No. 23-15265

In the United States Court of Appeals for the Ninth Circuit

TAYLOR ANDERS; HENNESSEY EVANS; ABBIGAYLE ROBERTS; MEGAN WALAITIS; TARA WEIR; COURTNEY WALBURGER, individually and on behalf of all those similarly situated,
Plaintiffs-Appellants,
v.
CALIFORNIA STATE UNIVERSITY, FRESNO; BOARD OF TRUSTEES OF CALIFORNIA STATE UNIVERSITY,
Defendants-Appellees.

On Appeal from the United States District Court for the Eastern District of California, Fresno, No. 1:21-cv-00179-AWI-BAM

OPENING BRIEF OF PLAINTIFFS-APPELLANTS

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INTRODUCTION

In this Title IX action, Plaintiffs—six former members of Fresno State's now-eliminated women's lacrosse team—seek to certify a class of all current and future female student-athletes, advancing claims for equal participation opportunities and equal treatment. Determining liability for these claims will require program-wide comparisons of the opportunities and treatment provided to all women and all men in the varsity athletics program. The district court denied class certification for a single reason: It held, *sua sponte*, that, as a matter of constitutional law, members of one women's team cannot adequately represent women on any other team, much less all female student-athletes.

The district court's holding was based on its view that student-athletes have a "due process right to vigorous and single-minded advocacy *specific to their sports*." And, it continued, that constitutional right applies at "*all stages of this litigation*," preventing certification of an all-female-student-athletes class even as to liability. This holding, unprecedented in U.S. legal history, is inconsistent with Title IX, Rule 23(b)(2), and this Court's precedents about speculative remedy-stage conflicts.

Indeed, the district court's *sua sponte* constitutional holding is so contrary to the law that, when given the chance, Fresno State did not even attempt to defend it. Instead, incredibly, Fresno State claimed the court did not issue the ruling at all. But, as the quotes above demonstrate, the court relied heavily on a broad and persistent

constitutional right to sport-specific advocacy. For at least four reasons, its orders denying certification should be reversed.

First, there is no "due process right to vigorous sport-specific representation" in Title IX litigation. No other court has ever recognized such a right. And the district court's creation of it ignores how Title IX works. Liability hinges on program-wide comparisons of the opportunities and treatment provided to *all* women and *all* men—regardless of team. There can be no conflict between members of various teams here, much less a constitutional one, because the claims never involve sport-specific liability. In this way, the district court's analysis also clashes with Rule 23(b)(2) by preventing the victims of Fresno State's institutional policies and practices from banding together as a class to challenge them. Moreover, the court's analysis ignored that, once liability is established, Plaintiffs do not dictate how a school comes into Title IX compliance. Instead, even then, schools retain discretion over compliance plans that level the playing field. The compliance-plan remedy, which the district court previously acknowledged, would obviate any potential remedy-stage conflict.

Second, the district court's focus on potential *remedy*-stage conflicts was itself inconsistent with this Court's precedents. The Ninth Circuit has repeatedly explained that conflicts that may or may not arise as to remedies are speculative and *not* a reason to deny certification. But the district court agreed with out-of-circuit cases denying certification based on potential remedy-stage conflicts.

Third, the district court erred by holding that the supposed due process right to sport-specific advocacy applies at all stages of litigation, preventing certification of a liability-only class. Here, the decision ignores Rule 23(c)(4), which expressly authorizes class certification for limited issues. Even assuming members of different teams might eventually prefer different remedies (and further assuming they could control how Fresno State comes into compliance), they can never have a conflict as to liability. Even if there were a conflict as to remedies, then, the court still should have certified a liability-only class.

Fourth, the district court disregarded undisputed evidence showing no conflict exists in this case. While it focused on potential remedy-stage conflicts, it ignored that all the relief Plaintiffs have sought in this case would protect the entire class. The court's orders denying certification should be reversed.

JURISDICTIONAL STATEMENT

This case arises under Title IX, 20 U.S.C. § 1681 *et seq.*, and its implementing regulations. The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1343. It denied Plaintiffs' motion for class certification on August 16, 2022, and their renewed motion for certification or reconsideration on November 22, 2022. 1-ER-2, 1-ER-21. On December 6, 2022, Plaintiffs timely filed a Rule 23(f) petition for leave to appeal. This Court granted that petition as to both orders and has jurisdiction under Rule 23(f) and 28 U.S.C. § 1292(e).

ISSUES PRESENTED

1. Whether the district court erred by holding that members of one women's team cannot adequately represent a class including women on other teams because all have "due process rights to vigorous sport-specific representation."
2. Whether the district court erred by denying class certification based on potential conflicts that could arise only as to remedies.
3. Whether the district court erred by holding, largely because the supposed constitutional right to sport-specific advocacy applies at all stages of litigation, that it could not certify a liability-only class.
4. Whether the district court erred by disregarding undisputed evidence showing there are no conflicts between the proposed class representatives and class members in this case.

STATEMENT OF THE CASE

In October 2020, Fresno State announced it would eliminate women's lacrosse, men's tennis, and men's wrestling at the end of the 2020-21 academic year. 1-ER-21–22. On February 12, 2021, Plaintiffs filed a complaint alleging Fresno State violated Title IX in two relevant ways: (1) by failing to provide female students with athletic participation opportunities substantially proportionate to their undergraduate enrollment (*i.e.*, the effective accommodation claim), and (2) by

failing to provide equal treatment and benefits to female student-athletes (*i.e.*, the equal treatment claim). 1-ER-22.[1]

Consistent with Title IX, Plaintiffs pleaded these claims on a program-wide basis. The effective accommodation claim compared participation opportunities offered to men and women, regardless of team, with their respective representation in the undergraduate student body. *See* 3-ER-430, 3-ER-440–41, 3-ER-444–46, 3-ER-457 (¶¶ 6, 74–78, 94–98, 100–07, 165–67). The equal treatment claim addressed how female student-athletes, as a whole, were treated compared to their male counterparts. 3-ER-448–50, 3-ER-459–61 (¶¶ 115–118, 187–89). The complaint sought an injunction requiring Fresno State to "provide female student-athletes and potential student-athletes . . . equal opportunities to participate . . . and [equal] treatment, as Title IX requires." 3-ER-451 (¶ 125); *see also* 3-ER-461–62 (seeking an injunction "prohibiting [Fresno State] from eliminating [its] women's lacrosse team (or any other women's varsity intercollegiate athletic opportunities . . .) unless and until [it] is and will be in compliance with Title IX"). It also sought a declaration that Fresno State "fail[ed] to offer female students an equal opportunity to participate

[1] Plaintiffs' financial-aid claim was dismissed with prejudice, 2-ER-192–206, and is not at issue here.

in intercollegiate athletics," 3-ER-458 (¶ 172), and had "engaged in a . . . pattern and practice of discrimination against female students," 3-ER-461.[2]

The same day they filed their initial complaint, Plaintiffs sought a preliminary injunction prohibiting Fresno State from eliminating the women's lacrosse team or any other women's team (*i.e.*, preserving the status quo) while the parties litigated the underlying claims. 1-ER-21–22. On March 4, 2021—before Fresno State responded to that motion—Plaintiffs offered to settle if Fresno State would "(1) reinstate, continue, and treat the women's lacrosse team as a varsity team, [and] (2) develop and implement a gender equity plan to get all aspects of its intercollegiate athletic department into compliance with Title IX in the next year or two." 2-ER-80. Fresno State never responded to that offer.

On April 21, 2021, the district court denied Plaintiffs' preliminary-injunction motion, clearing the way for Fresno State to eliminate women's lacrosse. 3-ER-337–70. Fresno State did so at the end of the 2020-21 academic year. Around the same time, it filed a motion to dismiss. 2-ER-255.

By then, discovery was off to an inauspicious start. In March 2021, the district court denied Plaintiffs' request for expedited discovery of documents used to generate Fresno State's official Title IX counts. 3-ER-372, 3-ER-376. In April 2021,

[2] Subsequent amendments did not alter this focus or these requests. *See, e.g.*, 2-ER-210, 2-ER-221–23, 2-ER-226–33, 2-ER-239–41, 2-ER-242, 2-ER-248–49, 2-ER-251–53 (¶¶ 6, 84–88, 111, 113–65, 202–05, 212, 252–54, 259, 274–76, pp.45–46).

given "the ongoing judicial emergency and heavy caseload experienced by this district," the court *sua sponte* continued the initial scheduling conference from May 13, 2021, to September 14, 2021. 3-ER-371. By mid-June 2021, Fresno State insisted no discovery could occur before its motion to dismiss was resolved, while Plaintiffs argued any discovery delay would cause them "extreme prejudice." 2-ER-287–88. Nonetheless, the district court granted Fresno State's motion to stay discovery pending resolution of the motion to dismiss. 2-ER-292.

On July 22, 2021, the district court denied Fresno State's motion to dismiss the effective accommodation and equal protection claims. 2-ER-284. But it granted the motion, with leave to amend, as to the financial-aid claim. *Id.* In August 2021, Plaintiffs filed a second amended complaint, and Fresno State moved to dismiss the financial-aid claim. Eleven days before the September 14, 2021, status conference was to be held, the district court *sua sponte* continued it to December 15, 2021—again requiring Fresno State's motion to be resolved before discovery. 2-ER-207. On October 29, 2021, the district court dismissed the financial-aid claim with prejudice. 2-ER-192–206.

On December 17, 2021, after conducting the twice-continued status conference, the district court set a schedule only for class certification. *See* 2-ER-189; 2-ER-52 (confirming it "set forth dates for class certification only"). In February 2022, Plaintiffs filed their motion for class certification. 1-ER-22. There,

Taylor Anders and Courtney Walburger sought to represent classes of all current and future female student-athletes at Fresno State as to their effective accommodation and equal treatment claims. 1-ER-23.

Both proposed representatives supported the motion with declarations. Ms. Anders stated: "I seek to eliminate Defendants' discrimination so that current, prospective, and future female students have an equal opportunity to participate in varsity sports and receive equal treatment and benefits." 2-ER-182. She continued: "I want to obtain injunctive relief that requires Defendants to add more athletic participation opportunities for women and to provide the new women's opportunities with the same benefits and treatment that they already provide to men." 2-ER-183. Ms. Walburger's declaration included similar statements. *See* 2-ER-186–87. Neither declaration mentioned the potential reinstatement of women's lacrosse.

On March 18, 2022—before the certification motion was fully briefed—Plaintiffs made a second settlement offer, setting out three "basic terms":

- Fresno State will reinstate the women's lacrosse team or add another women's team or teams to reach substantial proportionality.
- Fresno State will work with an agreed consultant to develop and implement a gender equity plan within agreed parameters that will bring all aspects of its intercollegiate athletic program into compliance with Title IX.
- Fresno State will pay Plaintiffs' reasonable attorneys' fees and costs.

2-ER-126. Fresno State did not agree.

In April 2022, before responding to the certification motion, Fresno State took the proposed representatives' depositions. Both women testified—repeatedly—that their ultimate goal was to have Fresno State comply with Title IX. 2-ER-108–12, 2-ER-118–20, 2-ER-122–23, 2-ER-164–65. Likewise, both testified they would resolve the case without reinstating their already-eliminated team. *See id.*

On August 16, 2022, the district court denied Plaintiffs' motion for class certification without prejudice. To start, it modified the proposed class definitions. 1-ER-30. It defined the effective-accommodation class as:

> [C]urrent and future female Fresno State students who: (i) have lost membership on a women's varsity intercollegiate athletics team at Fresno State; (ii) have sought but not achieved membership on a women's varsity intercollegiate athletics team at Fresno State; and/or (iii) are able and ready to seek membership on a women's varsity intercollegiate athletics team at Fresno State but have not done so due to a perceived lack of opportunity.

Id. It defined the equal-treatment class as:

> [C]urrent and future female Fresno State students who: (i) participate or have participated in women's varsity intercollegiate athletics at Fresno State; and/or (ii) are able and ready to participate in women's varsity intercollegiate athletics at Fresno State but have been deterred from doing so by the treatment received by female varsity intercollegiate student-athletes at Fresno State.

Id. Neither party challenges these class definitions on appeal.

Next, the district court held that Plaintiffs established numerosity, commonality, and typicality. 1-ER-30–37. Neither party challenges those determinations on appeal. The district court's sole basis for denying certification was

its view that the proposed representatives were inadequate under Rule 23(a)(4) because "there are evidently conflicts between the interests of the class representatives, as former members of the women's varsity lacrosse team, and current and future female students at Fresno State who were not members of the women's varsity lacrosse team and who are not able and ready to play lacrosse." 1-ER-40. Although the court purported "not [to] doubt that the proposed class representatives have the intentions they claim in bringing this action," it believed, "as plead[ed] and developed to date, this case is fundamentally about women's lacrosse" and that "the principal purpose of this action is to protect (or restore) women's varsity lacrosse." *Id.*

Fourteen days later, on August 30, 2022, Plaintiffs filed a renewed motion for class certification or, in the alternative, reconsideration. 1-ER-4. This motion sought to supplement the record, including with new declarations stating:

> [T]he principal purpose of this case was not and is not to protect or restore women's varsity lacrosse. It was and is to require Fresno State to comply with Title IX, stop discriminating against female student-athletes and potential student-athletes, and provide equal opportunities to participate and equal treatment of women in its varsity intercollegiate athletic program.

2-ER-93, 2-ER-98. In the alternative, the motion requested certification only as to liability. 1-ER-17–18.

On November 1, 2022, at Fresno State's urging, the district court confirmed its view that—nearly two years after Plaintiffs filed suit—merits discovery was *still*

premature. 2-ER-53–54. Three weeks later, the court denied Plaintiffs' renewed class certification motion, this time with a more fulsome explanation, based again on perceived remedy-stage conflicts. 1-ER-2–20. It reasoned that varsity sports compete for Fresno State's finite resources and that Fresno State could comply with Title IX only "through a lopsided allocation of resources that benefits some women's sports more than others." 1-ER-12; *see also* 1-ER-19 (similar). It believed "there is no remedy [it] could apply to prevent that conflict from materializing (or to make it go away)." 1-ER-12.

The district court also reaffirmed its view that "this action has primarily been about the reinstatement of women's lacrosse." 1-ER-15. And—despite crediting the proposed class representatives' "sworn statements as to their intentions with respect to neutrality"—it held it could not conclude that "other women's sports would be on fully equal footing with women's lacrosse if and when the time comes to select sports for addition or reinstatement." 1-ER-16.

Most importantly, the court held, *sua sponte*, that the proposed representatives were inadequate because they could not protect absent class members' "due process right to vigorous and single-minded advocacy specific to their respective sport." 1-ER-19; *see also* 1-ER-17 (finding the proposed representatives inadequate because they "do not purport to offer sport-specific advocacy"). And it declined to certify a liability-only class because "due process rights to vigorous sport-specific

representation apply at all stages of this litigation." 1-ER-19. Moreover, the court believed "liability and remedies cannot neatly be separated . . . in this case." 1-ER-18. Given its broad constitutional holding, the court granted Plaintiffs leave to file a motion to certify a lacrosse-only class. 1-ER-20.

On December 6, 2022, Plaintiffs timely filed a Rule 23(f) petition. In response, the district court again "decline[d] to set a schedule for merits discovery," believing "discovery is premature while the issue of class certification remains pending." 2-ER-48. On February 27, 2023, this Court granted Plaintiffs permission to appeal both certification orders. Case No. 22-80137, Dkt. No. 15.

Shortly thereafter, the parties briefed the lacrosse-only motion in the district court, with Fresno State arguing—for the first time—that Plaintiffs' now-former representation agreement precluded class certification. In addition, on March 3, 2023, Fresno State filed a new motion to dismiss, arguing—for the first time—the equal treatment claim was moot because Plaintiffs were no longer student-athletes.

On April 25, 2023, the district court denied the lacrosse-only motion and the motion to dismiss without prejudice. 2-ER-43–47. It reasoned that the Ninth Circuit should decide "the proper scope of certification in this case." 2-ER-46. It held this Court's decision "could have implications for Defendants' motion to dismiss, which essentially requires the Court to determine, under mootness exceptions for class actions, whether there was a live class equal treatment claim at the time class

certification was denied." *Id.* The court then *sua sponte* stayed the case "until the pending appeal [is] resolved." *Id.*[3]

SUMMARY OF THE ARGUMENT

The district court denied class certification because it held, *sua sponte*, that Ms. Anders and Ms. Walburger, as former women's lacrosse players, could not protect all female student-athletes' "due process right to vigorous and single-minded

[3] Because the district court did not decide whether Plaintiffs' former representation agreement prevented certification or whether the individual or class claims are moot, these issues are not properly before this Court. *See, e.g.*, *Singleton v. Wulff*, 428 U.S. 106, 121 (1976) (explaining appellate courts should resolve questions "for the first time on appeal" only "where the proper resolution is beyond any reasonable doubt" or where some "injustice might otherwise result"); *Planned Parenthood of Greater Wash. & N. Idaho v. U.S. Dep't of Health & Hum. Servs*., 946 F.3d 1100, 1110–11 (9th Cir. 2020) (holding "an appellate court does not decide issues that the trial court did not decide" except when "proper resolution is beyond any doubt, when injustice might otherwise result, [or] when an issue is purely legal"). Here, the district court expressly held its analysis of these questions would be informed by this Court's decision. 2-ER-46. No party will suffer injustice if the district court resolves these questions in the first instance on remand. Moreover, Fresno State itself told this Court the orders denying certification "do not alter [Plaintiffs'] ability to obtain the remedies they seek." Case No. 22-80137, Dkt. No. 9-1, at 25. Even assuming Plaintiffs' individual claims were moot, there is no doubt that, if classes of current and future students are certified, the claims would not be moot as to those classes. *See, e.g.*, *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1089 (9th Cir. 2011) (discussing Supreme Court precedent holding the timing of a class-certification decision—before or after the representatives' individual claims become moot—"does not deprive the Court of jurisdiction" and discussing the "inherently transitory" exception to mootness, which applies here).

advocacy specific to their respective sport" that "appl[ies] at all stages of this litigation." 1-ER-19. This ruling was wrong for at least three reasons.

First, the supposed due process "right" to sport-specific advocacy does not exist. No court has ever recognized such a right. No party in any Title IX athletics case (including Fresno State here) has ever claimed it exists, for good reason. The creation of such a "right" is inconsistent with how these Title IX claims work—namely, with program-wide, not sport-specific, comparisons of opportunities and benefits. It also ignores that, upon a finding of liability, schools have discretion over how to achieve compliance, including by reducing opportunities and benefits for men instead of increasing them for women. The "right" is also inconsistent with Rule 23(b)(2) because it prevents victims of systemic discrimination based on schools' institutional policies from being certified as a class. It is no wonder that, given an opportunity to defend the court's novel constitutional holding in response to Plaintiffs' Rule 23(f) petition, Fresno State opted instead to pretend it did not exist. The reason is simple: The district court was wrong.

Second, the district court declined to follow binding precedents holding that remedy-stage concerns that may never come to fruition are no basis to deny class certification. Instead, it denied certification based on speculative, potential remedy-stage conflicts that would evaporate if it merely required Fresno State to develop a

compliance plan. Indeed, it enshrined these speculative conflicts into constitutional law as a due process right previously unknown to American jurisprudence.

Third, the district court erred by relying on those same potential *remedy*-stage conflicts to deny certification as to *liability*, which is analytically distinct and requires uniform program-wide assessments. Because Fresno State's institutional policies and practices concerning athletic opportunities and treatment apply equally to *all* members of the proposed classes, regardless of team, there was no basis to deny liability-only certification.

Finally, the district court erred by overlooking the undisputed facts to find *any* conflict between the proposed representatives and the class members, even as to remedies. For example, the court discounted the fact that *all* the relief Plaintiffs sought—in the complaint and in the preliminary-injunction motion—would have benefitted the entire class. The same is true of Plaintiffs' proposed settlement terms. Instead of focusing on these facts, or on the proposed representatives' testimony it said it was crediting, the court focused on irrelevant details that showed no conflict at all. For example, it highlighted the number of times the word "lacrosse" appeared in the complaint and the proposed representatives' statements that, while dedicated to fighting for all women, they might be "sad" or "disappointed" if lacrosse were not reinstated. These snippets of testimony, stripped of critical context, should never have prevented certification.

For all these reasons, the orders denying class certification should be reversed.

STANDARD OF REVIEW

This Court generally reviews certification decisions for abuse of discretion. *See Wolin v. Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1171–72 (9th Cir. 2010). "[N]oticeably more deference" is accorded to decisions granting certification than to decisions denying it. *Id.* This Court reviews factual findings for clear error. *See id.* But it gives no deference to the district court's resolution of legal questions, which it reviews *de novo*. *See Yokoyama v. Midland Nat. Life Ins. Co.*, 594 F.3d 1087, 1091–92 (9th Cir. 2010). As this Court has "oft repeated," "an error of law is an abuse of discretion." *Id.* Indeed, "no federal court has ever held that a district court's error as to a matter of law is not an abuse of discretion, in the class action context, or in any other." *Id.*

ARGUMENT

Rule 23(a)(4)'s adequacy requirement "serves to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997). Such conflicts undermine the "structural assurance of fair and adequate representation for the *diverse* groups and individuals" whose rights would be at issue in class litigation. *Id.* at 627 (emphasis added); *see also Rodriguez v. Hayes*, 591 F.3d 1105, 1125 (9th Cir. 2010), *abrogated on other grounds as recognized by Rodriguez Diaz v. Garland*, 53 F.4th 1189 (9th Cir. 2022)

(providing that, as relevant here, adequacy depends on "an absence of antagonism" and "a sharing of interests between representatives and absentees").

Because there was no conflict of interest or antagonism here, the orders denying certification should be reversed.

I. The District Court Erred by Denying Class Certification Based on a Due Process Right to Sport-Specific Advocacy that Does Not Exist.

The district court's decision was based largely on its *sua sponte* holding that, in Title IX class actions seeking equal participation opportunities and treatment, student-athletes have a "due process right to vigorous and single-minded advocacy specific to their respective sport." 1-ER-19. No such right exists. Fresno State effectively conceded as much. It never argued such a right existed, either to the district court or to this Court. Instead, when Plaintiffs sought this Court's review based on that supposed right, Fresno State argued the district court did not say what it said. *See, e.g.*, Case No. 22-80137, Dkt. No. 9-1, at 7 (arguing Plaintiffs "misconstrue[d] the district court's ruling as creating a due process right for sport-specific advocacy"); *id.* at 19 (arguing, in a section heading, "the district court's ruling does not require sport-specific advocacy"); *id.* at 20 (arguing the court "did not create[] a new due process right" (internal quotation marks omitted)).

But, of course, the district court *did* say what it said. It denied class certification based on student-athletes' supposed "due process right to vigorous and single-minded advocacy specific to their respective sport." 1-ER-19 (declining to

certify a liability-only class because "due process rights to vigorous sport-specific representation apply at all stages of this litigation"); 1-ER-17 (holding Ms. Anders and Ms. Walburger "do not purport to offer sport-specific advocacy . . . and thus cannot meet the requirement of structural protection recognized in *Amchem*"). Fresno State cannot attempt to justify that ruling now without conceding its initial representations to this Court were false.

Fresno State's attempt to pretend away the constitutional holding reveals a simple reality—namely, that holding cannot be defended. It represents a profound and inescapable legal error. And that legal error, which requires *de novo* review, infected the district court's entire analysis.

A. No court has ever recognized such a right to sport-specific advocacy, which would conflict with Title IX class-action precedent nationwide.

Aside from the district court, Plaintiffs are aware of no court—anywhere—that has ever recognized a constitutional right to sport-specific advocacy. Such a right is irreconcilable with Title IX decisions certifying all-female-student-athletes classes with representatives from one or two teams. *See, e.g.*, *A. B. v. Hawaii State Dep't of Educ.*, 30 F.4th 828 (9th Cir. 2022) (reversing the denial of certification of class of all present and future female student-athletes, with representatives from women's swimming and water polo, because the class was sufficiently numerous); *Cohen v. Brown Univ.* ("*Cohen I*"), 991 F.2d 888, 893 (1st Cir. 1993) (affirming certification for class of "all present and future Brown University women

students . . . who participate, seek to participate, and/or are deterred from participating in intercollegiate athletics," with representatives from women's volleyball and gymnastics)[4]; *Brust v. Regents of Univ. of Cal.*, No. 2:07-cv-01488, 2008 WL 11512299, at *2, 7 (E.D. Cal. Oct. 24, 2008) (certifying class of "current, prospective, and future women students . . . who seek to participate in and/or who are deterred from participating in intercollegiate athletics," with representatives from women's field hockey and women's rugby); *Portz v. St. Cloud State Univ.*, 297 F. Supp. 3d 929, 943–50 (D. Minn. 2018) (similar); *Foltz v. Del. State Univ.*, 269 F.R.D. 419, 424–25 (D. Del. 2010) (similar); *Biediger v. Quinnipiac Univ.*, No. 3:09-cv-621, 2010 WL 2017773, at *5 (D. Conn. May 20, 2010) (similar).

In addition, Plaintiffs are aware of no party in a Title IX case (including Fresno State here) that has even *argued* such a right exists. In the landmark *Cohen* case, the First Circuit recently rejected the notion of a *per se* conflict between members of different teams in litigation involving program-wide Title IX claims. *See Cohen v. Brown Univ.* ("*Cohen III*"), 16 F.4th 935 (1st Cir. 2021), *cert. denied sub nom. Walsh v. Cohen*, 142 S. Ct. 2667 (2022). There, despite a decades-old Joint

[4] This Court has approvingly described *Cohen I* and *Cohen II*—discussed throughout this brief—as having "particularly well-developed" reasoning, albeit on a different point of law. *Neal v. Bd. of Trustees of Cal. State Univs.*, 198 F.3d 763, 772 (9th Cir. 1999).

Agreement, Brown University eliminated five women's teams, later reaching a settlement requiring two teams to be reinstated. *See id.* at 940, 942.

Objectors argued there was an "irredeemable conflict" between class members because "the women students on the five downgraded teams wanted immediate reinstatement, while their peers may have been more inclined to bargain for longer-term concessions." *Id.* at 949–50. The First Circuit disagreed:

> The interests of all women athletes presently at Brown are in large part aligned. Under the Joint Agreement, every varsity team, regardless of gender, played at Brown's pleasure, knowing that Title IX does not require institutions to fund any particular number or type of athletic opportunities. When Brown pulled the plug on certain teams in 2020, women students on the unaffected teams may have breathed a sigh of relief. At the same time, however, they must have been keenly aware that nothing prevented Brown from pulling the plug on their teams as well. . . . It follows inexorably, as night follows day, that a significant interest common to all student-athletes was the imposition of some meaningful limit on Brown's discretion to strip teams of varsity status. . . . Adequacy of representation is not hollowed out where, as here, the interests are generally shared by the members of the class, albeit differently weighted. We find, therefore, that the specter of intra-class conflict raised by the Objectors is purely speculative and that no intra-class conflict between sports teams placed the adequacy of representation out of bounds.

Id. at 950–51 (internal quotation marks and citations omitted). The court emphasized that the university—"not the class representatives or class counsel"—chose which teams to reinstate. *Id.* at 953; *see also Murray v. Grocery Delivery E-Servs. USA Inc.*, 55 F.4th 340, 350 (1st Cir. 2022) ("The most significant potential conflict

among class members concerned which teams Brown might elevate or demote—a decision . . . no class members could claim to be able to dictate"); *infra* at Part I.B.2.

If the novel "right" to sport-specific advocacy existed, all the Title IX cases above violated class members' constitutional rights. These cases show there is no such right. The handful of Title IX cases the district court cited never mention it either. *See generally, e.g.*, *Boucher v. Syracuse Univ.*, 164 F.3d 113 (2d Cir. 1999); *Robb v. Lock Haven Univ. of Pa.*, No. 4:17-cv-00964, 2019 WL 2005636 (M.D. Pa. May 7, 2019); *S.G. by Gordon v. Jordan Sch. Dist.*, No. 2:17-cv-00677, 2018 WL 4899098 (D. Utah Oct. 9, 2018); *Miller v. Univ. of Cincinnati*, 241 F.R.D. 285 (S.D. Ohio 2006); *Bryant v. Colgate Univ.*, No. 93-cv-1029, 1996 WL 328446 (N.D.N.Y. June 11, 1996); 1-ER-12–13 (discussing these cases).[5]

Nor does *Amchem* support the district court's invention of that constitutional "right." There, the Supreme Court confronted Rule 23(a)(4)'s adequate-representation requirement in the context of a settlement-only class of present and

[5] *Boucher* is inapposite for a separate reason. Unlike Plaintiffs here, the *Boucher* plaintiffs did *not* seek to represent all female student-athletes, nor did they seek to require Syracuse to offer substantially proportionate participation opportunities generally. *See* 164 F.3d at 119 (rejecting plaintiffs' argument that "their real claim in this suit is to represent all women, present and future, who wish to be varsity athletes at Syracuse—regardless of sport"—because plaintiffs had "[t]oo often . . . made clear that their interests are more specific: . . . varsity status for women's lacrosse and softball"); *id.* at 119–20 (declining to take a position on the merits of a broader suit plaintiffs did not bring); *id.* at 116 (confirming the "allegations . . . only address the need for women's varsity lacrosse and women's varsity softball").

future asbestos victims arising under Rule 23(b)(3). *See Amchem*, 521 U.S. at 615–20, 625–28. The Court explained that "named parties with diverse medical conditions sought to act on behalf of a single giant class," but "the interests of those within the single class are not aligned." *Id.* at 626. For example, "for the currently injured, the critical goal is generous immediate payments." *Id.* But "[t]hat goal tugs against the interest of exposure-only [*i.e.*, currently uninjured] plaintiffs in ensuring an ample, inflation-protected fund for the future." *Id.*

This case is very different. To start, *Amchem* analyzed remedy-stage conflicts in the concrete context of an agreed-upon "global settlement." Here, there was no proposed settlement class. Instead, the district court analyzed hypothetical conflicts that *may* (or may *not*) materialize at the remedy stage. *See infra* at Part II. Moreover, *Amchem* did not involve the kind of Rule 23(b)(2) class involved here, where interests are necessarily aligned because the challenged institutional conduct causes a group-wide harm that should be remedied on a group-wide basis. *See infra* at Part I.C. Rather, it concerned a Rule 23(b)(3) damages class that included those already suffering diverse conditions and those who might someday develop diverse conditions. Finally, *Amchem* did not announce a constitutional right, much less one requiring, at *all* stages of *all* cases, that current and future asbestos victims have separate representation. The Court focused narrowly on whether, given the claims

and potential remedies involved, representatives could adequately represent both current and future victims for purposes of settlement. It held they could not.

In short, no case cited by the district court—nor anywhere else—supports the supposed right to sport-specific advocacy. The district court's *sua sponte* creation of that "right" is unprecedented. Its problems hardly end there.

B. The supposed right to sport-specific advocacy is inconsistent with the way Plaintiffs' Title IX claims work.

Title IX has an "unmistakable focus" on women as a group because they had historically been "discriminated against on the basis of sex" and needed "effective protection against [discriminatory] practices." *Cannon v. Univ. of Chicago*, 441 U.S. 677, 691–94, 704 (1979). As this Court has explained:

> Title IX was Congress's response to significant concerns about discrimination against women in education. . . . The drafters of the[] regulations recognized a situation that Congress well understood: Male athletes had been given an enormous head start in the race against their female counterparts for athletic resources, and Title IX would prompt universities to level the proverbial playing field.

Neal, 198 F.3d at 766–67 (internal quotation marks and citation omitted); *Cohen v. Brown Univ.* ("*Cohen II*"), 101 F.3d 155, 175, 179 (1st Cir. 1996) (explaining Title IX was enacted for the "special benefit" of women, as a class, "to remedy discrimination that results from stereotyped notions of women's interests and abilities"); *Cohen I*, 991 F.2d at 894 (explaining Title IX seeks "a more level playing field for female athletes").

Title IX's broad focus takes shape both in the tests for liability, which examine program-wide realities, and in the remedies available for violations, which permit schools significant discretion in determining how best to level the playing field. The district court's analysis ignored these critical features of Title IX law.

1. *Liability for these Title IX claims turns on program-wide, not sport-specific, analyses.*

It is well-established, as to both effective accommodation and equal treatment claims, that Title IX liability depends on program-wide comparisons. For the former, this Court has adopted the "three-part test," which allows schools to demonstrate Title IX compliance by:

> (1) showing substantial proportionality (the number of women in intercollegiate athletics is proportionate to their enrollment); (2) proving that the institution has a "history and continuing practice of program expansion" for the underrepresented sex (in this case, women); or (3) . . . establishing that it . . . "fully and effectively accommodate[s]" the interests of women.

Mansourian v. Regents of Univ. of Cal., 602 F.3d 957, 965 (9th Cir. 2010) (citation omitted). Because Fresno State cannot meet the second or third parts of the test, only the first is at issue here. But *all* parts focus on program-wide realities. *See, e.g.*, *Neal*, 198 F.3d at 765, 772 n.8. Indeed, the *Neal* Court held that "determining whether discrimination exists in athletic programs *requires* gender-conscious, group-wide comparisons." *Id.* at 772 n.8.

This Court is hardly alone in holding that effective accommodation violations are inherently programmatic. Indeed, the circuits broadly agree on this point. *See, e.g.*, *Portz v. St. Cloud State Univ.*, 16 F.4th 577, 584 (8th Cir. 2021) (holding courts must "focus[] on program-wide . . . opportunities"); *Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824, 829 (10th Cir. 1993) (explaining the test requires "program wide" comparisons); *Williams v. Sch. Dist. of Bethlehem, Pa.*, 998 F.2d 168, 175 (3d Cir. 1993) (rejecting a "sports-specific interpretation" of effective accommodation requirements and "looking instead to the overall athletic opportunities"); *Favia v. Indiana Univ. of Pa.*, 7 F.3d 332, 342 n.18 (3d Cir. 1993) (agreeing "Title IX assesses compliance on a programmatic rather than a sport-specific basis"); OCR, Policy Interpretation, 44 Fed. Reg. 71413, 71423 (Dec. 11, 1979) (noting Title IX "frames . . . general compliance obligations . . . in terms of program-wide . . . opportunities").

For Plaintiffs' effective accommodation claim, then, the court must assess liability based on "whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments." *Neal*, 198 F.3d at 767–68. There can be no "sport-specific advocacy" on this question—nor any conflict among class members regarding it—precisely because the question can never be answered in a sport-specific way. The

test itself requires consideration of the opportunities offered to *all* women and *all* men participating in *all* sports. *See id.* at 772 n.8.

The same is true of equal treatment claims, which turn on "equivalence in the availability, quality and kinds of . . . athletic benefits and opportunities provided male and female athletes." *Mansourian*, 602 F.3d at 964. These claims concern "sex-based differences in the schedules, equipment, coaching, and other factors affecting participants in athletics." *Id.* at 965. Here, the court must consider the treatment of *all* female student-athletes compared to *all* male student-athletes, not whether women playing a particular sport have been shortchanged. *See id.*

Accordingly, equal treatment claims, too, are necessarily programmatic. Again, the circuits are in accord. *See, e.g.*, *Parker v. Franklin Cnty. Cmty. Sch. Corp.*, 667 F.3d 910, 922 (7th Cir. 2012) (holding that, for equal treatment claims, courts "look to the overall effect of any differences on a program-wide, not sport-specific basis"); *T.W. v. Shelby Cnty. Bd. of Educ.*, 818 Fed. App'x 453, 462 (6th Cir. 2020) (same); Policy Interpretation, 44 Fed. Reg. at 71,423 (explaining equal treatment claims must be measured based on "program-wide benefits," *not* via "sport-specific comparison").

Indeed, a sport-specific comparison would make no sense because the law "contemplates that a disparity disadvantaging one sex in one part of a school's athletics program can be offset by a comparable advantage to that sex in another

area." *McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 293–94 (2d Cir. 2004) (holding a school's scheduling policy for girls soccer was not "offset by any advantages given to girls" elsewhere in the program and was "substantial enough by itself to deny girls . . . equality of athletic opportunity"); *see also, e.g.*, *T.W.*, 818 Fed. App'x at 462 (similar); *Parker*, 667 F.3d at 922 (similar). "For example, a school that provides better equipment to the men's basketball team than to the women's basketball team" might still "be in compliance with Title IX if it provide[s] comparably better equipment to the women's soccer team than to the men's soccer team." *McCormick*, 370 F.3d at 293–94. Thus, the program-wide analysis applies even when plaintiffs challenge a sport-specific discrepancy. Indeed, offsetting disparities can be captured *only* by a program-wide analysis.

Put otherwise, and as reflected in Plaintiffs' complaint, *see supra* at 5–6, the claims at issue in this case necessarily examine the institutional treatment of women as a group. As this Court explained:

> Institutions, not individual actors, decide how to allocate resources between male and female athletic teams. Decisions to create or eliminate teams or to add or decrease roster slots for male or female athletes are official decisions, not practices by individual students or staff. Athletic programs that fail effectively to accommodate students of both sexes thus represent "official policy of the recipient entity[.]"

Mansourian, 602 F.3d at 968. Accordingly, the "failure to provide equal athletic opportunities for women," like the failure to offer them equal benefits and treatment, "is a *systemic* violation." *Id.* at 968, 974 (emphasis added). And these systemic

failures reflect institutional policies. *See id.*; *A. B.*, 30 F.4th at 834 (agreeing effective accommodation and equal treatment claims involve "discriminatory actions with inherently systemic effects on female student athletes" and such claims involve a "common injury" to all female student-athletes); *Brust*, 2008 WL 11512299, at *6 (holding these claims "arise out of the systemic denial of varsity athletic opportunities and accompanying benefits" and hinge on "whether . . . system-wide programs, policies, and practices violate Title IX").

By requiring sport-specific advocacy, at all stages of litigation, the district court's adequacy analysis is inconsistent with Title IX's program-wide focus on institutional policy and practice. Surprisingly, the court elsewhere recognized the need for program-wide liability assessments. When assessing Rule 23(a)(2)'s commonality requirement, it held:

> [P]articipation opportunities and resource allocation at Fresno State must square with Title IX *in the aggregate*. Resolution of threshold questions as to the allocation of benefits and opportunities between male student-athletes and female student-athletes at the athletic department level *are of general applicability to the class* because they go directly to determining whether there has been a Title IX violation with respect to effective accommodation, equal treatment or both.

1-ER-33–34 (citation omitted; emphases added); *see also* 2-ER-276–77 (holding the "Title IX effective accommodation violation alleged here arises from a program-wide imbalance in participation opportunities" and suggesting the equal treatment

claim depends on disparities "in the institution's program as a whole"). Plaintiffs' claims necessarily concern program-wide, not sport-specific, issues.

Moreover, as to Rule 23(a)(3)'s typicality requirement, the district court held Ms. Anders and Ms. Walburger are "squarely in alignment with class members who have effective accommodation and equal treatment claims." 1-ER-35. It explained they (1) allege "they have been discriminated against with respect to both participation opportunities and benefits," and (2) suffered the same injuries as all class members—namely, "a discriminatory barrier to participation" and a "discriminatory imbalance in resource allocation." *Id.*

These commonality and typicality holdings, which Fresno State has not challenged on appeal, are irreconcilable with the simultaneous holding that there is some conflict between the proposed representatives and members of the classes. The unchallenged holdings take on greater significance here because the Supreme Court has held that Rule 23(a)(4) adequacy "tends to merge with the commonality and typicality criteria," which together "serve as guideposts for determining . . . whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Amchem*, 521 U.S. at 626 n.20. It is, at the very least, anomalous that proposed representatives who are "squarely in alignment with class members" as to two Title IX claims that examine "program-wide" opportunities and benefits extended to

women "in the aggregate" somehow simultaneously have a conflict of interest with those same class members.

The court's concern that the representatives' efforts to develop the record might "influence remedies in a way that late-stage creation of sport-specific subclasses cannot fully rectify," 1-ER-18, was equally misguided. By their very nature, the claims hinge on program-wide evidence about athletic opportunities and benefits. All class members benefit equally from any evidence of liability.

2. Even when Title IX plaintiffs establish liability, schools typically fashion their own compliance plans.

In Title IX cases, courts tend to "give universities as much freedom as possible in conducting their operations consonant with constitutional and statutory limits." *Cohen II*, 101 F.3d at 187–88. They do so out of "respect for academic freedom and reluctance to interject [themselves] into the conduct of university affairs." *Id.* at 187. And they do so by allowing schools to propose their own compliance plans when Title IX plaintiffs establish liability. *See id.* at 187–88 (allowing Brown to propose a second compliance plan when its first "fell short of a good faith effort"); *Balow v. Mich. State Univ.*, 24 F.4th 1051, 1061 (6th Cir. 2022), *cert. denied*, 143 S. Ct. 525 (2022) (agreeing that, upon a final determination of liability, "a school may be entitled to determine its own method for achieving statutory compliance"); *McCormick*, 370 F.3d. at 301–02 (similar).

The compliance-plan remedy underscores the fact that a school can achieve compliance in a variety of ways. For example, a school out of compliance with Title IX's effective accommodation requirements has options:

> It may eliminate its athletic program altogether, it may elevate or create the requisite number of women's positions, it may demote or eliminate the requisite number of men's positions, or it may implement a combination of these remedies. . . . [The school's] own priorities will necessarily determine the path to compliance it elects to take.

Cohen II, 101 F.3d at 185–86; *see also* OCR, Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test at 3 (Jan. 15, 1996) (explaining Title IX "provides institutions with flexibility and choice regarding how they will provide nondiscriminatory participation opportunities"). The same logic applies to equal treatment claims. Title IX does not *require* schools to bestow more benefits on women to achieve equality. Instead, schools may level the playing field by reducing benefits offered to men.

This Court has acknowledged schools' discretion over *how* to achieve compliance. For example, the *Neal* Court joined decisions uniformly holding that "Title IX is not offended" if a university "wishes to . . . level[] down programs instead of ratcheting them up." 198 F.3d at 769–70. Likewise, the *Mansourian* Court recognized that, given "budgetary constraints," "[u]niversities may achieve compliance by reducing men's athletic slots until participation rates become substantially proportionate." 602 F.3d at 973.

Discretion about how to equalize opportunities and benefits—whether by offering more to the underrepresented sex, offering less to the overrepresented one, or some combination of both—underscores a fundamental reality about Title IX. The law's "objective is not to ensure that the athletic opportunities [or benefits] available to women increase." *Kelley v. Bd. of Trustees*, 35 F.3d 265, 272 (7th Cir. 1994). Instead, its "purpose is to prohibit . . . discriminati[on] on the basis of sex." *Id.* A level playing field achieves that end, no matter how a school chooses to reach it.[6]

Critically, long before addressing class certification, the district court acknowledged the compliance-plan remedy. *See* 2-ER-276 (noting reinstatement of women's lacrosse was "by no means necessitated by [Plaintiffs'] claim" and summarizing a case that "ordered defendant to submit a Title IX compliance plan"). When assessing Rule 23(a)(4)'s adequacy requirements, however, the court said "there is no remedy the Court could apply" to prevent the perceived conflict between various women's teams over resource allocation "from materializing (or to make it go away)." 1-ER-12. Not so.

Put simply, the court's adequacy analysis ignored the possibility of a compliance-plan remedy. That failure alone is legal error requiring reversal. Because

[6] While schools are given broad latitude in the first, and perhaps even second, instance, courts may eventually need to order specific relief. "[S]pecific relief [is] most useful in situations where the institution . . . demonstrates an unwillingness or inability to exercise its discretion in a way that brings it into compliance with Title IX." *Cohen I*, 991 F.2d at 906–07.

there can be no intra-class conflict over compliance decisions Fresno State controls, at least in the first instance, that remedy would "prevent th[e supposed] conflict from materializing" or "make it go away." 1-ER-12; *see also Cohen III*, 16 F.4th at 953 (holding there was no intra-class conflict over decisions the university made).

Similarly, the district court's concern that Plaintiffs' litigation conduct might "influence remedies in a way that late-stage creation of sport-specific subclasses cannot fully rectify," 1-ER-18, was misplaced. There is no reason to believe Plaintiffs' conduct will guide how Fresno State eventually exercises its discretion vis-à-vis a compliance plan.

But the district court compounded this initial legal error with a second unsupported assumption—akin to the ones that motivated *Boucher*, *Robb*, *Gordon*, *Miller*, and *Bryant*. *See supra at* 21; *infra* at 42–43. It assumed that, once liability is established, women's teams will inevitably compete for additional opportunities and benefits. *See, e.g.*, 1-ER-16 (addressing whether "other women's sports would be on fully equal footing with women's lacrosse if and when the time comes *to select sports for addition or reinstatement*" (emphasis added)). This assumption ignores that Fresno State could, in its discretion, achieve Title IX compliance by "leveling down programs instead of ratcheting them up"—that is, by reducing opportunities and benefits extended to men. *Neal*, 198 F.3d at 770. So long as that reduction levels

the playing field, Fresno State could achieve compliance without giving women *any* additional opportunities or benefits.[7]

The perceived conflict of interest exists only because of these equally unfounded assumptions—that (1) opportunities and benefits must increase for women, and (2) the class representatives, not Fresno State, will decide how they are allocated. Each assumption is inconsistent with Title IX and warrants reversal. The presence of both removes all doubt.

C. The supposed right to sport-specific advocacy is inconsistent with Rule 23(b)(2)'s text and purpose.

Rule 23(b)(2) allows plaintiffs to maintain class actions when a "party . . . has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." FED. R. CIV. P. 23(b)(2). The Supreme Court has explained that "[t]he key to the (b)(2) class is the notion that the conduct . . . can be enjoined or declared unlawful only as to all of the class members or as to none of them." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360 (2011) (quoting Richard A. Nagareda,

[7] The district court's specific assessment of Fresno State's resources was irrelevant and misguided. Indeed, its discussion of what "the record shows" cites only Fresno State's response to Plaintiffs' preliminary-injunction motion. *See* 1-ER-11 (citing 3-ER-401) Without merits discovery, Plaintiffs have been unable to test Fresno State's claim. *See* 2-ER-48, 2-ER-54, 2-ER-292. Still, the compliance-plan remedy will give Fresno State the opportunity to decide, in its discretion, how to deploy its resources—whatever they may be—to level the playing field.

Class Certification in the Age of Aggregate Proof, 84 N.Y.U. L. REV. 97, 132 (2009)). Likewise, it has explained that "[c]ivil rights cases against parties charged with unlawful, class-based discrimination are prime examples" of the class actions permitted by Rule 23(b)(2). *Amchem*, 521 U.S. at 614; *Dukes*, 564 U.S. at 361 (explaining such cases are "what (b)(2) is meant to capture"); *Parsons v. Ryan*, 754 F.3d 657, 686 (9th Cir. 2014) (confirming Rule 23(b)(2)'s "primary role . . . has always been the certification of civil rights class actions").

This Court has declined to "interpret Rule 23(b)(2) in a manner that would prevent certification of the kinds of civil rights class action suits that it was intended to authorize." *Parsons*, 754 F.3d at 686. It has also confirmed that Rule 23(b)(2) certification is appropriate when "class members complain of a pattern or practice that is generally applicable to the class as a whole." *Walters v. Reno*, 145 F.3d 1032, 1047 (9th Cir. 1998); *Parsons*, 754 F.3d at 688 (holding Rule 23(b)(2)'s requirements are "unquestionably satisfied" when plaintiffs challenge such patterns and practices); *Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161, 1168 (9th Cir. 2014) ("So long as the plaintiffs were harmed by the same conduct, disparities in how or by how much . . . d[o] not defeat class certification." (citation omitted)).

Put simply, when a defendant's "systemic policies and practices" are aimed at a class of people, that defendant has "acted on grounds that apply generally to the proposed class . . . , rendering certification under Rule 23(b)(2) appropriate."

Parsons, 754 F.3d at 688–89. These kinds of "policies and practices" are typically present in "civil-rights cases," which "involve an allegation of discrimination against a group as well as the violation of [individual] rights." *Id.* at 686 (citation omitted).[8]

Important consequences flow from these realities. First, "[t]he very nature of a (b)(2) class is that it is homogeneous without any conflicting interests between the members of the class." *Wetzel*, 508 F.2d at 256; *see also Allison*, 151 F.3d at 413 (explaining that, "because of the group nature of the harm alleged and the broad character of the relief sought," a Rule 23(b)(2) class is, "by its very nature, assumed

[8] Other circuits agree. *See, e.g.*, *DL v. D.C.*, 860 F.3d 713, 726 (D.C. Cir. 2017) ("Rule 23(b)(2) exists so that parties and courts, especially in civil rights cases like this, can avoid piecemeal litigation when common claims arise from systemic harms that demand injunctive relief."); *Jefferson v. Ingersoll Int'l Inc.*, 195 F.3d 894, 897–98 (7th Cir. 1999) (explaining "Rule 23(b)(2) is designed for all-or-none cases . . . settling the legality of the behavior with respect to the class as a whole"); *Allison v. Citgo Petrol. Corp.*, 151 F.3d 402, 413 (5th Cir. 1998) (explaining Rule 23(b)(2)'s "underlying premise" is that class "members suffer from a common injury"); *Marisol A. v. Giuliani*, 126 F.3d 372, 378 (2d Cir. 1997) (affirming certification under Rule 23(b)(2) because "the deficiencies of the [challenged] system stem from central and systemic failures"); *Holmes v. Cont'l Can. Co.*, 706 F.2d 1144, 1155 n.8 (11th Cir. 1983) (agreeing "[i]njuries remedied through (b)(2) actions are really group, as opposed to individual injuries" and explaining "[t]he members of a (b)(2) class are generally bound together through preexisting or continuing legal relationships or by some significant common trait such as race or gender" (citation omitted)); *Senter v. Gen. Motors Corp.*, 532 F.2d 511, 525 (6th Cir. 1976) (explaining "common claim[s]" of "class-wide discrimination" are "particularly well suited for 23(b)(2) treatment" because they are "susceptible to a single proof"); *Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239, 250–51 (3d Cir. 1975) (holding claims involving "a common class characteristic, in this case sex," are "particularly fit for (b)(2) treatment" because they involve conduct that "is actionable on grounds generally applicable to the class").

to be a homogen[e]ous . . . group with few conflicting interests among its members"); *Holmes*, 706 F.2d. at 1156–57 (explaining that, for such classes, "the rights and interests of class members were visualized as more likely to be homogeneous" and that their "interest[s] . . . are, by the very terms of the (b)(2) definition, substantially identical"). This class-wide homogeneity is an almost inevitable result of having been subjected to the same challenged policy or practice.[9]

Second, and relatedly, because the entire group is subjected to the challenged conduct, "representative members can adequately represent the interests of absent members." *Holmes*, 706 F.2d at 1155 n.8. Indeed, in such cases, "the need for and interest in individual representation will be minimal." *Id.*

Here, Plaintiffs challenge Fresno State's program-wide policies and practices concerning participation opportunities and benefits. *See supra* at Part I.B.1. Accordingly, the class is tied together by shared traits and legal relationships, *see Holmes*, 706 F.2d at 1155, because the challenged policies and practices are aimed at the collective group of female students seeking to participate in Fresno State's

[9] Homogeneity is different than "cohesiveness." *See, e.g.*, *Reid v. Donelan*, 17 F.4th 1, 11 (1st Cir. 2021) (discussing cases holding there is a "cohesiveness" requirement for Rule 23(b)(2) classes). This Court has rejected a free-standing "cohesiveness" requirement for Rule 23(b)(2) classes. *See Senne v. Kan. City Royals Baseball Corp.*, 934 F.3d 918, 937–38 (9th Cir. 2019). Still, as a descriptive matter, class members who challenge a "pattern or practice . . . generally applicable to the class as a whole," *Walters*, 145 F.3d at 1047, are "homogeneous" in the sense that they have been harmed by the same conduct and share an interest in having it declared unlawful and enjoined.

athletics program (for effective accommodation) and female student-athletes (for equal treatment), *see supra* at Part I.B.1.

Critically, because the violations are systemic, the challenged conduct can be declared illegal "only as to all of the class members or as to none of them." *Dukes*, 564 U.S. at 360 (quoting Nagareda, 84 N.Y.U. L. REV. at 132). As the district court noted, these claims concern whether Fresno State's policies square "with Title IX in the aggregate." 1-ER-33. Given the *program-wide* assessment, Fresno State cannot provide substantially proportionate participation opportunities to some class members but not others. Nor can it provide equal treatment to some class members but not others.

As such, all class members—as the targets of the challenged program-wide conduct—are homogeneous. All, including Ms. Anders and Ms. Walburger, have an identical interest in having that challenged conduct declared unlawful and enjoined. *See, e.g.*, *Murray*, 55 F.4th at 350 (explaining that, in Title IX class actions, there is no conflict because "class members possess[] the same claim with the same elements"). There is no concern about "adequate representation for the diverse groups" whose rights are at issue in this case, *Amchem*, 521 U.S. at 625, precisely

because there are *no* diverse groups in this case. As to each claim, there is a unified group of women targeted by Fresno State's systemic, program-wide policies.[10]

Outside of its adequacy analysis, the district court acknowledged these realities. *See* 1-ER-33–35 (holding the proposed representatives are "squarely in alignment with class members" concerning "threshold" liability questions). Accordingly, there is no need for sport-specific representation here. Ms. Anders and Ms. Walburger can adequately represent the classes' shared interests. *Holmes*, 706 F.2d at 1155 n.8.

In concluding otherwise, the district court created a second anomaly. Its constitutional holding means the targets of a university's systemic, program-wide Title IX misconduct can *never* be certified as a class. Instead, because of the novel "right" to sport-specific advocacy, only sport-specific classes can be certified (if they meet Rule 23's requirements), even though the challenged policies do *not* target

[10] Accordingly, the district court's reliance on *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), *Juris v. Inamed Corp.*, 685 F.3d 1294 (11th Cir. 2012), and *In re Literary Works in Elec. Databases Copyright Litig.*, 654 F.3d 242 (2d Cir. 2011), was misplaced. Those cases involved diverse class members with different claims. *See Ortiz*, 527 U.S. at 856–57 (identifying four separate groups of claimants—those with current and future injuries caused by asbestos exposure before and after 1959, when insurance coverage ended); *Juris*, 685 F.3d at 1324–25 (holding class representatives who had "the full spectrum of breast implant claim[s] and separate counsel [for] present injury and future injury claimants" satisfied adequacy requirements); *Literary Works*, 654 F.2d at 255 (holding the interests of class members with "only Category C claims fundamentally conflict with those of class members [with] Category A and B claims"). There are no divergent groups here.

members of individual teams and Title IX liability *cannot* be assessed in a sport-specific way. *See supra* at Part I.B.1; Nagareda, 84 N.Y.U. L. REV. at 124 ("If the wrong . . . comes into focus only when one looks at the situation in the aggregate, then it would seem odd for the procedural mode of the litigation to take anything other than a commensurately aggregate form."). The district court's approach is inconsistent with this Court's goal of certifying "the kinds of civil rights class action suits . . . [Rule 23(b)(2)] was intended to authorize." *Parsons*, 754 F.3d at 686. Indeed, it would *require* that each team pursue its own separate lawsuit or team-specific class, with separate representatives and counsel, all to challenge the legality of a single policy with program-wide effects.

This approach is also inconsistent with the Supreme Court's admonition that "systemwide relief" is appropriate to remedy "systemwide deficiencies." *Brown v. Plata*, 563 U.S. 493, 532 (2011). The district court's methodology would force courts to remedy "systemwide" and programmatic deficiencies with only sport-specific relief. This mismatch undermines Title IX's broad goals and is bad for Title IX plaintiffs because not all systemwide deficiencies can be resolved with sport-specific relief (*e.g.*, a school may have a participation gap so large that the addition of just one team will not achieve Title IX compliance). It may also be bad for Title IX defendants because sport-specific classes seem destined to restrict their discretion over how best to achieve compliance. *See supra* at Part I.B.2.

The unprecedented notion that there is a constitutional right to sport-specific advocacy contradicts Title IX class-action precedent, ignores how these Title IX claims work, and conflicts with Rule 23(b)(2)'s text and purpose. Because the right simply does not exist, the district court's orders relying on it should be reversed.

II. The District Court Erred by Denying Class Certification Based on Speculative, Potential Remedy-Stage Conflicts.

"[T]his circuit does not favor denial of class certification on the basis of speculative conflicts." *Cummings v. Connell*, 316 F.3d 886, 896 (9th Cir. 2003). "Mere speculation as to conflicts that *may* develop at the remedy stage is insufficient to support denial of initial class certification." *Soc. Servs. Union, Loc. 535 v. Cnty. of Santa Clara*, 609 F.2d 944, 948 (9th Cir. 1979) (emphasis added); *see also Blackie v. Barrack*, 524 F.2d 891, 909 (9th Cir. 1975) (holding that "the *possible* creation of *potential* conflicts" concerning remedies "does not render the class inappropriate now" (emphases added)).

The district court's analysis focused exclusively on conflicts that may (or may not) arise at the remedy stage. It repeatedly discussed what "could" or "might" happen if Plaintiffs prevail on their Title IX claims. *See, e.g.*, 1-ER-39–40 (discussing how "Title IX compliance *might* . . . be achieved" (emphasis added)); 1-ER-16 (discussing how "Fresno State *could* achieve Title IX compliance . . . *if Plaintiffs prevail in this action*" (emphases added)); *id.* (holding that, "*if Plaintiffs prevail*," other women's sports might not be "on fully equal footing with women's

lacrosse *if and when* the time comes to select sports for addition or reinstatement" (emphases added)); 1-ER-19 (holding "one or more women's sports will benefit more than others *if Plaintiffs prevail*" (emphasis added)).

In this Circuit, these potential remedy-stage conflicts are speculative as a matter of law; they are no reason to deny certification. *See, e.g.*, *Cummings*, 316 F.3d at 896; *Soc. Servs. Union, Loc. 535*, 609 F.2d at 948; *Blackie*, 524 F.2d at 909. The proper course is to certify the classes and reassess the situation as the case progresses. *See, e.g.*, *Blackie*, 524 F.2d at 909, 911 (noting district courts retain "constant supervision" and can "create sub-classes," if necessary, "to assure fairness of representation"); *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 431 n.7 (4th Cir. 2003) ("[P]otential conflicts relating to relief issues which would arise only if the plaintiffs succeed on common claims of liability on behalf of the class will not bar a finding of adequacy.").

The district court failed to follow these precedents and, instead, "agree[d] with the reasoning," 1-ER-13, of out-of-circuit decisions that—contrary to Ninth Circuit law—declined to certify classes based on *potential* remedy-stage conflicts. *See Boucher*, 164 F.3d at 118–19 (holding "the district court correctly found *potential* conflicts" concerning which women's team might be elevated to varsity (emphasis added)); *Robb*, 2019 WL 2005636, at *12 (holding that Title IX claims "seek to have universities distribute more benefits" and that plaintiffs on the women's rugby team

"would likely advocate" for relief that favored that team); *Gordon*, 2018 WL 4899098, at *2 (holding there were "*potential* conflicts" because "the remedies the class and subclass seek *could* conflict with each other" (emphases added)); *Miller*, 241 F.R.D. at 290 (discussing whether proposed representatives "would . . . *likely* be amenable" to ways "compliance *could conceivably* be achieved" (emphases added)); *Bryant*, 1996 WL 328446, at *6 (stating, in dicta, that "plaintiffs' interests would be antagonistic to those . . . who might desire elevation of their own sport"). The court was not free to cast aside binding precedent and deny certification based on remedy-stage conflicts that may never come to fruition. Doing so was legal error.

Indeed, as to the effective accommodation claim, the court's remedy-stage concerns require at least four layers of speculation. First, one must speculate there will be a Title IX violation, a necessary precondition to any remedial undertaking. Second, one must speculate that Fresno State will "ratchet[] up" its women's program instead of "leveling down" its men's program. *Neal*, 198 F.3d at 770. Third, one must speculate the class representatives, rather than Fresno State, will make allocation decisions. Fourth, one must speculate their decision-making would favor women's lacrosse. As to the equal treatment claim, there is at least a fifth layer of speculation because the representatives could not possibly favor the women's lacrosse team unless that team is first reinstated.

None of that speculation is warranted. And, as a matter of law, none of it justifies denying class certification. The district court compounded its error by ignoring that these speculative remedy-stage conflicts would evaporate if, after a finding of liability, Fresno State submitted an acceptable compliance plan. *See supra* at Part I.B.2. Accordingly, the orders denying certification should be reversed.

III. If There Were an Actual Conflict about Remedies, the District Court Erred by Refusing to Certify a Liability-Only Class.

"When appropriate, an action may be brought or maintained as a class action with respect to particular issues." FED. R. CIV. P. 23(c)(4). As this Court has explained, certification as to liability is appropriate when it "eliminates the need for individual litigation" over the legality of a "pattern or practice that is generally applicable to the class as a whole." *Walters*, 145 F.3d at 1047. Indeed, liability-only certification remains appropriate even if the liability determination will require "numerous individual . . . proceedings" about remedies. *Id.* Even then, a liability-only class "avoid[s] duplicative litigation" whereby would-be class members file individual "complaints against the [same defendant] in federal court, each of them raising precisely the same legal challenge." *Id.* As such, "a single, central, common issue of liability [i]s sufficient to support class certification." *Jimenez*, 765 F.3d at 1168 (internal quotation marks and citation omitted).

Here, there can be no conflict between the proposed class members concerning liability. Because they challenge institutional policies that result in

systemic harms, the class claims are inseparable—they succeed or fail together. *See supra* at Parts I.B.1 & I.C. The "determination of liability . . . depends on whether [Fresno State] discriminated on the basis of sex." *Wetzel*, 508 F.2d at 255. Given the claims and the tests for determining liability, "[t]his question is common to . . . all members of the class." *Id.*; *see also supra* at Parts 1.B.1 & I.C.

Again, when assessing commonality, the district court acknowledged this reality. *See* 1-ER-33–34 (holding that "determining whether there has been a Title IX violation" requires "[r]esolution of threshold questions" that "are of general applicability to the class"). As such, the district court should have—at the very least—certified the classes as to liability under Rule 23(c)(4). Such certification would have "materially advance[d] the litigation," 1-ER-18, by avoiding the prospect of "duplicative litigation," *Walters*, 145 F.3d at 1047.

The district court declined to do so for two reasons. *First*, it held that the newly minted "right" to sport-specific advocacy prevented liability-only certification because it "appl[ies] at all stages of this litigation." 1-ER-19. As discussed above, that right does not exist at *any* stage of litigation, let alone *every* stage. *See supra* at Part I. Importing this legal error predictably renders the court's liability-only analysis legally erroneous as well.

Second, the district court held that "liability and remedies cannot neatly be separated . . . in this case." 1-ER-18. This holding was also legal error. The court

based this holding on Plaintiffs' settlement offers that, among other things, initially called for the continuation of women's lacrosse and later for the addition of women's lacrosse or some other women's sport(s). 1-ER-17–18. Those offers relate purely to remedies (*i.e.*, how Fresno State might change its program to achieve Title IX compliance). They do not concern the "threshold questions" that "determin[e] whether there has been a Title IX violation." 1-ER-33–34. Certifying classes for those "threshold questions" is entirely independent of how Fresno State might someday achieve compliance.

Moreover, upon a finding of class-wide liability, the court could eliminate the perceived conflict by requiring Fresno State to develop its own compliance plan. *See supra* at Part I.B.2.[11] To the extent potential settlement was a valid concern (rather than another speculative conflict, *see supra* at Part II.A), Plaintiffs' second offer is instructive. That offer gave Fresno State the choice of reinstating women's lacrosse, at a time when former varsity athletes remained on campus, *or* "add[ing] . . . some other unspecified women's sport (or sports) instead." 1-ER-18. This choice betrays

[11] It could also reevaluate the need for sub-classes if the case ever reached a stage where the representatives needed to make specific proposals (*e.g.*, if Fresno State demonstrated an unwillingness to exercise its discretion in a way that resulted in compliance). *See, e.g.*, *Blackie*, 524 F.2d at 909 (discussing subclassing at later stages); *Brust*, 2008 WL 11512299, at *7 (holding, "because the liability determination . . . is particularly well-suited to class treatment, . . . the appropriate course is to defer consideration of any subclasses to the relief stage").

no intra-class conflict. *See Cohen III*, 16 F.4th at 953 (emphasizing that the school, "not the class representatives or class counsel," chose which sports to elevate).

Of course, the district court would review any proposed settlement, approving it only if "fair, reasonable, and adequate." FED. R. CIV. P. 23(e)(2). Denying certification based on predictions about whether and how a hypothetical future settlement might comply with the Rule, 1-ER-18, puts the cart firmly before the horse and constitutes legal error. *See supra* at Part II. Accordingly, the orders denying certification should be reversed.

IV. There Is No Actual Conflict in This Case.

The district court said this lawsuit is "fundamentally" or "primarily" about women's lacrosse. That finding, which was clearly erroneous, ignored Plaintiffs' program-wide allegations, the broad relief they requested, and their repeated efforts to bring Fresno State into compliance with the law, even if it meant their team was gone for good. It was equally erroneous for the court to disregard the very evidence it purported to credit. There was and is no conflict in this case. For this reason as well, the orders denying class certification should be reversed.

A. This case concerns program-wide Title IX compliance, *not* just women's lacrosse.

Plaintiffs brought program-wide claims. *See supra* at Part I.B.1. Moreover, they sought program-wide injunctive relief that would "provide female student-athletes and potential student-athletes . . . equal opportunities to participate . . . and

[equal] treatment, as Title IX requires." 2-ER-242. They also sought to "prohibit[Fresno State] from eliminating [the] women's lacrosse team (or any other women's varsity intercollegiate athletic opportunities at Fresno State) unless and until Fresno State is and will be in compliance with Title IX." 2-ER-253. And they sought a broad declaration that Fresno State (1) "engaged in discrimination on the basis of sex by failing to offer female students an equal opportunity to participate in intercollegiate athletics," 2-ER-249, and (2) "engaged in a past and continuing pattern and practice of discrimination against female students on the basis of sex in the operation of [its] varsity intercollegiate athletics program," 2-ER-252.

Still, the district court held that, "as plead[ed] and developed to date, this case is fundamentally about women's lacrosse" and that its "principal purpose . . . is to protect (or restore) women's varsity lacrosse." 1-ER-40; *see also* 1-ER-15 (holding "this action has primarily been about the reinstatement of women's lacrosse"). These factual determinations bear no resemblance to the claims Plaintiffs brought or the remedies they sought.[12] And, given the district court's repeated refusal to permit merits discovery, 2-ER-48, 2-ER-54, 2-ER-292, there have been few

[12] Indeed, the court did not even attempt to assess the case's "principal" purpose based on the relief Plaintiffs sought. Instead, it based its assessment on the number of times "women's lacrosse" appeared in a complaint brought by six former lacrosse players after Fresno State threatened and eliminated one women's team—women's lacrosse. 1-ER-15. There was no basis to answer the question this way. The number of times "women's lacrosse" appears in the complaint is both unsurprising and irrelevant.

"developments" in the case. The district court mentioned only the preliminary-injunction motion and Plaintiffs' rejected settlement offers, neither of which demonstrates any conflict.

First, the day they filed the initial complaint, Plaintiffs—except Ms. Walburger, who was not yet involved—filed a motion to "bar Fresno State from eliminating the women's lacrosse team or any other women's sport during the pendency of this case." 1-ER-39.[13] This relief, if granted, would have protected every woman in Fresno State's athletics program. It does not show a conflict. If anything, it demonstrates the proposed classes' uniform interests.

Moreover, seeking to preserve the status quo does not—and cannot—alter the case's broad purposes. It simply aligns with the narrow purpose of a preliminary injunction, which is to preserve "the relative positions of the parties until a trial on the merits can be held." *Favia*, 7 F.3d at 342. And it is well established that such relief may not be available after trial. *See, e.g.*, *Balow*, 24 F.4th at 1061 (explaining that, at the preliminary-injunction stage, "the appropriate remedy when a school seeks to eliminate a women's team in violation of Title IX is typically an injunction that prevents [it] from doing so," even though, "as a more permanent matter, a school

[13] Ms. Walburger was added as a plaintiff on May 3, 2021, *see* 3-ER-294, *after* the motion for preliminary injunction was denied, *see* 3-ER-337 (entered April 19, 2021). Nothing about the preliminary-injunction motion could demonstrate a conflict as to her.

may be entitled to determine its own method for achieving statutory compliance"); *Cohen I*, 991 F.2d at 906–07 (explaining "the district court has broad discretionary power to . . . restor[e] the status quo pending the conclusion of a trial," while "the same remedy" may not "be suitable at trial's end").[14]

Second, Plaintiffs made two rejected settlement offers. In March 2021, before the preliminary-injunction motion was decided and while the women's lacrosse team played what became its final season, Plaintiffs agreed to settle if Fresno State would:

> (1) reinstate, continue, and treat the women's lacrosse team as a varsity team, (2) develop and implement a gender equity plan to get all aspects of its intercollegiate athletic department into compliance with Title IX in the next year or two, and (3) pay . . . costs and attorneys' fees.

2-ER-80. This offer reflected a simple truth—continuing a still-existing team threatened with elimination would bring Fresno State into compliance much faster than a years-long plan to add some other team (*e.g.*, hire coaches, recruit new athletes, obtain necessary equipment, etc.). It reflected no conflict at all; lacrosse was the only women's team threatened with elimination.

[14] The district court also held, incorrectly, that an expert report filed with the preliminary-injunction motion "expressly takes aim at other women's teams." 1-ER-39. As Fresno State itself explained, that report sought merely to "reverse-engineer" the school's Title IX counts using publicly available information that counts participants differently. 3-ER-381. It did not "take aim" at women's teams; it took aim at Fresno State's publicly available participation counts. The district court's contrary conclusion was clearly erroneous.

Nearly a year later—while former players on the then-eliminated women's lacrosse team remained on campus, Plaintiffs offered to settle if:

- Fresno State will reinstate the women's lacrosse team or add another women's team or teams to reach substantial proportionality.
- Fresno State will work with an agreed consultant to develop and implement a gender equity plan within agreed parameters that will bring all aspects of its intercollegiate athletic program into compliance with Title IX.
- Fresno State will pay Plaintiffs' reasonable attorneys' fees and costs.

2-ER-126. As discussed above, this offer expressly gave Fresno State the option to add *any* women's team(s) so long as it reached substantial proportionality. *See supra* at 46–47. There is no conflict there.

Further, *both* offers required a comprehensive gender equity plan that would bring all aspects of Fresno State's program into Title IX compliance. The district court ignored this feature, focusing instead on the mentions of "women's lacrosse." 1-ER-15–16. Accordingly, its analysis was based on only *part* of Plaintiffs' settlement offers. It never addressed the fact that the broad gender equity plan Plaintiffs demanded would have protected the entire classes' interests.

As such, the court's findings were clear error and, to the extent necessary, should be reversed. *See, e.g.*, *Abdullah v. U.S. Sec. Assocs., Inc.*, 731 F.3d 952, 956 (9th Cir. 2013) (holding findings are clearly erroneous when illogical, implausible, or without support in the record). Indeed, the court's finding that Ms. Anders and Ms. Walburger would favor women's lacrosse, 1-ER-16, 1-ER-40, contradicted its

own separate finding that they "cannot meet the requirements of structural protection recognized in *Amchem*" because they "do not purport to offer sport-specific advocacy," 1-ER-17. The facts showed no conflict. The proposed class representatives cannot be inadequate both because they *did* and *did not* offer sport-specific advocacy.

B. The district court disregarded the evidence it purported to credit.

To the extent there was any doubt about what the proposed representatives sought, their unrebutted testimony and declarations removed it. For example, Ms. Anders and Ms. Walburger declared, under penalty of perjury, that they sought "to eliminate Defendants' discrimination so that current, prospective, and future female students have an equal opportunity to participate in varsity sports and receive equal treatment and benefits." 2-ER-182, 2-ER-186. They explained they sought "injunctive relief that requires Defendants to add more athletic participation opportunities for women and to provide the new women's opportunities with the same benefits and treatment that they already provide to men." 2-ER-183, 2-ER-187; *see also* 2-ER-93, 2-ER-98 (declaring their "principal purpose . . . was not and is not to protect or restore women's varsity lacrosse," but "to require Fresno State to comply with Title IX, stop discriminating against female student-athletes and potential student-athletes, and provide equal opportunities to participate and equal treatment of women").

They testified similarly. For example, Ms. Anders explained the case was about "the fight for women." 2-ER-165. Her "ultimate goal" was "to have Fresno State abide by . . . Title IX rules," and she "hop[ed] to provide an environment" where everyone would "be treated equally." 2-ER-109, 2-ER-165. Meanwhile, Ms. Walburger testified her goal was *not* to reinstate the women's lacrosse team but to ensure "Fresno State []comes into compliance with Title IX," which she understood could happen without reinstating her former team. 2-ER-118–20. Critically, the district court purported to *credit* these statements. *See, e.g.*, 1-ER-8, 1-ER-15, 1-ER-40. Still, it concluded the case was "fundamentally" and "primarily" about women's lacrosse. Contradicting the purportedly credited testimony constitutes clear error.

Instead of crediting the testimony, the district court highlighted a few words and seemingly overlooked the rest. *See* 1-ER-15. Attempting to divine the proposed representatives' goals based on a few isolated snippets of testimony, removed from all relevant context, was clear error. To show the critical, undisputed evidence the court disregarded, Plaintiffs reproduce the questions and answers here, bolding the portions the district court quoted.

Fresno State's Counsel	Taylor Anders
At the time of that initial meeting, was your personal goal to have the lacrosse team reinstated?	It was a goal. **Of course** it was **a goal** to have the lacrosse team reinstated, but the ultimate goal is for fair treatment all around, right? Because, if I'm being honest with myself, I might not even be here when this lawsuit gets finished. But it's more than that. It's . . . about the fight that I was talking about earlier, the long ingrained one where, you know, we recognize the flaws in society and how they . . . treat women. And just understanding that that's a fight that, you know, every woman should be a part of because it's important that, for myself, for women after me, you know, can't do much about the women before me, but they'll probably be proud of what we're doing, that we're showing that it's wrong how Fresno State is treating women. That's the ultimate goal . . . is to have Fresno State abide by those Title IX rules.
And that's still your ultimate goal, as you sit here today?	Absolutely. Of course I want to play lacrosse. That's what it was about in the beginning. That's what it's about now. But it's . . . more than that, you know. It would be a **bonus** if it got reinstated, but the premises of what we're doing is really the fight for women.
So would you be satisfied with a resolution of this lawsuit where Fresno State agreed to make some changes that you thought . . . would treat women more equally but did not reinstate the lacrosse team?	I would be **disappointed**, of course, **if the Fresno State women's lacrosse team was not reinstated** for women to come after me. But, like I said, the ultimate goal is for the fair treatment of women at Fresno State as a whole. So if the changes that they made made it so that they were NCAA compliant and that they were abiding by all of those different bullet points that they need to hit, I would be happy with that. But that's under the terms that they actually meet all of the requirements of Title IX. It's also . . . my understanding that the opportunities that they give women here at Fresno State [are] not even equal in number to those of men. So I

	don't think that they would be in NCAA compliance if they did not reinstate a team, whether or not that be lacrosse. I don't think that just giving women more gear is going to supplement the issue.
Based on what you told me earlier, it sounds like your goal in this lawsuit is to have Fresno State make changes that you think would bring it into compliance with Title IX?	Yes.
Are you seeking any specific relief within that, any specific changes?	I mean, we provided our list of complaints because that was our personal experience. But the thing that I would like to see most come out of this is just overall the general fair treatment of everybody and, like you said, for Title IX to be a main priority of the schools. Other than that, I don't have an in particular objective. It would be a **bonus**, don't get me wrong, if the team was reinstated. But at this point it's about more than that.

Fresno State's Counsel	**Courtney Walburger**
Okay. Do you think any of your teammates would be disappointed with the result of the litigation if lacrosse wasn't reinstated?	Yeah. I think some . . . would be sad because, you know, there's . . . **certain opportunities that were taken away** from people who play lacrosse now in Fresno. . . . Personally, I'll never **play in an alumni game**, which is kind of sad because those are always so much fun to come together with the community. So, yeah, . . . it would be sad. But, you know, I have to put those personal feelings aside and think, you know, what's the best teams that could come to Fresno State and be reinstated for women if not lacrosse, you know. And maybe they get the opportunities that I didn't get. And they get to, you know, have an alumni game or something and I'll be there watching. But I have to put those feelings aside. Would I be sad? Yes, I'd be **sad**, but . . . [witness trailed off]

2-ER-106–12, 2-ER-123, 2-ER-164–66.

In context, this testimony confirms the proposed class representatives understood their obligations to the classes and sought to establish broad Title IX compliance at Fresno State, no matter what happened to women's lacrosse. In fact, *Fresno State's* counsel—during the deposition—expressed her understanding that the proposed class representatives' "goal in this lawsuit is to have Fresno State make changes that [they] think would bring it into compliance with Title IX." The district court's contrary conclusion was clear error.

CONCLUSION

Accordingly, the district court's orders denying class certification should be reversed.

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