of Rights as applied to the States through the Fourteenth Amendment,[10] and safeguarding Due Process rights.[11] Particularly relevant here, § 1983 has safeguarded the constitutional right to be free from state action that discriminates on the basis of sex[12] and denies women due process of law.[13] This

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[9] *See, e.g.*, *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967) (challenge to state laws requiring loyalty oaths); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (addressing rules preventing the wearing of armbands by students as a form of political protest); Blackmun, *supra* note 5, at 19-20 & nn.80-84 (discussing First Amendment cases).

[10] *See, e.g.*, *Tennessee v. Garner*, 471 U.S. 1 (1985) (setting forth the circumstances under which use of deadly force constitutes an unlawful search and seizure in violation of the Fourth Amendment); *Graham v. Connor*, 490 U.S. 386 (1989) (holding that claims brought under § 1983 to challenge excessive force by a police officer are correctly analyzed under the Fourth Amendment's reasonableness test); *Wilson v. Layne*, 526 U.S. 603 (1999) (holding that bringing third parties into a home during execution of an arrest violates the Fourth Amendment when the presence of those parties was not in aid of the warrant's execution); *Estelle v. Gamble*, 429 U.S. 97 (1976) (holding that deliberate indifference to prisoners' serious medical needs violates the Eighth Amendment); *cf. District of Columbia v. Heller*, 128 S. Ct. 2783 (2008) (striking down District of Columbia statutes restricting handgun ownership under the Second Amendment in a case brought under § 1983).

[11] *See*, *e.g.*, *Memphis Light, Gas, & Water Div. v. Craft*, 436 U.S. 1 (1978) (due process rights of recipients of utility service).

[12] *See, e.g.*, *Forrester v. White*, 484 U.S. 219 (1988) (refusing to extend judicial immunity in the context of a § 1983 suit alleging that a judge violated the Equal Protection Clause by demoting and discharging an employee on account of her sex); *see also e.g.*, *Tamayo v. Blagojevich*, 526 F.3d 1074 (7th Cir. 2008) (finding that plaintiff stated a claim under § 1983 where she

long history must inform the Court's consideration of whether Congress intended to alter the relationship between § 1983 and the Equal Protection clause for claims alleging sex discrimination in education.

B. The Court Should Decline to Read a Modern Civil Rights Statute to Displace the Ability to Enforce Constitutional Claims Through § 1983 Absent a Clear Indication from Congress.

Except where Congress has clearly expressed its intent to achieve a contrary result, the Court interprets a later-enacted statute to leave undisturbed claims previously available under § 1983. In *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113 (2005), the Court confirmed that claims already available under § 1983 *prior to* the enactment of a later statute – in that case, the Telecommunications Act of 1996 ("TCA") – remained "entirely unaffected" by the passage of the new statute. *Id.* at 126. The "crux" of the Court's holding was that the passage of the TCA in 1996 "ha[d] no effect on § 1983 whatsoever: The rights [the TCA] created may not be enforced under § 1983 and,

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alleged that state employers treated her less favorably than similarly-situated male employees); *Faulkner v. Jones*, 51 F.3d 440 (4th Cir. 1995) (finding men-only admission policy at The Citadel violated the Equal Protection Clause in a case brought pursuant to § 1983).

[13] *See, e.g., Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1975) (striking down, as violating the Due Process Clause, school board rules requiring female employees to take unpaid maternity leave).

conversely, the claims available under § 1983 prior to the enactment of the TCA continue to be available after its enactment." *Id.*

This Court has taken a similar approach when considering whether "substantive rights conferred in the 19th century were . . . withdrawn, *sub silentio*, by the subsequent passage of . . . modern [civil rights] statutes," repeatedly concluding that they were not. *Great Am. Fed. Sav. & Loan Assn. v. Novotny*, 442 U.S. 366, 377 (1979). So, for example, the Court found that "the fair housing provisions of the Civil Rights Act of 1968" did not implicitly displace "the property rights guaranteed by the Civil Rights Act of 1866." *Id.* (discussing *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413-17 (1968)). And the Court has confirmed consistently that "the passage of Title VII did not work an implied repeal of the substantive rights to contract conferred by the same 19th-century statute now codified at 42 U.S.C. § 1981." *Id.* (discussing *Johnson v. Railway Express Agency*, 421 U.S. 454, 457-61 (1975)); *see also CBOCS West, Inc. v. Humphries*, 128 S. Ct. 1951, 1960 (2008) (recognizing the Court's longstanding "acknowledg[ment of] a 'necessary overlap' between Title VII and § 1981") (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 181 (1989)). In these cases, the Court's guiding principle has been a reluctance "to assume that Congress," in passing modern civil rights laws, "intended to effect any change, either substantive or procedural, in the prior statute[s]." *Jones*, 392 U.S. at 416 n.20 (citing *United States v. Borden Co.*, 308 U.S. 188, 198-99 (1939)).

The presumption against finding that modern civil rights statutes displaced their nineteenth-century precursors should be strongest where the Court considers the effect of a modern statute on an individual's ability to vindicate *constitutional* rights through the remedial framework of a contemporaneous statute designed specifically to ensure vindication of those rights. As explained in Part I.A., *supra*, the primary purpose of § 1983 was to provide a federal judicial remedy for violations of the Fourteenth Amendment. This Court should not find that Congress intended to disrupt the historic link between Equal Protection claims and § 1983 absent a clear indication that Congress intended to take so dramatic a step. This is especially so given that constitutional rights have a unique dignity and are not interchangeable with statutes or common law rules containing similar guarantees. *See*, *e.g.*, *Monroe*, 365 U.S. at 488-89 (Harlan, J., concurring) (noting the "significantly different" nature of constitutional deprivations from state tort violations).

This case is thus readily distinguishable from cases concerning the question whether a "Civil War Era remedial statute," such as § 1983, "was intended to provide a remedy generally for the violation of *subsequently created* statutory rights." *Novotny*, 442 U.S. at 379 (Powell, J. concurring). In *Novotny*, 442 U.S. at 378, the Court held that 42 U.S.C. § 1985(3) – which, like § 1983, was originally part of the Civil Rights Act of 1871 – may not be invoked to redress violations of Title VII of the Civil Rights Act of 1964. Similarly, *Rancho Palos Verdes*, 544 U.S. 113, like

others in the *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981), line of cases, considered whether the substantive rights contained in a modern statute were enforceable both through a remedial provision in the statute itself *and* through § 1983. The question in such cases is whether Congress, by enacting the later statute, made available two avenues for enforcing its substantive guarantees. In such cases, the Court held, "[t]he provision of an express, private means of redress in the [later] statute itself is ordinarily an indication that Congress did not intend to leave open a more expansive remedy under § 1983" for the enforcement of the substantive guarantees created by the newer statute. *Rancho Palos Verdes*, 544 U.S. at 121. Therefore, "the existence of a more restrictive private remedy for statutory violations has been the dividing line between those cases in which" the Court has "held that an action would lie under § 1983 [to enforce the statute's guarantees] and those in which" the Court has "held that it would not." *Id.* By contrast, where the question is whether Congress intended to eliminate a plaintiff's ability to bring constitutional claims under § 1983, the existence of a restrictive private remedy for violations of the later statute sheds little light on Congress's intent to alter previously available remedies for constitutional claims.

This distinction is especially salient because § 1983 was never intended to be available only where no other rights exist. The premise underlying § 1983 is that constitutional rights must be enforceable, even where other sources of law also offer protection,

and even where those protections overlap. *See Monroe*, 365 U.S. at 172-74 (rejecting the argument "that under Illinois law a simple remedy is offered for th[e] violation" and finding that one of § 1983's purposes was "to provide a remedy where" existing state law was "inadequate" or, "though adequate in theory, was not available in practice"). Section 1983 has long been recognized "to provide a remedy in the federal courts *supplementary* to any remedy any State might have." *McNeese*, 373 U.S. at 672 (Section 1983 challenge to segregated schools in Illinois) (emphasis added). There is no indication that Congress intended for this remedy to disappear wherever another remedy, whether under state or federal law, was theoretically or practically available.

II. TITLE IX DOES NOT PRECLUDE THE ENFORCEMENT OF CONSTITUTIONAL CLAIMS THROUGH § 1983.

The history and structure of Title IX confirm the presumption that § 1983 remains available to enforce the constitutional right to be free from sex discrimination in education. Only once has the Court found any statute to preclude a plaintiff from seeking redress for constitutional violations through the traditional avenue of § 1983 and that decision, *Smith v. Robinson*, 468 U.S. 992 (1984), is readily distinguishable. In *Smith*, the Court held that petitioners who had prevailed on claims to an equal public education under the Education of the Handicapped Act ("EHA"), 20 U.S.C. § 1400 *et seq.*, could not obtain attorneys' fees pursuant to 42 U.S.C. § 1988 based on constitutional claims that they had advanced through 42 U.S.C. § 1983. The Court

engaged in a two-step analysis. First, the Court found that "petitioners' constitutional claims . . . [we]re *virtually identical* to their EHA claims." 468 U.S. at 1009 (emphasis added). Next, it considered "whether Congress intended that the EHA be the exclusive avenue through which a plaintiff may assert those claims." *Id.* Relying on the text of the EHA, its legislative history, and the statute's "elaborate procedural mechanism" for enforcing the rights it protects, the Court concluded that Congress indeed "intended the EHA to be the exclusive avenue through which a plaintiff may assert an equal protection claim to a publicly financed special education." *Id.* at 1009-10. Neither of the two prongs of the *Smith* analysis is satisfied here.

A. Title IX and the Equal Protection Clause Do Not Protect a "Virtually Identical" Set of Rights.

Title IX was intended to function independently from and as a supplement to the Equal Protection Clause. Title IX and the Constitution reach different activities and cover different actors. In some areas, Title IX enhances the fundamental constitutional guarantee of gender equality. In others, Title IX's protections do not apply, leaving those areas regulated solely by constitutional standards. Moreover, even where they overlap, the provisions may differ meaningfully in their scope. Title IX and the Equal Protection Clause thus do not establish "virtually identical" rights, and a Title IX claim cannot preclude an Equal Protection claim brought pursuant to § 1983.

1. In Title IX, Congress created an independent source of protection against sex discrimination, supplementing and enhancing the protections of the Equal Protection Clause.

While Title IX and the Constitution each prohibit discrimination on the basis of sex by some actors in some instances, Congress, in enacting Title IX, intended that the statutory prohibition would function independently from the constitutional rule, and thus would supplement rather than supplant § 1983 claims under the Equal Protection Clause. In 1972, when Title IX was enacted, Congress was aware that the Equal Protection Clause prohibited some forms of sex discrimination. *See generally Franklin v. Gwinnett*, 503 U.S. 60, 71 (1992) ("[I]n determining Congress' intent . . . we evaluate the state of the law when the Legislature passed Title IX."). In *Reed v. Reed*, 404 U.S. 71 (1971), the Court had held that an Idaho probate law that mandated a preference for males over females was unconstitutional under the Equal Protection Clause. This holding, the first of its kind in the Nation's history, was an historic milestone. However, the decision in *Reed* came only months after the Court had summarily affirmed a lower court decision rejecting a § 1983 challenge to the women-only admissions policy of a public college that provided instruction in subjects such as "'sewing, dressmaking, millinery, art, needlework, cooking,

housekeeping and such other industrial arts as may be suitable to [women]. . . .'" *Williams v. McNair*, 316 F. Supp. 134, 136 n.3 (D.S.C. 1970) (quoting 22 Code of South Carolina § 408 (1962)), *aff'd*, 401 U.S. 951 (1971); *see* 117 CONG. REC. S30155 (daily ed. Aug. 5, 1971) (statement of Sen. Bayh) (noting in introducing predecessor to Title IX that "[w]hile racial discrimination has been explicitly prohibited for nearly 20 years, only a few months ago the Supreme Court summarily affirmed a lower court decision upholding the constitutionality of a State's maintenance of a branch of its public university system on a sexually segregated basis"). The scope of constitutional protections thus remained uncertain.

The legislative history confirms that Congress intended Title IX to provide an independent source of protection against sex discrimination in education, supplementary to the as yet undefined constitutional protection. For example, while noting that Title IX exempted military schools from coverage, Senator Bayh, the sponsor of the statute, "hasten[ed] to point out" that Title IX "in no way lessens the responsibility of those who are presently charged with administering our Federal military academies to provide education for women applicants," 118 CONG. REC. S5812 (daily ed. Feb. 28, 1972), thus indicating that Title IX had no effect on military academies' obligations under the Equal Protection Clause.[14]

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[14] "Senator Bayh's remarks, as those of the sponsor of the language ultimately enacted, are an authoritative guide to the statute's construction." *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 527 (1983).

Congress further indicated that it intended Title IX to complement, not replace, the independent protection provided by the Equal Protection Clause, by taking deliberate action, in passing Title IX, to bolster Equal Protection sex discrimination cases brought by private litigants under § 1983. Originally, 42 U.S.C. § 2000h-2 permitted the Attorney General to intervene in private suits brought to challenge discrimination on the basis of race, color, religion or national origin under the Equal Protection Clause and to obtain the same broad relief that would be available if the United States had itself instituted the action. Title IX included an amendment to § 2000h-2 that added the word "sex" to this list, in order to permit the Justice Department "to help develop the law in such a vitally important area." 118 CONG. REC. 5808 (Feb. 28, 1972) (statement of Sen. Bayh). The context of the amendment makes indisputably clear that it was intended to promote the broader purpose of Title IX—"to prohibit sex discrimination in education." *Id.* at 5803. Congress did not intend to duplicate and displace the constitutional right to be free from sex discrimination by passing Title IX. Rather, by creating Title IX's independent antidiscrimination provisions while enhancing the effectiveness of cases brought by individuals to enforce their rights through § 1983 Equal Protection claims, Congress acted to supplement and strengthen these rights.

2. While both the Equal Protection Clause and Title IX prohibit sex discrimination, the prohibitions differ in their coverage.

Because Title IX's prohibition against sex discrimination is, in several important respects, narrower in its reach than the Constitution's (although it is broader in other respects), Title IX is not a comprehensive mechanism for enforcing the right to be free from discrimination on the basis of sex in education and does not displace § 1983 claims enforcing the Equal Protection Clause.

First, Title IX's prohibition against sex discrimination applies only to educational programs and activities, whether public or private, that receive federal funds. 20 U.S.C. § 1681. Receipt of such funds is voluntary: a school district or educational program could purposefully avoid Title IX's requirements by declining to accept them. In contrast, the Equal Protection Clause applies to all "state actors," regardless of whether they receive federal funds, and a public school or program that does not receive federal funds cannot thereby evade its constitutional obligations. *See*, *e.g.*, *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 298 (2001) (rejecting a school athletic association's argument that it was not subject to constitutional claims brought pursuant to § 1983 because the relationship between the state Board of Education and the athletic association made the latter a state actor).

Second, while § 1983 permits plaintiffs to proceed against individual school officials,

supervisors, and teachers acting under color of state law, most courts have interpreted Title IX to permit suit only against institutions. *E.g., Hartley v. Parnell*, 193 F.3d 1263, 1270 (11th Cir. 1999). The court below appropriately recognized that Title IX could not preclude constitutional claims against individuals alleged to be "immediately responsible" for the plaintiff's injury. *Fitzgerald v. Barnstable Sch. Comm.*, 504 F.3d 165, 180 (1st Cir. 2007); *see also Delgado v. Stegall*, 367 F.3d 668, 674 (7th Cir. 2004) (Posner, J.) (holding that "the only possible effect of applying the [S]ea[] [C]lammers doctrine" to a case against a sexually harassing teacher "would be to immunize [the teacher] from liability for his federal constitutional tort," a result inconsistent with Congress's intent and the policies of Title IX). Likewise, Title IX cannot be understood to preclude claims under § 1983 for constitutional violations committed by individuals in their capacities as ultimate decision-makers for an institution, as such a result would immunize those state actors from liability for violations of their constitutional obligations.

Third, Title IX expressly exempts certain forms of discrimination from its coverage. Its prohibition against sex discrimination in admissions does not apply to elementary or secondary schools. 20 U.S.C. § 1681(a)(1). Thus, if an academically selective public high school required girls to meet more rigorous standards than boys as a condition of admission, Title IX would provide no recourse, even though, as courts have recognized, the Equal Protection Clause forbids such discrimination. *See*

Berkelman v. San Francisco Unified Sch. Dist., 501 F.2d 1264, 1269-70 (9th Cir. 1974) (holding that higher admission standards for girls than for boys in public high school violated the Equal Protection Clause, while noting that Title IX exempted such practices); *Bray v. Lee*, 337 F. Supp. 934 (D. Mass. 1972) (holding in a § 1983 action that higher admission standards for girls than boys in public high school violated the Equal Protection Clause).[15]

Title IX also expressly exempts educational institutions whose primary purpose is to train people for military service or the merchant marine, 20 U.S.C. § 1681(a)(4), and public undergraduate institutions with a traditional and continuing policy of admitting students of only one sex, 20 U.S.C. § 1681(a)(5). These institutions, however, remain subject to the independent demands of the Constitution. *See United States v. Virginia*, 518 U.S. 515 (1996) (finding that the men-only admissions policy at Virginia Military Institute violated the Equal Protection Clause in an action brought by Attorney General); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982) (finding that the women-only

[15] Title IX also exempts membership practices of social fraternities and sororities and voluntary youth services organizations; activities undertaken in connection with Boys State, Boys Nation, Girls State, and Girls Nation conferences; father-son or mother-daughter activities; and higher education scholarship awards in beauty pageants. 20 U.S.C. § 1681(a)(6), (7), (8), (9).

admission policy at a traditionally single-sex public college violated the Equal Protection Clause).[16]

In *Hogan*, the Court rejected Mississippi's argument that, by exempting traditionally single-sex public undergraduate institutions from Title IX, Congress intended to limit plaintiffs' ability to bring Equal Protection claims against them. The Court found the argument to "require[] little comment," given that "Congress apparently intended, at most, to exempt [the university] from the requirements of Title IX." *Id.* at 732. The Court emphasized that "neither Congress nor a State can validate a law that denies the rights guaranteed by the Fourteenth Amendment." *Id.*

The Court restated this fundamental principle in *Smith*, noting that the decision under review made clear that "it did not intend to indicate that the EHA in any way limits the scope of a handicapped child's constitutional rights. Claims not covered by the EHA should still be cognizable under § 1983." 468

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[16] Title IX regulations issued by the Department of Education further limit the statute's reach, although such administrative regulations clearly cannot limit the scope of the Constitution. For example, Title IX regulations exempt sports involving bodily contact from the requirement that recipients of federal funds allow individuals to try out for opposite-sex athletics teams in certain circumstances. 34 C.F.R. § 106.41(b). Courts have nonetheless allowed *constitutional* claims by, for example, girls seeking the opportunity to participate in interscholastic wrestling competitions or join school football teams. *See, e.g.*, *Barnett v. Tex. Wrestling Ass'n*, 16 F. Supp. 2d 690, 694 (N.D. Tex. 1998); *Adams v. Baker*, 919 F. Supp. 1496, 1503 (D. Kan. 1996); *Saint v. Neb. Sch. Activities Ass'n.*, 684 F. Supp. 626 (D. Neb. 1988); *Lantz v. Ambach*, 620 F. Supp. 663 (S.D.N.Y. 1985).

U.S. at 1003 n.7. Presumably, this holding means not only that a student with disabilities could use § 1983 to assert, for example, First Amendment rights, but also that, if the EHA had exempted certain claims based on educational discrimination against students with disabilities from its coverage, Equal Protection challenges to such discrimination, brought under § 1983, would still be available.

Despite the explicit exemptions from Title IX's coverage and this Court's rulings in *Hogan* and *Smith*, the court below held in the instant case that "Congress saw Title IX as the sole means of vindicating the constitutional right to be free from gender discrimination perpetrated by educational institutions." *Fitzgerald*, 504 F.3d at 179.[17] This language is startlingly broad and contravenes this Court's holding in *Hogan*, 458 U.S. at 732, that Congress does not and cannot, in excepting certain categories of gender discrimination from Title IX, thereby restrict the scope of constitutional protection against sex discrimination available through § 1983.[18] The truism that Congress cannot by statute

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[17] In addition, as set out above, the First Circuit held that no § 1983 claims were available against individuals who were not "immediately responsible" for a plaintiff's injury, despite the fact that such claims are unavailable under Title IX.

[18] The problems with the First Circuit's broad statement are evident in the Third Circuit's decision in *Williams v. School District of Bethlehem*, 998 F.2d 168, 172-74 (3d Cir. 1993) (dismissing the Title IX *and constitutional* claims of a male student who wished to join his school's female-only field hockey team based on the regulatory exemption of 34 C.F.R. § 106.41(b) of contact sports from Title IX's nondiscrimination requirements). The court effectively read the regulatory

deny plaintiffs the constitutional right to be free from sex discrimination in public education – or narrow the scope of that right – accords with the fundamental principle of the supremacy of Constitutional law. *See id.* at 733 ("[A] statute apparently governing a dispute cannot be applied by judges, consistently with their obligations under the Supremacy Clause, when such an application of the statute would conflict with the Constitution.") (quoting *Younger v. Harris*, 401 U.S. 37, 52 (1971) (quoting *Marbury v. Madison*, 1 Cranch 137 (1803))) (internal quotation marks omitted). Because Title IX does not reach all forms of sex discrimination in education prohibited by the Equal Protection Clause, the claims under the statute and the Constitution are not virtually identical, and Title IX should not be understood to preclude reliance on § 1983 to raise constitutional claims.

3. Even when the protections of Title IX and the Equal Protection Clause overlap, the tests they provide for determining what constitutes unlawful discrimination may differ.

While, for the reasons set out above, § 1983 must be available to challenge forms of discrimination explicitly exempted under Title IX and state actors not reached by Title IX, this alone is insufficient to ensure that individuals who suffer discrimination have access to the full range of

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exemption for contact sports into the Constitution, concluding that the issue was "fully addressed" by Title IX's "comprehensive scheme." *Id.* at 176.

constitutional protections. Even where discriminatory conduct is barred under both Title IX and the Equal Protection Clause, the tests for establishing violations of the statute and the Constitution are not identical. Activities may be lawful under Title IX but nevertheless unlawful under the Equal Protection Clause.

For example, in announcing recent Title IX regulations allowing federal funding recipients to offer single-sex classes and schools in some instances, the Department of Education explicitly stated, "[B]ecause the scope of the Title IX statute differs from the scope of the Equal Protection Clause, these regulations do not regulate or implement constitutional requirements or constitute advice about the U.S. Constitution." 71 Fed. Reg. 62,530, 62,533 (Oct. 25, 2006) (footnote omitted). Indeed, the regulations allow certain public single-sex charter schools to operate even when no comparable educational option is available to the excluded sex. *Compare* 34 C.F.R. § 106.34(c)(2) *with Virginia*, 518 U.S. at 539 ("However 'liberally' this plan provides for the Commonwealth's sons, it makes no provision whatever for her daughters. That is not *equal* protection.") (emphasis in original).

4. Because they are distinct in their contours, Title IX and Equal Protection claims brought under § 1983 must be permitted to proceed simultaneously.

Given the potentially divergent protections and standards, judicial economy and fairness to litigants counsel against a piecemeal approach, in

which only those § 1983 Equal Protection claims determined to be identical to the particular Title IX claims pled might be precluded. At the motion to dismiss stage, prior to factual development in the case, the scope of a particular constitutional claim and a particular Title IX claim will often be unclear. A rule requiring a court to sound the particulars of plaintiffs' claims and weigh the precise protections of constitutional law at a preliminary stage in litigation would violate the doctrine of constitutional avoidance and impose an unnecessary burden on courts and litigants. Given the imprecise match between the protections of Title IX and the Equal Protection Clause, precedent and prudence require that constitutional claims brought under § 1983 be permitted to proceed as parallel claims in Title IX litigation.

Even when Title IX and the Equal Protection Clause appear to occupy the same ground, it is inappropriate to look only to Title IX in determining whether a plaintiff's rights have been violated.[19]

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[19] Many courts holding that the availability of Title IX precludes recourse to § 1983 actions to enforce the Constitution have made that error, without attention to whether or how the requirements of Title IX and the Constitution may diverge. *E.g.*, *Bruneau v. So. Kortright Cent. Sch. Dist.*, 163 F.3d 749, 758 (2d Cir. 1998) (explaining that focus on the "nature of the underlying right" was misplaced and concluding that Title IX precluded Equal Protection claims brought pursuant to § 1983 when based on the same factual predicate); *Waid*, 91 F.3d at, 862 ("[A] plaintiff may not claim that a single set of facts leads to causes of action under both Title IX and § 1983"). This reasoning has led some courts to conclude, erroneously, that Title IX precludes other constitutional claims, addressing different legal harms entirely, when the claims depend on the

"Certain wrongs affect more than one right[.]" *Soldal v. Cook County*, 506 U.S. 56, 70 (1992). Because Title IX's protections are distinct from those offered by the Constitution, plaintiffs must be permitted to pursue these claims simultaneously. *Cf. Humphries*, 128 S. Ct. at 1960-61 (discussing distinct and independent nature of claims under Title VII and 42 U.S.C. § 1981); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 50 (1974) (allowing discrimination claim under collective bargaining agreement and Title VII because "[t]he distinctly separate nature of these contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence").

B. The Text, Structure, and Legislative History of Title IX Demonstrate That Congress Did Not Intend to Eliminate the Ability to Pursue Constitutional Claims Through the Framework of Section 1983.

Unlike the statute at issue in *Smith*, 468 U.S. 992, Title IX contains no clear indication that it was intended to supplant § 1983. In *Smith*, the Court

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same facts relied on for the Title IX claim. *See Doe v. Smith*, 470 F.3d 331, 338-40 (7th Cir. 2006) (finding that Title IX precluded § 1983 Due Process claim as well as § 1983 Equal Protection claim arising out of same facts); *Doe v. Sch. Admin. Dist. No. 19*, 66 F. Supp. 2d 57, 65-66 (D. Me. 1999) (finding that Title IX precluded § 1983 Due Process claim against school district); *Nelson v. Univ. of Me.*, 914 F. Supp. 643, 647-48 (D. Me. 1996) (finding First Amendment claim precluded by Title IX when claims arose out of same facts).

held that Congress made clear its intention that students with disabilities who had constitutional claims to a free appropriate public education be required to pursue those claims "through the carefully tailored administrative and judicial mechanism set out in the statute," and not through § 1983. 468 U.S. at 1009. The Court examined the EHA's text and legislative history, which indicated that Congress intended for the statutory framework to "provide assistance to the States in carrying out their responsibilities under . . . the Constitution of the United States to provide equal protection of the laws." 468 U.S. at 1010 (quoting S. Rep. No. 94-168, at 13, 1975 U.S.C.C.A.N. at 1437). The Court focused on the statute's express provisions detailing an "elaborate procedural mechanism" to protect those constitutional rights, including "hearings conducted by the State," and "a process that begins on the local level and includes ongoing parental involvement, detailed procedural safeguards, and a right to judicial review." *Smith*, 468 U.S. at 1010-11 (citing EHA, 20 U.S.C. §§ 1412(4), 1414(a)(5), 1415). The Court found that the statute's detailed procedures reflected "Congress' express efforts to place on local and state educational agencies the primary responsibility for developing a plan to accommodate the needs of each individual handicapped child," and to preclude such children from going directly to court with an Equal Protection claim. *Id.* at 1011. None of the indicators on which the Court relied in *Smith* is present in the Title IX context.

1. Title IX does not establish comprehensive enforcement procedures for asserting individual rights.

First, Title IX contains no *express* indication that Congress intended for it to be the exclusive mechanism for vindicating Equal Protection rights in educational contexts or to preclude vindication of those rights through § 1983. Second, in contrast to *Smith*, Title IX lacks the "elaborate procedural mechanisms" for enforcing its guarantees that the EHA contains. Title IX does not establish administrative procedures for individuals to pursue relief. Under Title IX's implied private right of action, plaintiffs need not file an administrative complaint before filing a lawsuit; instead, plaintiffs may file a lawsuit directly in court. *See Cannon v. University of Chicago*, 441 U.S. 677, 709 (1979).

The sole means of administrative enforcement expressly set forth in Title IX is a mechanism directed at the programs receiving federal funds – the recipients. *See* 20 U.S.C. § 1682. The Court has characterized the statute as setting forth "a procedure for the termination of federal financial support" for recipients that violate Title IX. *Cannon*, 441 U.S. at 683. While Title IX's regulations allow individuals to file complaints with the Department of Education, 34 C.F.R. § 106.71, complainants are not entitled to a hearing and cannot demand individually tailored remedies.

Title IX also lacks the EHA's emphasis on the role of local and state educational agencies. Its regulatory structure provides for enforcement by the

Department of Education's Office for Civil Rights, not by state or local entities. Therefore, the Court is not faced with a situation, as it was in *Smith*, where "[n]o federal district court presented with a constitutional claim . . . can duplicate th[e detailed local and state administrative] process." 468 U.S. at 1012. Nor is there a concern that allowing a § 1983 claim would allow a plaintiff to make an end run around procedures specified by Congress, because, whether a plaintiff raises § 1983 claims or only Title IX claims, she may do so in federal court in the first instance.

2. Legislative history demonstrates that Congress intended to preserve § 1983 remedies for unconstitutional discrimination when it enacted Title IX.

Legislative history indicates Congress's intent, in enacting Title IX, to leave undisturbed previously available remedies under § 1983 for constitutional violations. First, as explained in Part II.A.1., *supra*, at the same time it enacted Title IX's nondiscrimination rule, Congress empowered the Attorney General to intervene in individual cases challenging sex discrimination under the Equal Protection Clause. *See* 42 U.S.C. § 2000h-2. In so doing, Congress not only assumed that such suits would continue to go forward to challenge sex discrimination in education, it sought to deepen their impact by allowing the United States to use these cases as a vehicle to obtain far-reaching relief.

Second, Congress modeled Title IX on Title VI of the Civil Rights Act of 1964. *See Cannon*, 441 U.S.

at 694-95 ("[T]he drafters of Title IX explicitly assumed that it would be interpreted and applied as Title VI had been."). For years prior to Title IX's enactment, Title VI had been applied in cases also alleging parallel Equal Protection claims, brought under § 1983, of unconstitutional race discrimination. *See, e.g.*, *Blackshear Residents Org. v. Hous. Auth.*, 347 F. Supp. 1138 (W.D. Tex. 1971) (discussing possibilities of remedies under Title VI and § 1983 Equal Protection claim); *Gautreaux v. Chicago Hous. Auth.*, 265 F. Supp. 582 (N.D. Ill. 1967) (rejecting motion to dismiss Title VI claim and § 1983 Equal Protection claim). Indeed, Congress passed Title VI in the wake of *Brown v. Board of Education*, 347 U.S. 483, because it was concerned with the "lack of progress in school desegregation." *Green v. County Sch. Bd.*, 391 U.S. 430, 435 n.2 (1968). Congress intended Title VI to facilitate African-Americans' access to educational programs, not to preclude their constitutional discrimination claims. *Id.*

Congress can be presumed to have been aware of the history of litigation raising both Title VI and § 1983 Equal Protection claims when it enacted Title IX in 1972. *See Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185 (1988). Congress's express indication that it was modeling Title IX on Title VI, coupled with the absence of any expressed intent to foreclose actions under § 1983 to enforce the Equal Protection Clause, indicate that Congress did not intend for Title IX to operate differently from Title VI in its effect on the availability of § 1983 for constitutional claims. Litigation raising both Title VI claims and §

1983 claims has continued since Title IX's enactment. *See, e.g.*, *United States v. Fordice*, 505 U.S. 717, 723-24 (1992) (race discrimination case in higher education raising both Title VI and Equal Protection claims); *Grutter v. Bollinger*, 539 U.S. 306 (2003) (case challenging state law school's admissions policy as violating the Fourteenth Amendment's ban on race discrimination – a claim brought under 42 U.S.C. §§ 1983 and 1981 – as well as Title VI).

Moreover, legislative history from 1975, when Congress again considered the scope and effect of Title IX, also indicates that Title IX was not intended to displace § 1983 Equal Protection claims. Under the General Education Provisions Act, Congress required all agency regulations under Title IX to be "laid before" Congress before they became effective and claimed authority to disapprove any regulations deemed inconsistent with that Act. Pub. L. No. 93-380, 88 Stat. 567, 20 U.S.C. § 1232 (d)(1) (1970 & Supp. IV 1974). In 1975, the Department of Health, Education and Welfare (HEW) submitted its Title IX regulations to Congress for review. In support of the HEW regulations and their interpretation of Title IX, Senator Bayh approvingly cited a Texas Law Review article discussing the scope and purpose of Title IX and caused it to be printed in the Congressional Record. 121 Cong. Rec. S9030-31 (daily ed. May 22, 1975). That article, elevated to the status of legislative history by the sponsor of Title IX, distinguishes between the standards of review under the Constitution and Title IX, and explicitly states:

> The administrative procedures and private suits available under Title IX are the most obvious remedies for persons aggrieved by sex discrimination in education. Nevertheless, other avenues of redress could supplement the statutory suit. . . . A civil rights action based on section 1983 would be available to assert rights under Title IX and the federal Constitution. *Id.* at S9036.

In sum, nothing in the text, structure, or history of Title IX indicates any congressional intent to foreclose § 1983 remedies for constitutional claims. On the contrary, the statute's history indicates that Congress contemplated that Title IX's protections would co-exist with litigation brought under § 1983 to redress related constitutional violations. In contrast to *Smith*, therefore, there is no indication that Congress intended Title IX to duplicate and supplant Equal Protection claims under § 1983.

C. Comprehensive protection against sex discrimination remains necessary to achieve Congress's goal of equal opportunity in education.

While progress has been made since the Court first held in 1971 that a law discriminating against women violated the Equal Protection Clause in *Reed v. Reed*, 404 U.S. 71, and since Congress enacted Title IX the following year, women and girls still face discrimination in education. High school girls taking vocational courses continue to be clustered in classes for traditional women's occupations, such as cosmetology, which are substantially lower-paying

than are traditional men's occupations. Girls make up only 4% of the students learning about heating, air conditioning, and refrigeration, 5% of those studying welding, 6% of those in electrician and plumber and pipefitter classes, and 9% of those learning automotive skills.[20] Girls' choices are limited by discriminatory practices such as gender stereotyping by counselors and teachers, and by harassment of girls who take "boys' classes."[21] These educational limitations translate into lower earning power. For example, while women in non-traditional fields such as maintenance and repair can often expect to earn between $20 and $30 per hour (or $800 to $1200 per week),[22] child care workers (of whom 92% are female) make $360 per week on average, barely minimum wage.[23]

Women and girls also are discouraged from pursuing the fields of science, technology, engineering and mathematics: In 2005, women were only about 20% of those who received bachelors' degrees in physics and engineering, and 22% of those

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[20] NAT'L WOMEN'S LAW CTR., TOOLS OF THE TRADE: USING THE LAW TO ADDRESS SEX SEGREGATION IN HIGH SCHOOL CAREER AND TECHNICAL EDUCATION 6 (2005) (study of twelve states), *available at* http://www.nwlc.org/pdf/NWLCToolsoftheTrade05.pdf.

[21] *Id.*, 10-12.

[22] Department of Labor, Women's Bureau, *Quick Facts on Nontraditional Occupations for Women* (2007), http://www.dol.gov/wb/factsheets/nontra2006.htm.

[23] Bureau of Labor Statistics, *Median weekly earnings of full-time wage and salary workers by detailed occupation and sex* 257 (2007), http://www.bls.gov/cps/cpsaat39.pdf.

who received computer sciences degrees.[24] These low percentages result at least in part from discriminatory treatment that isolates and excludes female students.[25] This discrimination harms women and deprives our nation of needed skills.[26]

Women and girls still play school sports in lower numbers than do men and boys. In high school, girls make up 49% of students,[27] but only 41% of athletes[28]; in higher education, women make up 57% of the students,[29] but only 43% of the athletes.[30]

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[24] Nat'l Sci. Found., Div. of Sci. Res. Statistics, *Women, Minorities, and Persons with Disabilities in Science and Engineering*, Table C-5, (2006), http://www.nsf.gov/statistics/wmpd/underdeg.htm

[25] NAT'L ACADS. OF SCI., BEYOND BIAS AND BARRIERS: FULFILLING THE POTENTIAL OF WOMEN IN ACADEMIC SCIENCE AND ENGINEERING (2007), *available at* http://books.nap.edu/openbook.php?record_id=11741&page=1.

[26] *See* NAT'L SCI. BD., SCIENCE AND ENGINEERING INDICATORS (2006), *available at* http://www.nsf.gov/statistics/seind06/pdfstart.htm (The "troubling decline in the number of U.S. citizens who are training to become scientists and engineers… threaten[s] the economic welfare and security of our country.").

[27] U.S. Census Bureau, School Enrollment--Social and Economic Characteristics of Students: October 2006**,** Table 2, http://www.census.gov/population/www/socdemo/school/cps2006.html.

[28] Nat'l Fed'n of State High Sch. Ass'ns, *2004-05 High School Athletics Participation Survey*, http://www.nfhs.org/custom/participation_figures/default.aspx.

[29] U.S. Census Bureau, *supra* note 27.

[30] ROBERTO VINCENTE, NAT'L COLLEGIATE ATHLETIC ASS'N,1981-82 – 2004-05 NCAA SPORTS SPONSORSHIP AND PARTICIPATION

Female athletes receive fewer resources: only 37% of the money spent on college athletics went to women during the 2003-2004 school year,[31] and female athletes are often treated as second class. *See*, *e.g.*, *Jackson v. Birmingham Bd. of Educ.,* 544 U.S. 167 (2005) (girls' high school basketball team treated unfairly); *Communities for Equity v. Mich. High Sch. Athletics Ass'n*, 459 F.3d 676 (6th Cir. 2006) (girls were discriminated against by being required to play in nontraditional seasons).

Finally, sexual harassment remains a serious problem. A 2006 study of college campuses found that 62% of female students reported harassment, with 16% of those reporting that the harassment was severe enough to interfere with their ability to study and focus on their classes, and 27% reporting that because of harassment they had stayed away from particular places on campus.[32]

For these reasons, women and girls must be permitted to enforce the full scope of their rights to be free from discrimination in education, including

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REPORT 158 (2006), *available at* http://www.ncaa.org/library/research/participation_rates/1982-2005/1982_2005_participation_rates.pdf.

[31] DENISE DEHASS, NAT'L COLLEGIATE ATHLETIC ASS'N, 2003-2004 NCAA GENDER-EQUITY REPORT (2006).

[32] CATHERINE HILL & ELENA SILVA, AM. ASS'N OF UNIV. WOMEN EDUC. FOUND., DRAWING THE LINE: SEXUAL HARASSMENT ON CAMPUS 31 (2005), *available at* www.aauw.org/research/upload/DTLFinal.pdf. For this report, sexual harassment was defined by students as behavior that is "inappropriate" or "offensive" or that makes others feel "uncomfortable."

those under the Equal Protection Clause pursuant to § 1983, as well as the supplementary protections of Title IX, to achieve equality in education. Such a result fulfills Congress's purpose, in enacting Title IX, to increase – not to limit – protections against sex discrimination in education.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the First Circuit and remand with instructions to allow Petitioners to proceed on their Equal Protection claims under § 1983.

Respectfully submitted,

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APPENDIX A

STATEMENTS OF INTEREST

American Association for Justice (AAJ) is a voluntary, nation-wide association of trial lawyers who primarily represent plaintiffs in personal injury, civil rights, employment rights, and consumer litigation. AAJ's 50,000 attorney members are committed to the preservation of access to the courts and to the right of trial by jury. Title 42 U.S.C. § 1983 is an historic statute enacted to compensate victims of constitutional violations and to deter future violations by public officials. The rights afforded by § 1983 must remain in full force and effect unless Congress explicitly legislates to the contrary.

American Association of University Professors (AAUP), founded in 1915, is an association of over 46,000 faculty members and other academic professionals in all academic disciplines. AAUP has participated before this Court in numerous *amicus curiae* briefs, including a recent Title IX case, *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005). AAUP's policy statements have long recognized that the sexual harassment of students has no place in education; preclusion of § 1983 claims would detrimentally affect the ability of college as well as high school students to raise claims of sexual harassment. In addition, AAUP has consistently opposed limitations on constitutional claims and remedies when those limitations conflict with the rights recognized by this Court or Congress. *See*, *e.g.*, *Meacham v. Knolls Atomic Power Lab.*, 128 S. Ct. 2395 (2008); *Crawford*

v. Metro. Gov't of Nashville and Davidson County, No. 06-1595 (2008).

American Association of University Women (AAUW) has been a catalyst for the advancement of women and their transformation of American society for over 125 years. AAUW's more than 100,000 members belong to a community that breaks through educational and economic barriers so all women have a fair chance. With more than 1,000 branches across the country, AAUW works to promote equity for all women and girls through education, research, and advocacy. AAUW mobilizes advocates nationwide on priority issues, and chief among them is educational equity and opportunity. AAUW supports civil rights laws such as Title IX that promote and enforce equal opportunities for women and girls, and works to improve the campus climate for all students.

American Civil Liberties Union of Massachusetts (ACLUM) is the local affiliate of the ACLU in Massachusetts, and has over 20,000 members and supporters. The ACLUM has long sought to ensure that the law provides individuals with meaningful protection from harassment and other forms of discrimination. In particular, the ACLUM has battled the invidious effects of discrimination in education, given that the proper role of education is to provide opportunities to overcome disadvantage and stereotypes. Discrimination that serves to undermine this vital role and close down opportunity is especially pernicious. The ACLUM appeared with the ACLU Women's Rights Project as *amici curiae* in the instant case before the First Circuit.

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

Association for Gender Equity Leadership in Education (AGELE) is an organization that supports the implementation of Title IX and works with gender equity in education advocates and Title IX Coordinators in state education agencies and local school districts across the nation. We believe that a range of avenues open to those filing sex discrimination complaints, including constitutional claims under § 1983, are not precluded by Title IX.

Business and Professional Women/USA (BPW/USA), founded in 1919, is a multi-generational, nonpartisan membership organization with a mission to achieve equity for all women in the workplace through advocacy, education, and information. Established as the first organization to focus on issues of workingwomen, BPW/USA is historically a leader in grassroots activism, policy

influence and advocacy for millions of workingwomen.

Connecticut Women's Education and Legal Fund (CWEALF) is a non-profit women's rights organization dedicated to empowering women, girls and their families to achieve equal opportunities in their personal and professional lives. CWEALF defends the rights of individuals in the courts, educational institutions, workplaces and in their private lives. For the past three decades, CWEALF has provided legal information and conducted public policy and advocacy to ensure the spirit of Title IX is implemented and enforced in educational and athletic opportunities.

Crittenton Women's Union (CWU) is a Boston-based nonprofit organization that combines direct service programs, independent research and public policy advocacy in its mission to transform the course of low-income women's lives so that they can attain economic independence and create better futures for themselves and their families. Each year CWU helps more than 2,000 people through its safe housing, education and training programs. Central to CWU's mission is its commitment to removing the barriers—economic, political and social—that prevent low-income women from attaining economic independence. Sex discrimination remains a challenge for many women we help as they attempt to enter male-dominated fields in order to maximize their economic opportunities. Therefore, we strongly support the maintenance and upholding of all rights and remedies for victims of sex discrimination.

Equal Rights Advocates (ERA) is a San Francisco-based women's rights organization whose mission is to protect and secure equal rights and economic opportunities for women and girls through litigation and advocacy. In service of its mission, ERA litigates class actions and other high-impact cases on issues of gender discrimination in employment and education. In particular, ERA has a long history of pursuing equality and justice for women and girls under the Equal Protection Clause of the Constitution and Title IX. ERA's work includes the representation of the plaintiffs in *Doe v. Petaluma City School District*, the nation's first federal court case to recognize that peer (student-to-student) sexual harassment is actionable under Title IX. ERA also provides advice and counseling to hundreds of individuals each year through a telephone advice and counseling hotline, and has participated as *amicus curiae* in scores of state and federal cases involving the interpretation and application of procedural and substantive laws affecting the ability of women and girls to obtain and enforce their equal rights under the law.

Feminist Majority Foundation is a non-profit organization with offices in Arlington, VA and Los Angeles, CA. The Foundation is dedicated to eliminating sex discrimination and to the promotion of women's equality and empowerment. The Foundation's programs focus on advancing the legal, social, educational, economic, and political equality of women with men, countering the backlash to women's advancement, and recruiting and training young feminists to encourage future leadership for the feminist movement. To carry out these aims, the Foundation engages in research and public policy

development, public education programs, litigation, grassroots organizing efforts, and leadership training programs. The Foundation's Educational Equity Program promotes understanding and enforcement of Title IX as well as full equality for women and men, girls and boys in education.

Lambda Legal Defense and Education Fund, **Inc.** is a national organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people and those with HIV through impact litigation, education and public policy work. The largest and oldest legal organization of its kind, Lambda Legal has appeared before this Court as counsel in leading civil rights cases such as *Lawrence v. Texas*, 539 U.S. 558 (2003), and *Romer v. Evans*, 517 U.S. 620 (1996), and as *amicus curiae* in numerous cases. Lambda Legal is particularly interested in the question before the Court in this case because the viability of § 1983 claims for unconstitutional sex discrimination is an issue of particular importance to the clients and community that Lambda Legal serves. For example, Lambda Legal was counsel in *Nabozny v. Podlesny*, 92 F.3d 446 (7th Cir. 1996), in which the Seventh Circuit Court of Appeals permitted a gay high school student to sue under § 1983 for egregious sex discrimination he suffered at his school.

Legal Momentum advances the rights of women and girls by using the power of the law and creating innovative public policy. It is the nation's oldest legal advocacy organization devoted to women's rights**.** Legal Momentum, then known as NOW Legal Defense, pioneered the implementation of Title IX with PEER, its nationwide Project on

Equal Education Rights, from 1974-1992, and it continues to work with students, school systems and colleges throughout the country. It was co-counsel in *Doe v. Petaluma City School District*, 949 F. Supp. 1415 (N.D. Cal. 1996), the first case to recognize that a school's failure to respond to peer sexual harassment may violate Title IX, and has appeared as *amicus curiae* in numerous cases concerning the right to be free from sexual harassment and sex discrimination in education, including *Davis v. Monroe County Board of Education*, 526 U.S. 648 (1999), and *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992).

Massachusetts Society for the Prevention of Cruelty to Children has been working to strengthen families and prevent child abuse since its incorporation in 1878. This includes promoting the development of safe and supportive environments in which children can learn and grow. Preventing the devastating emotional and educational consequences of sexual harassment of children in school is key to such efforts and must focus both on ending the harassing acts and requiring schools to respond appropriately to reports. Each has significant implications for the welfare of the targeted child and for the entire school.

National Alliance for Partnerships in Equity (NAPE) is a consortium of state and local agencies, corporations, and national organizations that collaborate to create equitable and diverse classrooms and workplaces where there are no barriers to opportunities. It focuses on improving the achievement of students in secondary and

postsecondary programs that lead to high-skill, high-wage, and nontraditional careers.

National Association of Commissions for Women (NACW) is a national professional association supporting state, county and city commissions for women that reach countless women across the country. NACW supports full remedies for sex discrimination to ensure equality for girls and women. NACW recognizes the importance of Title IX and the vast opportunities it has provided, along with the constitutional right of protection against discrimination based on sex, for the girls and young women of this country. Gender equity in education is a crucial right for America's females attending schools and one that should not be violated nor curtailed.

National Association of Social Workers (NASW), established in 1955, is the largest association of professional social workers in the world, with approximately 145,000 members and chapters throughout the United States, in Puerto Rico, Guam, the Virgin Islands, and an International Chapter in Europe. With the purpose of developing and disseminating standards of social work practice while strengthening and unifying the social work profession as a whole, NASW provides continuing education, enforces the *NASW Code of Ethics,* conducts research, publishes books and studies, promulgates professional criteria, and develops policy statements on issues of importance to the social work profession. NASW recognizes that discrimination and prejudice directed against any group are not only damaging to the social, emotional, and economic well-being of the affected group's

members, but also to society in general. NASW has long been committed to working toward the elimination of all forms of discrimination against women.

National Campaign to Restore Civil Rights is a collection of more than one hundred civil rights organizations and numerous individuals who came together to ensure that the courts protect and preserve justice, fairness, and opportunity. The Campaign believes that the judiciary is the branch of government that the founders of this nation intended to safeguard individual rights and liberties. The founders recognized that an independent and vigorous judiciary is a necessary predicate for a true democracy. The judiciary is often the last resort for people in the United States whose rights have been violated by the actions of government officials and private citizens. The Campaign is interested in this case because of the importance of § 1983 as a vehicle to enforce constitutional rights. The Campaign is concerned that too often victims of unconstitutional conduct are left without a remedy.

National Council of Jewish Women (NCJW) is a grassroots organization of 90,000 volunteers and advocates who turn progressive ideals into action. Inspired by Jewish values, NCJW strives for social justice by improving the quality of life for women, children, and families and by safeguarding individual rights and freedoms. NCJW's Resolutions state that the organization endorses and resolves to work for "the enactment and enforcement of laws and regulations that protect civil rights and individual liberties for all." Consistent

with our Principles and Resolutions, NCJW joins this brief.

National Council of La Raza (NCLR) is a private, nonprofit, nonpartisan organization established in 1968 to reduce poverty and discrimination and improve life opportunities for Hispanic Americans. NCLR works toward this goal through two primary, complementary approaches: capacity-building assistance to support and strengthen Hispanic community-based organizations and applied research, policy analysis, and advocacy. NCLR believes that sexual harassment in schools places students at risk of social and psychological distress and school failure. Nationally, a little more than half (58%) of Hispanic girls graduate from high school. Ensuring a school environment that is free of sexual harassment and gender discrimination is critical to improving the educational experiences of millions of Hispanic schoolchildren.

National Council of Women's Organizations is a non-profit, non-partisan coalition of more than 230 progressive women's groups that advocates for the 12 million women they represent. While these groups are diverse and their membership varied, all work for equal participation in the economic, social, and political life of their country and their world. The Council addresses critical issues that impact women and their families: from workplace and economic equity to international development; from affirmative action and Social Security to the women's vote; from the portrayal of women in the media to enhancing girls' self-image; and from Title IX and other education rights to health and insurance challenges.

National Education Association (NEA) is a nationwide employee organization with more than 3.2 million members, the vast majority of whom are employed by public school districts, colleges and universities. NEA is strongly committed to ending gender discrimination by educational institutions, including the sexual harassment of students, and firmly supports the use of § 1983 by students as a much needed remedy for such discrimination.

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

National Women's Political Caucus is a bipartisan, multicultural grassroots organization dedicated to increasing women's participation in the political field and creating a political power base designed to achieve equality for all women. Founded in 1971, NWPC prides itself in increasing the number of pro-choice women elected and appointed into office every year. Through recruiting, training and financial donations, NWPC provides support to women candidates running for all levels of office

regardless of political affiliation. In addition, hundreds of state and local chapters reach out to women in communities across the country to better assist them in their dreams of being elected into office. NWPC strives to break the glass ceiling, which restricts a woman's ability to climb the political ladder, one crack at a time.

Northwest Women's Law Center (NWLC) is a regional, non-profit, public interest organization that works to advance the legal rights of all women through litigation, legislation, education and the provision of legal information and referral services. Since its founding in 1978, NWLC has been involved in both litigation and legislation aimed at ending all forms of discrimination against women. As part of that effort, NWLC has been dedicated to protecting and ensuring women's and girls' rights to equal opportunities in education. Toward that end, NWLC has litigated several cases throughout the Northwest region to challenge discrimination and harassment in education and has participated as *amicus curiae* in cases throughout the country. NWLC serves as a regional expert and leading advocate on Title IX and gender equity.

Older Women's League (OWL) is the only national grassroots advocacy organization to focus solely on issues unique to women as they age. OWL strives to improve the status and quality of life for all women. OWL is a non-profit, non-partisan organization that accomplishes its work through research, educations, and advocacy activities conducted through a nationwide chapter and at-large membership. OWL is committed to public policies that help women fight sex discrimination and

harassment. OWL strives to help all women who suffer from the effects of discrimination and believes that all avenues should be open and available to seek justice when subjected to said mistreatment.

People For the American Way Foundation (PFAWF) is a nonpartisan citizens' organization established to promote and protect civil and constitutional rights. Founded in 1980 by a group of religious, civic, and educational leaders devoted to our nation's heritage of tolerance, pluralism, and liberty, PFAWF now has hundreds of thousands of members nationwide. PFAWF has been actively involved in litigation and other efforts to combat discrimination, and is particularly concerned that all Americans retain the ability to enforce their constitutional right to the equal protection of the laws, including in the educational setting. PFAWF joins this brief because the ruling of the court of appeals in this case, if not reversed, would significantly undermine that right.

Pick Up the Pace is a San Francisco-based non-profit organization whose mission is to identify and eliminate barriers to women's advancement in the workplace, emphasizing the role of law in combating glass ceiling discrimination, cognitive bias, gender stereotyping and work/family conflict. Established in 2005, the organization seeks to raise awareness of cutting edge gender bias issues through public education and legal advocacy, and has participated as *amicus curiae* before the United States Supreme Court in *Burlington Northern & Santa Fe Railway Co. v. Sheila White*, *BCI Coca-Cola Bottling Co. v. EEOC*, and *Ledbetter v. Goodyear Tire & Rubber Company, Inc.*

Public Justice, P.C., is a national public interest law firm that specializes in precedent-setting and socially significant civil litigation. Public Justice prosecutes cases designed to advance civil rights and civil liberties, environmental protection and safety, consumers' and victims' rights, occupational health and employees' rights, the preservation and improvement of the civil justice system, and the protection of the poor and powerless. Public Justice has litigated numerous sex discrimination in education cases under both the Equal Protection Clause and Title IX of the Education Amendments Act of 1972, and believes that maintaining all rights and remedies is crucial for full protection against sex discrimination.

Sargent Shriver National Center on Poverty Law champions economic opportunity through fair laws and policies so that people can move out of poverty permanently. Our methods blend advocacy, communication, and strategic leadership on issues affecting people living in poverty. National in scope, the Shriver Center's work extends from the Beltway to state capitols and into communities building strategic alliances. Through its Women's Law and Policy Project, the Shriver Center works on issues related to education, sexual harassment, and other forms of violence against women and girls. Access to safe and quality education is the surest path out of poverty and toward economic well-being. The Shriver Center has a strong interest in the eradication of sexual harassment and sex discrimination in schools because they deny women and girls equal educational opportunities.

Sociologists for Women in Society (SWS) is a non-profit scientific and educational organization of sociologists and others dedicated to maximizing the effectiveness of and professional opportunities for women in sociology exploring the contributions which sociology can, does and should make to the investigation of and humanization of current gender arrangements improving women's lives and creating feminist social change.

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

Union for Reform Judaism is the congregational arm of the Reform Jewish Movement in North America, including 900 congregations encompassing 1.5 million Reform Jews. The Union has a long-standing commitment to equal rights and social justice, including the rights of women and girls to be free of harassment. In a 1992 resolution on sexual harassment, the Union noted a "deficiency of adequate legal remedies to compensate for emotional trauma and to deter future harassment" and resolved that "victims should have available to them

the full panoply of remedies afforded for other forms of discrimination and injury."

Women's Bar Association of the District of Columbia (WBA-DC), founded in 1971, works to advance and protect the interests of women lawyers, to maintain the honor and integrity of the profession, and to promote the administration of justice. Among its many activities, WBA-DC develops and promotes the interests of women by monitoring legislation and filing *amicus curiae* briefs on issues vital to women. WBA-DC has an interest in protecting the legal rights of women, both within and outside of the legal profession, as guaranteed by the Equal Protection Clause of the U.S. Constitution and by Title IX. The organization is particularly interested in protecting the rights of women to be free from sexual discrimination and harassment. Therefore, WBA-DC joins this brief in the interest of protecting young women's right to equality in our nation's public school system.

Women's Bar Association of Massachusetts (WBA) is a professional association of over 1,600 attorneys, judges, and policy makers dedicated to advancing and protecting the interests of women and children in the legal system and in society. The WBA has been active in advocating for the elimination of discriminatory practices and beliefs in the legal system and has filed numerous *amicus curiae* briefs in matters involving sex discrimination and the equal treatment of women by courts, the legislature, and regulatory agencies including *amicus curiae* briefs in matters involving the treatment of girls and women in educational settings.

Women's Law Center of Maryland, Inc. is a nonprofit, membership organization with a mission of improving and protecting the legal rights of women, particularly regarding gender discrimination, sexual harassment, employment law and family law. Through its direct services and advocacy, the Women's Law Center seeks to protect women and girls from discrimination and harassment.

Women's Law Project (WLP) is a non-profit public interest legal center with offices in Philadelphia and Pittsburgh, Pennsylvania. Founded in 1974, the WLP works to abolish discrimination and injustice and to advance the legal and economic status of women through litigation, public policy development, public education and individual counseling. The WLP is committed to ending sexual abuse and harassment of women and children and to safeguarding the legal rights of women and children who experience sexual abuse. Toward that end, the WLP is interested in insuring a proper remedy for students who are subject to sexual harassment.

Women's Research & Education Institute (WREI) has provided timely, nonpartisan data and issue analysis to the women of the U.S. Senate and House of Representatives since 1977. Every other year, WREI produces a detailed demographic profile of women's status as students, workers, voters, taxpayers, wives, mothers, widows, and retirees. This book focuses on education, employment, health, military participation, economic well-being, and family formation. The women of Congress have been united in their support for Title IX and have called

upon WREI on frequent occasions to research and report on its positive impact on girls and women with regard to physical performance, academic achievement, educational attainment, and career advancement.

Women's Sports Foundation is a 501(c)3 nonprofit educational organization dedicated to advancing the lives of girls and women through sports and physical activity and ensuring equal participation and leadership opportunities for girls and women in sports and fitness. The Foundation distributes over 2 million pieces of educational information each year, awards grants and scholarships to female athletes and girls' sports programs, answers over 100,000 inquiries a year concerning Title IX and women's sports issues, and administers awards programs to increase public awareness about the achievements of women in sports. The Foundation is interested in this case because of its important implications for gender equity in sports. Despite the success of Title IX, girls continue to face significant disparities in athletics in terms of participation opportunities and resources and services provided to female teams compared to their male counterparts. Additionally, sexual harassment of female athletes and coaches continues to be pervasive. Given these continued challenges, it is very important for all who care about equal opportunity for girls and women, especially in the area of athletics, that these victims of discrimination maintain all rights and remedies for full protection against discrimination.