James C. Sturdevant, SBN 94551 (jsturdevant@sturdevantlaw.com)
Whitney Huston, SBN 234863 (whuston@sturdevantlaw.com)
THE STURDEVANT LAW FIRM
A Professional Corporation
354 Pine Street, Fourth Floor
San Francisco, CA 94104
Telephone:(415) 477-2410
Facsimile: (415) 477-2420

Noreen Farrell, SBN 191600 (nfarrell@equalrights.org)
Jora Trang, SBN 218059 (jtrang@equalrights.org)
EQUAL RIGHTS ADVOCATES
180 Howard Street, Suite 300
San Francisco, CA 94105
Telephone:(415) 621-0672
Facsimile: (415) 621-6744

Monique Olivier, SBN 190385 (monique@dplolaw.com)
DUCKWORTH PETERS LEBOWITZ OLIVIER LLP
235 Montgomery St., Suite 1010
San Francisco, CA 94104
Telephone:(415) 433-0333
Facsimile: (415) 449-6556

Kristen Galles (SBN 148740) (kgalles@comcast.net)
EQUITY LEGAL
10 Rosecrest Avenue
Alexandria, VA 22301
Telephone: (703) 683-4491

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
[Sacramento Division]

AREZOU MANSOURIAN; LAUREN MANCUSO; and CHRISTINE WING-SI NG,

Plaintiffs,

vs.

REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al.,

Defendants.

CASE NO. S-03-2591 FCD EFB

PLAINTIFFS' CONSOLIDATED MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

Date: December 3, 2010
Time: 10:00 am
Courtroom: 2
Judge: Hon. Frank C. Damrell, Jr

Complaint filed: December 18, 2003
Trial date: April 26, 2011

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL STATUTES

I. INTRODUCTION

Plaintiffs Arezou Mansourian, Christine Ng, and Lauren Mancuso are former students at the University of California at Davis ("UCD") who were kicked out of the varsity wrestling program because they are women at a time when UCD was unlawfully depriving hundreds of other women an equal chance to play sports. Plaintiffs hereby oppose the motions for summary judgment filed by individual Defendants Larry Vanderhoef, Robert Franks, Greg Warzecka, and Pam Gill-Fisher (collectively, "Defendants") seeking judgment in their favor on the claim that they violated the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, which prohibits sex discrimination by state actors, when they took or approved the acts at issue in this case.

Defendants seek judgment in their favor based on the incredible argument that they did not single out Plaintiffs for mistreatment based on their gender or, alternatively, that the law prohibiting sex discrimination in athletics was not clearly established in 2000. Defendants' motions are an exercise in revisionist history based on heavily disputed facts not suitable for resolution on summary judgment. Defendants were high ranking employees at UCD who, by their own admissions, participated in or approved of the decisions at issue in this case. Defendants admitted to being well-trained in laws requiring gender equity in intercollegiate athletics and/or were responsible for ensuring that UCD's athletic program treated women equally. They either authored or had knowledge of UCD reports that revealed that UCD was not treating men and women equally in terms of varsity athletic participation opportunities program-wide. Each knew that Plaintiffs and other women were competing against other women in the varsity wrestling program. Each knew that Plaintiffs and other women were removed from the roster. Each then either decided that Plaintiffs and other women would have to compete against men for their reinstatement in the varsity program, or ratified this decision.

Defendants not only miscast the misconduct alleged by Plaintiffs, they ignore evidence of their own unlawful acts, previous orders of this Court, and settled law establishing the constitutional rights at issue. These strategies are fatal to each motion and accordingly, each motion should be denied.

II. SUMMARY OF ARGUMENT

Plaintiffs contend that Defendants violated their equal protection rights in three ways. First, Defendants afforded Plaintiffs fewer opportunities to compete in varsity athletics than they did men program-wide. Second, Defendants purposefully removed Plaintiffs from the varsity wrestling program based on gender. Third, Defendants imposed permanent barriers to the participation of Plaintiffs in the varsity wrestling program through their graduation from UCD.

Defendants present three flawed arguments to support their claim of entitlement to summary judgment. First, they argue that Plaintiffs' equal protection claim fails as a matter of law. Defendants contend that Plaintiffs sought a guaranteed spot on a men's team and otherwise refused to develop women's wrestling at the club level as some other women's varsity teams had done. The facts establish, however, that Plaintiffs were *already* members of UCD's varsity wrestling team competing against other women. Demotion to the club level would have meant loss of significant varsity benefits. Defendants next attempt to shift blame onto wrestling coach Michael Burch for the removal of the women from the wrestling program. Yet, the evidence also shows that Warzecka and Gill-Fisher, not Burch, removed women from the program in 2000. And, although Defendants contend that Plaintiffs were not skilled enough to make the wrestling team in 2001, the facts establish that each Defendant ratified the decision to fundamentally change the terms of Plaintiffs' participation by requiring them to wrestle off against *men* for a spot in the program. Thus, under the new terms of the program imposed by Defendants in 2001, it would have been nearly impossible for Plaintiffs to continue to participate in the varsity wrestling program, regardless of their wrestling skills. Finally, the evidence shows that Defendants were also providing women, including Plaintiffs, with fewer varsity athletic opportunities than they afforded men relative to their enrollment. Construing all facts in Plaintiffs' favor, the Court should find that each Defendant deprived Plaintiffs of equal protection under the law.

Second, Defendants contend that even if Plaintiffs could establish a constitutional violation, each is entitled to qualified immunity as a matter of law because it was not clearly established that their conduct violated the Constitution. The United States Supreme Court, the Ninth Circuit Court

of Appeals, and other federal circuit courts of appeals hold otherwise. Not only was the right to be free from sex discrimination under the Constitution clearly established decades before the period relevant to this case, its reach has extended to dozens of cases challenging sex discrimination in the context of high school and college athletics. Defendants' purported lack of knowledge or understanding of the law is belied not only by their own admissions, but also by evidence that Defendants deliberately ignored a protracted public outcry challenging their actions as discriminatory. Moreover, Plaintiffs challenge through competent evidence the reasonableness of Defendants' purported reliance on the resolution they reached unilaterally with the Office for Civil Rights ("OCR"), which neither considered constitutional claims nor adequately investigated Plaintiffs' claims.

Third, Defendants analogize Plaintiffs' equal protection claims to Title IX equal treatment claims to argue that the constitutional claims are time-barred. Putting aside that Plaintiffs have never alleged Title IX equal treatment claims in this case, this Court expressly rejected this analogy in denying the statute of limitations argument on Defendants' motion to dismiss the equal protection claim. The Court refused to revisit this prior ruling on Defendants' motion for judgment on the pleadings. The Ninth Circuit is in accord. The Court should refuse Defendants' attempt at a *fourth* bite at the apple, and deny their motions on this ground as well

III. PROCEDURAL HISTORY

Plaintiffs filed suit on December 18, 2003. (Dkt. # 1.) On March 5, 2004, Defendants moved to dismiss a number of Plaintiffs' claims, including their equal protection claim on the grounds that it was time-barred. This Court denied the motion in its entirety, and expressly rejected Defendants' argument that the equal protection claim was time-barred. (Dkt. # 25.) Defendants then filed a motion for judgment on the pleadings challenging Plaintiffs' various state law, statutory and constitutional claims. (Dkt. # 188-89.) On October 18, 2007, this Court issued a decision dismissing some of Plaintiffs' claims, and refusing to dismiss others. (Dkt. # 226.) Plaintiffs' Equal Protection Clause claims (as enforced under 42 U.S.C. § 1983) were among those dismissed based on the Court's finding that those claims were subsumed by the Title IX claim. However, the Court

refused to re-visit its finding with respect to the timeliness of the § 1983 claim. (Dkt. # 226.) Defendants then filed a motion for summary judgment on Plaintiffs' Title IX equal accommodation claim, which the Court granted on the grounds that Plaintiffs had not provided adequate notice of their Title IX claims before filing a suit for damages. (Dkt. # 368.)

Plaintiffs appealed the dismissal of the equal protection claim on the motion for judgment on the pleadings and the dismissal of the Title IX claim on summary judgment. (Docket item # 376.) Defendants once again raised their timeliness arguments with respect to the equal protection claim. They also asked the Ninth Circuit to find them immune from suit on this claim based on qualified immunity. On April 20, 2010, the Ninth Circuit issued its decision, reversing its dismissal of the Title IX and the section 1983 claims. *Mansourian v. Regents of the University of California*, 602 F.3d 957 (9th Cir. 2010). It noted this Court's prior rejection of the § 1983 statute of limitations argument and held that Plaintiffs' claims were not time-barred. *Id*. at 973-74. It also declined to rule on the qualified immunity defense because it was raised for the first time on appeal. *Id.* at 974.

IV. STATEMENT OF FACTS

A. Defendants' Authority in UCD's Varsity Athletic Program.

Defendants Larry Vanderhoef, Robert Franks, Greg Warzecka and Pam Gill-Fisher (collectively, "Defendants") were or are high ranking employees of Defendant Regents of the University of California ("Regents") who were charged with overseeing the administration and operation of the varsity athletics program[1] at the University of California at Davis (hereafter "UCD"). (Plaintiffs' Statement of Additional Disputed Facts in Support of Plaintiffs' Opposition to Defendants' Motions For Summary Judgment ("ADF") 1.)

As the Chancellor of UCD, Defendant Larry Vanderhoef was ultimately responsible for UCD's intercollegiate or varsity athletics program and compliance with gender equity requirements. (ADF 65; Plaintiffs' Consolidated Response to Defendants' Separate Statements of "Undisputed" Material Facts in Support of the Motions for Summary Judgment, Vanderhoef ("Response to

[1] The varsity athletic program at UCD has also been referred to as the "intercollegiate" athletic program. The varsity/intercollegiate program is distinct from UCD's club program.

Vanderhoef UMF") 1.)[2] Although day-to-day decisions were delegated, Vanderhoef tracked UCD's Title IX compliance and met frequently with officials regarding gender equity. (ADF 66.) In fact, Vanderhoef testified that the "buck" stopped with him. (ADF 67.)

Defendant Robert Franks was a senior administrator at UCD from 1994 to 2004, charged with oversight of the athletic department and actively involved in the events at issue in this case. (ADF 76.) As the Associate Vice Chancellor for Student Affairs, Franks directly supervised the Athletic Director, met with him weekly, and could overrule his decisions. (ADF 77, 78.) Franks was responsible for ensuring that men and women were treated equally in the athletic department. (ADF 79.) He admitted that he was expected to understand laws prohibiting sex discrimination. As a former practicing lawyer, he was also familiar with the equal protection guarantees of the United States Constitution. (ADF 80, 81, 82.)

Defendant Greg Warzecka has been UCD's Athletic Director since 1995, responsible for the overall direction, leadership, and management of the UCD Intercollegiate Athletic Program. (ADF 100, 101, 102.) He considered himself trained on gender equity issues, taught classes on the subject, and kept himself abreast of relevant developments in the law. (ADF 103.)

From approximately 1985 to 2003, Defendant Pam Gill-Fisher was the Associate Athletic Director and Supervisor of Physical Education. In 2003, Gill-Fisher was the Senior Associate Athletic Director and Senior Woman Administrator with significant responsibility in the intercollegiate athletic department. Gill Fisher had a particular expertise in Title IX and had responsibility for UCD's compliance with gender equity laws. (ADF 126.) Historically, she authored or significantly contributed to nearly every report related to gender equity at UCD, including reports that acknowledged UCD athletic department's gender equity failings. (ADF 127.) She understood that UCD was prohibited from discriminating against women in their athletic

[2] Plaintiffs' Responses to the Separate Statement of "Undisputed" Material Facts of the other Defendants will similarly be called "Response to Franks UMF", "Response to Gill-Fisher UMF", and "Response to Warzecka UMF". All such responses are contained in Plaintiffs' Consolidated Response to Defendants' Separate Statements of "Undisputed" Material Facts in Support of the Motions for Summary Judgment and separated by Defendant.

department. (ADF 128.) She was also the only consistent member of UCD's Title IX workgroup, aside from the Title IX officer. (ADF 129.) Defendants Vanderhoef, Franks, and Warzecka relied on Gill-Fisher given her purported gender equity expertise. (ADF 130-132.)

B. UCD's Women's Varsity Wrestling Program.

Plaintiffs are former UCD students who wrestled in high school and attended UCD, in large part, to wrestle. (ADF 2.) There was a long-standing women's varsity or intercollegiate wrestling program at UCD. (ADF 3.) Since 1992, when women first began wrestling at UCD, the varsity wrestling program included both men and women, each competing against their respective sex. (ADF 5.) Women wrestlers at UCD received highly-qualified coaching, wrestled using women's freestyle rules rather than men's collegiate rules, and received all of the benefits of varsity status. (ADF 6.) UCD sponsored a women's division in its annual Aggie Open wrestling tournament. (ADF 7.)

In 1995, UCD hired Michael Burch as a wrestling coach. (ADF 8.) Burch was interviewed for the job by a panel that included Afsoon Johnston, a female wrestler at UCD. (*Id.*) Johnston asked Burch during his interview whether he would be supportive of women's wrestling; he assured the panel that he would be. (*Id.*) Women continued to wrestle at UCD as varsity athletes under the coaching of Burch throughout his tenure. (ADF 9.) As members of the team, women wrestlers attended practice regularly and had the same responsibilities as any other team member. (ADF 10.) They received coaching and attention unique to the needs of women wrestlers. (ADF 11.)

UCD, including Defendants Franks, Warzecka and Gill-Fisher, admits that they were aware that Plaintiffs and other women were varsity wrestlers, who were listed on participation lists, official rosters, and the UCD wrestling event programs. (ADF 4, 13, 89, 113, 111.) Warzecka also admits that women wrestlers were counted by UCD as women varsity participants in official reports submitted by UCD to OCR. (ADF 111.) Defendants Franks, Gill-Fisher, and Warzecka admit that Plaintiffs were competing against other women in the varsity program. (ADF 4, 89, 111.) Plaintiffs, like the other women wrestlers, received benefits attendant to varsity status, including lockers, trainer services, academic support services, laundry services, and varsity coaching. (ADF 12.) Club

sports athletes do not receive any of these benefits. (*Id.*) Plaintiffs also attended the end of the year team banquet and received honors from the coach. (ADF 14.) The NCAA certification paperwork, not required of club athletes, was required of the women wrestlers. (ADF 15.)

C. Defendants Remove Women from the Varsity Wrestling Program.

In October 2000, the women wrestlers were removed from the wrestling roster at the request of Warzecka, whose decision was directly influenced by Gill-Fisher. (ADF 16, ADF 133, 134.) Franks admits that he learned at some point that women had been removed from the wrestling roster. (ADF 92.) Franks also admits that Burch told him that Gill-Fisher did not want women wrestling and that Warzecka directed the removal of the women from the roster. (ADF 92, 133, 134.)

Although Burch objected, he informed the women wrestlers of the athletic department's directive. (ADF 92, 133, 134.) Burch permitted the women to continue to practice with the wrestling team. (*Id.*) Plaintiff Arezou Mansourian was injured during a wrestling practice in January 2001 and sought assistance from a varsity trainer. (ADF 17.) When Warzecka learned that one of the Plaintiffs was seeking trainer services after he ordered her removal from the team roster, he confronted Plaintiffs Mansourian and Ng to confirm that they were not to participate in wrestling because they were a liability to the university. (ADF 18, 19, 116.) He was loud, irritated, and intimidating to the Plaintiffs. (ADF 117.)

Warzecka told Burch and the Plaintiffs that the women should form a club team if they wanted to wrestle. (ADF 118.) Franks admits that the Plaintiffs told him that they considered a move to club status to be a "demotion." (ADF 91.) While Warzecka admitted that transfer from varsity to club status resulted in a loss of significant varsity benefits (ADF 119), he suggested that the women should view the formation of a club team as an opportunity, not a demotion (ADF 120).

The female wrestlers were distraught over the elimination of their wrestling opportunities. (ADF 20.) They complained to Burch, Franks, and Warzecka and requested that they be reinstated to the varsity wrestling program on the same terms as they had been previously, *i.e.*, practicing and competing against women. (ADF 21, 22.) In April 2001, Mansourian and Ng submitted a complaint of sex discrimination with the Department of Education's Office for Civil Rights ("OCR"). (ADF

23.) They charged they had been subject to gender discrimination due to the elimination of intercollegiate athletic opportunities for women. (*Id.*) Subsequently, Mansourian, Ng, and Mancuso filed supplemental complaints of sex discrimination with OCR. (*Id.*) Each of the complaints was based on the UCD's acts of sex discrimination in violation of Title IX. (*Id.*) Vanderhoef, Franks, Warzecka and Gill-Fisher were aware of Plaintiffs' OCR complaints. (ADF 21, 31, 97, 121, 138.) Franks, Warzecka and Gill-Fisher were actively involved in formulating UCD's defense to Plaintiffs' various complaints about their removal from the wrestling program. (*Id.*) After the OCR complaints were filed, the OCR never interviewed any of the Plaintiffs or any other women wrestlers. (ADF 24.) Similarly, UCD's Chief Title IX Compliance Officer, Dennis Shimek, admits he did not speak to the Plaintiffs and that the UCD did not independently investigate the Plaintiffs' complaints. (ADF 25.) At the same time, soon after the OCR complaints were filed, UCD fired Burch for his support of women's wrestling. (ADF 27.)

Soon thereafter, each of the individual Defendants was bombarded by public outcry protesting the removal and continued exclusion of women from the varsity wrestling team. (ADF 28-30, 71-73, 123, 139.) Students, student government, UCD employees, parents, members of the public, and legislators alike expressed their strong concerns that Defendants' actions toward the women wrestlers were unfair and discriminatory through press, emails, protests, and petitions. (ADF 29.) Assemblywoman Helen Thomson challenged UCD's efforts to demote the women wrestlers to club status as "separate but equal" treatment and threatened to withhold a significant source of funding on a UCD building in protest. (*Id.*) Vanderhoef, Franks, Warzecka, and Gill-Fisher were actively involved in responding to various complaints by others about UCD's treatment of the women wrestlers. (ADF 72-73, 93, 123, 136.)

Despite the legal challenges by Plaintiffs and charges by many that removal of women from the wrestling program was sex discrimination, neither Franks nor Warzecka was aware of UCD hiring any outside consultant to evaluate their compliance with gender equity laws. (Response to Franks UMF 19; Response to Warzecka UMF 42.) All Defendants agree that they ignored the advice given by the one gender equity expert they did consult, Donna Lopiano, who suggested that

they convene a "blue ribbon panel" of experts to evaluate whether their treatment of the women wrestlers was lawful. (ADF 74, 94, 125.)

D. Defendants Deny Women Wrestling Opportunities By Insisting that They Wrestle-Off Against Men for a Spot on the Roster.

In May 2001, UCD reinstated the women to the team by placing them on the roster list. (ADF 30.) This reinstatement was meaningless as it occurred after the 2000-2001 wrestling season was over and there were no opportunities for the women to participate. (*Id.*)

In September/October 2001, the OCR, unilaterally and without consultation with Plaintiffs, negotiated with Defendants a "voluntary resolution" of Plaintiffs' OCR complaints. (ADF 31.) Defendants Franks, Warzecka, and Gill-Fisher agreed to reinstate the women on the team as a resolution of Plaintiffs' complaints, conditioned on Plaintiffs' ability to compete against men for slots in the wrestling program using different competitive rules unique to male wrestling. (ADF 32.) Significantly, in reaching this resolution, UCD did not advise the OCR that the women wrestlers had previously only competed against other women. (ADF 33.)

Defendants Warzecka and Gill-Fisher justified the requirement that Plaintiffs compete against men in a try-out using male rules on the purported grounds that spots in the program were limited by roster caps. (ADF 34.) Yet significantly, Warzecka admits that the purpose of roster caps was to limit the number of male athletes so that UCD could address unequal treatment of men and women in the program in terms of participation opportunities. (Response to Franks UMF 8.) Other than UCD's women wrestlers, roster caps have *never* been applied to any women's team at UCD. (ADF 37.) Plaintiffs inquired whether, as females, they would have to comply with a roster cap intended to limit the number of men participating in order to move toward gender equity in participation opportunities. (ADF 35.) The women were told that they would have to comply with the male roster caps. (*Id.*) Franks researched the issue and approved the decision to require that women be counted as participants under the male roster cap, despite agreeing that Plaintiffs' request that there be a separate cap for men and women was not unreasonable. (ADF 96.) UCD's expert testified that forcing women in a women's program to be counted within a roster cap for the men's team and to compete against men to be on the team is the effective elimination of the women's

program. (ADF 36.) In fact, the Title IX expert consulted by Defendants[3] later testified, "in this particular situation, U.C. Davis did something I've never seen before which was to count women as men and to apply the roster cap to the underrepresented sex as part of their designation as male … it just was inconceivable to – I've never seen women counted as men and had roster caps applied that way. … It was pretty amazing." (Response to Franks UMF 8.)

The requirement that Plaintiffs be able to defeat male wrestlers for a spot on the team where they would compete against women only was not only unprecedented in the history of women in the program, it was an impossible hurdle. (ADF 38.) In the fall of 2001, Mansourian, Ng, and Mancuso attended wrestling practices with the team. (ADF39.) At practice, Coach Zalesky was hostile to the women and did not provide them with any coaching, tips, or support. (ADF 40.) Feeling unwelcome and humiliated, Mansourian stopped attending practices. (ADF 41.) Ng wrestled off against Mancuso, who beat her. (ADF 42.) Mancuso then wrestled off against a male wrestler, who beat her. (*Id.*) Unable to compete against college-age male wrestlers, Plaintiffs were eliminated from the varsity wrestling program altogether. (ADF 43.) Thomson called Defendants' resolution of Plaintiffs' complaints "hollow" given the terms of the sham reinstatement. (ADF 44.) Plaintiffs Mansourian, Ng, and Mancuso were devastated by their dismissal from varsity wrestling. (ADF 20.)

Vanderhoef was aware of UCD's actions regarding the elimination of women from the varsity wrestling team and subsequent "reinstatement" of them on unequal terms. (ADF 72, 75; Response to Vanderhoef UMF 8, 11.) Although he offered to allow a blue ribbon panel of experts to evaluate whether UCD's actions with respect to the women wrestlers ran afoul of the law, Vanderhoef never convened such a committee. (ADF 74.) Significantly, despite his having the ultimate authority to overrule the decisions of Warzecka, Franks, or Gill-Fisher, Vanderhoef chose not to do so. (ADF 75.)

E. Defendants Eliminate Women's Wrestling as Gender Inequities Persist in Athletic Opportunities Program-Wide.

Defendants Gill-Fisher, Warzecka, and Franks, and Vanderhoef admit that it was their

[3] This Title IX expert, Donna Lopiano, is now Plaintiffs' expert in this case.

responsibility to ensure gender equity in participation opportunities. (ADF 65-67, 79, 101-102, 126.) Defendants Gill-Fisher, Warzecka, and Franks directly oversaw and/or directed the addition and elimination of teams and participated in gender equity committees. (ADF 83-84, 105-106, 129-131.) These three Defendants regularly monitored the number of varsity athletic participation opportunities provided to men as compared to women relative to their respective enrollments. They prepared, reviewed, and/or verified Equity and Disclosure Act ("EADA") Reports reflecting these figures. (ADF 86, 107, 127.) Defendant Vanderhoef admits that he frequently reviewed the issue of whether UCD was providing men and women equitable athletic participation opportunities as well. (ADF 66.)

UCD's elimination of Plaintiffs' varsity wrestling opportunities occurred against the backdrop of Defendants' long and continuous history of failing to provide equal athletic opportunities for its female students. (ADF 45.) Defendants admit that UCD has never provided females with athletic opportunities that are substantially proportionate to their enrollment. (ADF 46.) Between 1971 and 1996, UCD added no women's teams whatsoever. (ADF 49.) For over 30 years, including since 1996, Defendants have provided men anywhere between 65 and hundreds of more varsity opportunities than they did women relative to enrollment number. (ADF 47.) Rather than ensuring equal treatment of men and women in terms of participation opportunities, Defendants have rejected varsity applications from hundreds of women club team members since 1995 alone. (ADF 48, 50, 62-64, 106.)

Franks, Warzecka, and Gill-Fisher admit that they were providing women with fewer proportionate varsity athletic opportunities than they provided men. (ADF 48, 108.) They understood that adding three teams in 1996 was not enough to address UCD's significant gender equity concerns. (ADF 51.) In 1994, Gill-Fisher stated that UCD's responsibility towards gender equity was incomplete, despite the addition of new teams. (ADF 52.) In 1998, Warzecka acknowledged that a gender imbalance in the athletic department "is not a new issue." (ADF 53.) In October 2000, shortly before women were removed from the wrestling roster, Warzecka acknowledged in a letter to Coach Burch that it "remains a challenge" for UCD to achieve its gender

equity goals. (ADF 109.) Warzecka, Gill-Fisher and Franks either authored or reviewed other internal reports and memos that revealed that women were being provided proportionally fewer athletic opportunities. (ADF 46.).

Despite having actual knowledge that they were not treating male and female students equally in terms of athletic participation opportunities, none of the Defendants took any action to remedy these glaring gender disparities. Warzekca's contention that indoor track for women was added in 1999 is disputed. (ADF 56; Response to Warzecka UMF 2.) Regardless of whether women's indoor track was added as a new sport in 1999 (which it was not), UCD dropped a total of 63 female participation opportunities from its athletic department during the period of 1999 and 2005, enough to field several women's varsity teams. (ADF 57-59.) UCD's expert agrees the drop during this time period was "drastic." (ADF 60.). Notably, although the number of women athletes was decreasing, female student enrollment experienced significant growth. (ADF 61.) From 1999-2005, UCD experienced an increase of over 2,200 women students. (*Id.*) To provide women with as many athletic opportunities as provided to men relative to their enrollment, UCD would have had to add at least 100 additional opportunities for women athletes in any given year between 1999 and 2005. (*Id.*) Between 1995 and 2003, Defendants did not even communicate to female students that they could seek the addition of a new women's varsity sport, or the process for doing so. (ADF 62.)

Despite persisting gender inequities and further elimination of 64 varsity slots for women, Defendants did not add female varsity athletic opportunities until 2005, after they removed women from the varsity wrestling program and Plaintiffs filed suit. (ADF 54, 63, 110.) Defendants' addition of women's varsity golf added only seven opportunities for women at UCD. (ADF 55.) Notably, UCD did not have an existing women's golf team. Defendants had to spend a year recruiting before they could fill at team. (ADF 55.) At the same time, Defendants rejected five out of six applications received from women club teams that sought varsity status. In so doing, the individual Defendants denied hundreds of interested female students the chance to play varsity sports. (ADF 64.)

//

V. ARGUMENT

A. Summary Judgment Should Be Denied Because Settled Law and Disputed Facts Establish A Violation By Each Defendant of Plaintiffs' Constitutional Rights.

Defendants have not met their burden of establishing with undisputed facts that their removal and permanent exclusion of women from the varsity wrestling program did not violate Plaintiffs' constitutional rights, especially given the gender disparities in athletic opportunities program-wide. Defendants may not prevail on summary judgment on the equal protection claim if a material issue of fact exists for trial. *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995). Federal Rules of Civil Procedure, Rule 56(c) states that summary judgment may be rendered only if

the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

All such evidence submitted must be interpreted in the light most favorable to the non-moving parties (here, Plaintiffs Mansourian, Ng and Mancuso). *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 262 (1986); *Gammoh v. City of La Habra*, 395 F.3d 1114, 1122 (9th Cir. 2005). All evidence submitted on their behalf must be believed and all justifiable inferences must be drawn in their favor. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Easter v. American West Fin.*, 381 F.3d 948, 957 (9th Cir. 2004). The nonmoving party need not produce evidence in a form that would be admissible at trial in order to avoid summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). However, evidence submitted by the moving party that would be inadmissible at trial may not be considered on a motion for summary judgment. *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007); *Orr v. Bank of Am., NT & SA*, 285 F.3d 764, 773 (9th Cir. 2002).

At this stage, a court must not weigh the evidence or decide the truth of the matter, but rather, determine whether there is a genuine dispute for a jury to decide at trial. *Lyons v. England*, 307 F.3d 1092, 1117 (9th Cir. 2002) (citing *Glenn K. Jackson Inc. v. Roe*, 273 F.3d 1192, 1196 (9th Cir. 2001)). "[T]he issue of material fact required by Rule 56(c) … to entitle a party to proceed to trial is not required to be resolved conclusively in favor of the party asserting its existence; rather, all that is

required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or a judge to resolve the parties' differing versions of the truth at trial." *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 288-89 (1968); *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987).

Finally, each of the Defendants – not Plaintiffs– has "the burden of showing the absence of a genuine issue as to any material fact." *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970). As set forth below, none of the Defendants have met this burden. Summary judgment should be denied with respect to each Defendant, accordingly.

1. At the Very Least, Plaintiffs Raise Genuine Issues of Material Fact as to Whether Each Defendant Violated a Constitutional Right.

a. Defendants' characterization of the claim at issue here is disputed.

Defendants' motions are premised on the argument that the Constitution does not guarantee women "special" treatment, including a guaranteed spot on a men's athletic team. Plaintiffs sought neither. The undisputed and disputed facts of this case, weighed in Plaintiffs' favor, establish that: (1) Plaintiffs were members of UCD's varsity wrestling program, competing against other women, just as women had for years (ADF 2-15); (2) Warzecka and Gill-Fisher removed Plaintiffs from the varsity wrestling program based on their gender, and Franks and Vanderhoef ratified this decision (ADF 18, 75, 78, 96, 112, 133-143); (3) Franks, Warzecka, and Gill-Fisher ensured the permanent exclusion of Plaintiffs from the program by imposing the discriminatory requirement that they wrestle off *men* for a spot on the team, and Vanderhoef ratified this decision (ADF 75, 98, 122, 135-136); and (4) during this same period, Defendants were not treating women equally with respect to athletic opportunities program-wide and were cutting opportunities in other women's sports as well. (ADF 45-46, 57-61.) These facts establish a violation of the equal protection clause of the United States Constitution, which prohibits sex discrimination in athletic programs.

The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution mandates that a state actor shall not "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The Equal Protection Clause is enforced through 42 U.S.C. § 1983 ("section 1983"), which provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, ….

Section 1983 provides a private right of action for damages to individuals who are deprived of "any rights, privileges, or immunities" protected by the U.S. Constitution or federal law by any person acting under the color of state law. 42 U.S.C. § 1983. As such, state officials may be held liable under section 1983 if there is, at minimum, an underlying constitutional tort. *Johnson v. City of Seattle*, 474 F.3d 634, 638-39 (9th Cir. 2007) (citing *Monnell v. Dep't of Soc. Serv. of the City of New York*, 436 U.S. 658, 691 (1978)).

Defendants were all state actors within the meaning of the statute. (ADF 1.) Plaintiffs contend and have presented evidence to establish that the Defendants violated their equal protection rights in three ways. First, Defendants have deprived Plaintiffs equal protection of the law by denying them an equal opportunity to participate in varsity sports. Defendants, who decide which teams to add and which teams to eliminate, afforded men more varsity opportunities proportionate to their enrollment for decades through the time of Plaintiffs' graduation. (ADF 45-49, 57, 61.) Second, Defendants purposefully removed Plaintiffs from the varsity program based on gender. Third, Defendants permanently excluded Plaintiffs from the varsity wrestling program based on their gender. Although Plaintiffs sought reinstatement to the program so they could continue competing against women, Defendants ensured their permanent exclusion from the program by requiring that they wrestle off against men for a spot in the program using different rules unique to male wrestling. (ADF 75, 98, 122, 135-136.) Notably, Defendants did not remove any men from the roster in 2000 and they did not impose comparable obstacles on male participation in 2001, by requiring, for example, that they wrestle off against larger football players for a spot in the wrestling program. Plaintiffs contend that this gender-based mistreatment deprived them of equal protection of the law.

The United States Supreme Court and the Ninth Circuit have affirmed that the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution creates the right to

be free from purposeful sex discrimination by state actors. This prohibition extends to various forms of sex discrimination in both the spheres of employment and education. *Mississippi Univ. of Women v. Hogan*, 458 U.S. 718, 731 (1982) (denial of school admission to male applicants); *United States v. Virginia*, 518 U.S. 515, 519 (1996) (denial of admission of female applicants); *Bator v. Hawaii*, 39 F.3d 1021, 1029 (9th Cir. 1994) (sexual harassment in employment); *Oona v. McCaffrey*, 143 F.3d 473, 474-75 (9th Cir. 1998) (peer sexual harassment in schools); *Lindsey v. Shalmy*, 29 F.3d 1382, 1386 (9th Cir. 1994) (sex discrimination at work shown by denial of promotion in favor of male candidate).

The availability of this constitutional claim for Plaintiffs challenging gender-based decisions in high school and college athletics is well-settled. *See, e.g., Haffer v. Temple Univ.*, 678 F.Supp. 517, 523, 526-27 (E.D. Pa. 1987), and cases cited therein; *Brenden v. Indep. School District*, 477 F.2d 1292 (8th Cir. 1973) (striking regulation barring girls from competing against boys in certain sports); *Communities for Equity v. Michigan High School Athletic Ass'n*, 459 F.3d 676, 693-95 (6th Cir. 2006) (affirming district court judgment for Plaintiffs on Plaintiffs' Equal Protection and Title IX claims challenging high school athletic association's decision to change scheduling of female athletes seasons); *Alston v. Virginia High School League, Inc.*, 144 F. Supp. 2d 526, 533-34, 538 (W.D. Va. 1999) (denying Defendants' motion for summary judgment on Plaintiffs' 1983 claims in case involving schedule change for women's teams but not men's teams.) The case of *Haffer v. Temple University* is directly on point. The court there denied defendants' motion for summary judgment on an equal protection claim brought by female students who alleged that defendants offered men more intercollegiate athletic opportunities than female opportunities proportionate to enrollment, and thus deprived women of an equal opportunity to participate. 678 F. Supp. at 523, 526-27.

In fact, the Ninth Circuit and other Circuits have repeatedly affirmed that there is an important government interest in promoting equality of opportunity and in redressing past discrimination against women in athletics, even if this means decreasing opportunities for men. *Clark v. Arizona Interscholastic Ass'n*, 695 F.2d 1126, 1131 (9th Cir. 1982) (holding that the policy

of excluding boys from a girls high school volleyball team did not violate the Equal Protection clause because it was a permissible means of attempting to promote equality of opportunity for girls in Arizona interscholastic sports and redressing past discrimination. Noting in dicta that boys would have an "undue advantage" if allowed to compete against women for positions on the volleyball team); *Neal v. Bd. of Trs. of Cal. State Univ.*, 198 F.3d 763, 769-72 (9th Cir. 1999) (rejecting constitutional challenge brought by male wrestlers whose team was eliminated by school attempting to achieve gender equity); *Miami Univ. Wrestling Club v. Miami Univ.*, 302 F.3d 608 (6th Cir. 2002) (holding that men's rights not violated when institution eliminates a male team to achieve gender equity in compliance with Title IX.)

The Supreme Court has held that a party seeking to uphold a gender-based classification "must carry the burden of showing an 'exceedingly persuasive justification' for that classification." *Mississippi Univ. for Women*, 458 U.S. at 724. The state must show that the sex-based classification serves an important governmental objective and that its means are substantially related to the achievement of those objectives. *Id.* Here, Defendants present *no* evidence or argument to justify their failure to ensure that women have equal opportunities to participate in intercollegiate athletics, or their exclusion of women from the wrestling program. Nor do they contend that the elimination of the women's intercollegiate wrestling opportunities at UCD served an important governmental objective. Defendants similarly make no effort to establish a direct relationship between an important government objective and the elimination of the female wrestling opportunities. Indeed, Defendants cannot justify the elimination of female wrestling opportunities, where they were eliminating (rather than adding) female opportunities elsewhere in the program. (ADF 57-61.)

Instead of providing a legal justification for their removal and exclusion of Plaintiffs from the wrestling program, as they must, Defendants deny any involvement with the removal of the women from the roster in 2000. This assertion is not only disputed, it is not determinative here where Defendants admittedly required Plaintiffs to wrestle off against men for their reinstatement. (Response to Franks UMF 8, Gill-Fisher UMF 11, Vanderhoef UMF 7, Warzecka UMF 18.)

Defendants next mischaracterize Plaintiffs' claim as one for preferential treatment that is not

constitutionally protected. They argue that allowing women on the team when they lacked the skills to beat men would have been discriminatory against men trying to make the team. However, the ability of women does have to be equal to that of men where they compete against women using different rules. (Response to Franks UMF 31.) To the extent that Defendants suggest that the women were not skilled even as competitors against women, this is disputed, not to mention irrelevant. (Response to Warzecka UMF 6, 8, 20, 46, 47.) Warzecka and UCD's experts both agree that the varsity program includes athletes of varying skills levels. (Response to Warzecka UMF 6.) Finally, Defendants suggest that Plaintiffs were never "true varsity" athletes in the program and that they sought either the creation of a new team or an exception for them in the roster cap of the men's team. Each of these contentions is disputed. (Response to Franks UMF 8, Gill-Fisher UMF 10.)

Defendants do not cite any other cases which actually support their position. Their reliance on *Lee v. City of Los Angeles*, 250 F.3d 668 (9th Cir. 2001) is curious, at best. There, the Court, applying rational basis review to a disability discrimination claim found there was no violation of the equal protection clause. *Id*. at 687. *Lee* does not discuss qualified immunity, or even gender discrimination, and therefore, has no relevance to the matters at issue here. *Force v. Pierce City R-VI School Dist.*, 570 F. Supp. 1020, 1031 (W.D. Mo. 1983) is similarly distinguishable. First, this non-precedential district court case does not address qualified immunity and applied an outdated standard of review to a claim of gender discrimination. *Id*. at 1029. Additionally, unlike the plaintiff in *Force*, who sought the right to spot on the boys' football team without a try-out, Plaintiffs sought neither the right to join a men's team nor preferential treatment.

Defendants then proceed to vaguely argue that there is no constitutional right to participate in school athletics, citing *Gonyo v. Drake University*, 837 F. Supp. 989 (S.D. Iowa 1993) and *Miami University Wrestling*, 302 F.3d 608. Not only are Plaintiffs' claims here far more nuanced than this proposition, these cases are factually distinguishable. In *Gonyo*, plaintiffs were male wrestlers challenging the constitutionality of their team's elimination. 837 F. Supp. at 991. The court denied plaintiffs' motion for preliminary injunction ordering defendants to reinstate men's wrestling, finding that injunctive relief might undermine the remedial purpose of Title IX to protect women's

athletic opportunities and encourage greater participation rates for women. *Id*. at 995-996. Similarly, in *Miami University Wrestling Club*, the court simply affirmed the well-settled law that a school does not violate a male student's constitutional equal protection rights by eliminating a male sports team in the effort to comply with Title IX. 302 F.3d at 614-616.

Defendants' arguments demonstrate the inappropriateness of summary judgment in this case. Each of their contentions is a gross distortion of the facts of this case and contradicted by the plethora of disputed facts that defeat summary judgment.

b. Defendants' reliance on Title IX jurisprudence is misplaced.

Defendants' reliance on regulations implementing Title IX of the Education Amendments of 1972 and interpreting case law does not support their motions. Different standards apply to a Title IX and equal protection claim. *See, e.g., Jeldness v. Pearce*, 30 F.3d 1220, 1226-27 (9th Cir. 1994) (citing *Canterino v. Wilson*, 546 F. Supp. 174, 210 (W.D. Ky. 1982), *vacated on other grounds*, 869 F.2d 948 (6th Cir. 1989)). Even if there were no Title IX violations, which there are, it does not mean that the Defendants' actions were in all respects lawful. *See, e.g., Mississippi Univ. for Women*, 458 U.S. at 732 (although Title IX expressly permitted traditionally single-sex university, sexual segregation at the university violated the 14th amendment).

Defendants advance the unremarkable proposition that Title IX does not require that a school provide the same sports for men and women and allows a school to determine which sports to sponsor. Plaintiffs do not dispute this contention. This is, however, entirely irrelevant to whether UCD's actions in removing and demoting existing female varsity athletics were constitutional. Defendants then argue that Title IX does not require the establishment of a separate team for a few interested women, citing *Cohen v. Brown University*, 991 F.2d 888, 898 (1st Cir. 1993) and *Roberts v. Colorado State Board of Agriculture*, 998 F.2d 824, 830 n.10 (10th Cir. 1993). Again, Defendants' argument is misplaced. Here, Plaintiffs sought reinstatement back into the program on the same terms, not the creation of new varsity opportunities.

The misconduct actually alleged by Plaintiffs is sufficient to establish a violation of the equal protection clause. Even if Defendants had never eliminated women wrestling opportunities in

particular, which they did, their refusal to provide men and women equal athletic opportunities would be sufficient to support Plaintiffs' constitutional claim. *Haffer*, 678 F. Supp. at 526-27 (E.D. Pa. 1987). Because Plaintiffs raise sufficient disputed facts on this motion to support their claims and Defendants' Title IX arguments are off-base, no Defendant is entitled to summary judgment.

2. Plaintiffs Raise A Genuine Issue of Material Fact With Respect to The Individual Liability of Each Defendant.

Unable to avoid facts giving rise to a constitutional violation, each of the Defendants try to side-step personal liability for the misconduct at issue this case. However, the record contains sufficient evidence for a jury to find that Defendants Vanderhoef, Franks, Warzecka, and Gill-Fisher acted with an unconstitutional motive. "To survive summary judgment on the issue of motive, the plaintiff must "put forward specific, nonconclusory factual allegations that establish improper motive." *Jeffers v. Gomez*, 267 F.3d. 895, 907 (9th Cir. 2001) (quoting *Crawford-El v. Britton*, 523 U.S. 574, 598 (1998)); *Bingham v. City of Manhattan Beach*, 341 F.3d 939, 948-49 (9th Cir. 2003) (holding that plaintiff needs evidence sufficient to permit a reasonable trier of fact to find by a preponderance of the evidence that the individual Defendant's conduct was motivated by gender discrimination.)

Defendants' singled Plaintiffs out for mistreatment based on the gender by removing them, not men, from the program in 2000. They also imposed discriminatory barriers on Plaintiffs and other women to prevent their future participation in the program and without imposing comparable barriers on men. They were also personally responsible for deciding that UCD should provide Plaintiffs and other women fewer opportunities than men to participate in varsity athletics program-wide. Notably, no Defendant has presented evidence or even argument that their conduct served an important government interest. The following disputed and undisputed facts establish intentional discrimination by each Defendant sufficient to defeat summary judgment:

a. Disputed Facts Establish Defendant Vanderhoef's Liability.

Chancellor Vanderhoef contends that he should not be held liable for the claims at issue in this case because although he was aware of the alleged misconduct here, he was not directly involved in decision-making. Vanderhoef relies on the wrong standard of liability for constitutional

claims. In a binding precedential decision establishing the standard for qualified immunity of supervisors, the Ninth Circuit has held that that "direct, personal participation is not necessary to establish liability for a constitutional violation." *al-Kidd v. Ashcroft*, 580 F.3d 949, 965 (9th Cir. 2009). The Court explained:

> Supervisors can be held liable for the actions of their subordinates (1) for setting in motion a series of acts by others, or knowingly refusing to terminate a series of acts by others, which they knew or reasonably should have known would cause others to inflict constitutional injury; (2) for culpable action or inaction in training, supervision, or control of subordinates; (3) for acquiescence in the constitutional deprivation by subordinates; or (4) for conduct that shows a "reckless or callous indifference to the rights of others." *Larez v. City of Los Angeles*, 946 F.2d 630, 646 (9th Cir.1991) (internal quotation marks omitted). Any one of these bases will suffice to establish the personal involvement of the defendant in the constitutional violation. *Id*. at 965.

Vanderhoef admits that he was responsible for UCD's athletics program and compliance with gender equity requirements. (ADF 65, 67.) He admits that he tracked UCD's Title IX compliance and met frequently with officials regarding gender equity. (ADF 66.) He admits that at some point he was aware that Plaintiffs and other women had been removed from varsity wrestling roster and that the other Defendants subsequently "reinstated" the Plaintiffs on unequal terms. (ADF 71.) He also admits that he knew that many people challenged these actions as discriminatory, including Plaintiffs and their Assemblywoman Helen Thomson. He admits that he was actively involved in responding to Thomson's complaint. (ADF 72-73.) For example, although he offered to convene a blue ribbon panel of experts to evaluate whether UCD's actions with respect to the women wrestlers ran afoul of the law, Vanderhoef never convened such a committee. (ADF 74.) Significantly, despite Vanderhoef having the ultimate authority to overrule the decisions of Warzecka, Franks, or Gill-Fisher to remove women from the roster and to impose discriminatory conditions for reinstatement, he chose not to do so. (ADF 75.) Vanderhoef's limited contact with some of the Plaintiffs is not material to the issue of his liability where these facts established that he ratified discriminatory conduct, which deprived Plaintiffs of equal protection of law. *al-Kidd*, 580 F.3d at 965.

Vanderhoef, like Franks, Warzecka and Gill-Fisher, contends that he reasonably relied on

UCD's voluntary resolution with OCR as a lawful resolution of Plaintiffs' claims arising under Title IX of Education Amendments of 1972. (Response to Vanderhoef UMF 21.) However, the OCR did not reach any conclusion that Defendants' actions were lawful, even applying Title IX standards. (ADF 31.) Even if there were no Title IX violations, which there are, it does not mean that the Defendants' actions were in all respects lawful. *See, e.g. Mississippi Unive. for Women,* 458 U.S. at 732. As discussed above, different standards apply to Title IX and equal protection claims. Moreover, the OCR did not and cannot consider constitutional questions. *Garber v. City of Clovis*, 698 F. Supp. 2d 1204, 1214 (E.D. Cal. 2010).

Plaintiffs also have raised a genuine issue of material fact as to the adequacy of the OCR process to resolve any claims, much less an equal protection claim. The OCR failed to interview the Plaintiffs, other women wrestlers or Burch before entering into a Voluntary Resolution Plan with UCD. (ADF 24, 31.) Moreover, Defendants never advised The OCR that the women previously competed against women in the program, not men. (ADF 33.) Without knowledge of this significant fact, The OCR agreed to a resolution premised on the inaccurate assumption that Plaintiffs were being reinstated on the same terms.

Despite his responsibility, Vanderhoef took no affirmative steps to ensure that the athletic department complied with laws requiring gender equity. (ADF 68.) Instead, he simply trusted those around him. (ADF 69.) Thus, Vanderhoef knowingly refused to terminate the acts of his subordinates despite serious concerns about the constitutionality of their acts. He failed to supervise them and ultimately acquiesced to their constitutional violations. Weighing the facts in Plaintiffs' favor, the Court should find sufficient facts to take to a jury regarding Vanderhoef's individual liability. *al-Kidd*, 580 F.3d at 965.

b. Disputed Facts Establish Defendant Franks' Liability.

Franks' attempts to distance himself from the intentional discrimination at issue in this case are contradicted by his admissions, and thus preclude summary judgment. He contends that he had no involvement in the day to day operation of UCD's athletic teams, or in the selection of students to fill team rosters or receive grants in aid. (Response to Franks UMF 2, 3.) However, he was charged

with oversight of the athletic department and met with the Athletic Director weekly to discuss issues arising in the department. (ADF 76-78.) He also admits that he was responsible for ensuring that men and women were treated equally in the athletic department. (ADF 79, 83, 84, 87.) It was his job to ensure that coaches or his subordinates did not rely on discriminatory criteria in selecting team members or grant in aid recipients. (Response to Franks UMF 3.)

Franks denies that he intentionally discriminated against Plaintiffs, contending that he "had no involvement" in determining who would fill the spots on the wrestling team roster in the fall of 2000 or in try-outs for the team in the fall of 2001. (Franks MPA (Dkt. #434) 14.) However, his denial is a disputed material fact. Franks assumed the lead role on behalf of UCD in responding to Plaintiffs' discrimination complaints about: (1) their removal from the team; (2) the requirement that they wrestle off against men for their reinstatement; (3) the inclusion of women in roster caps; and (4) the attempt to "demote" them to club status without significant varsity benefits. (ADF 91.)

Franks argues that it cannot be found by a jury that he intentionally discriminated against Plaintiffs because his response to the OCR complaint "can hardly be classified as "deliberate indifference." (Franks MPA (Dkt. #434) at 16.) That Franks responded to a complaint is not the determinative factor for a jury. Rather, the jury must evaluate how he responded to this complaint. Plaintiffs present sufficient evidence to establish that Franks responded to Plaintiffs' complaint with additional acts of gender discrimination, and thus, defeat summary judgment. (Response to Franks UMF 6, 7.)

First, rather than place the women back on the roster immediately after learning that they had been removed, Franks suggested that they form a club team despite acknowledging that this would result in the loss of significant varsity benefits. (Response to Franks UMF 5, 16; ADF 11-14.) Any suggestion that the women wanted a demotion to club status is disputed. (Response to Franks UMF 14.) Notably, Franks did not suggest that any existing male member of the varsity wrestling program move to club status. Franks argues that his offer of a club team to Plaintiffs was appropriate because "the primary process" for the development of a varsity team was development at the club level first. Not only is Defendants' characterization of this supposed process disputed

(Response to Franks UMF 21), it is also disputed because Plaintiffs were *already* members of the varsity program and thus were not seeking to develop *new* varsity opportunities. (Response to Franks UMF 20, 21.)

Second, Franks' testimony that the women were initially removed from the roster because of a "misunderstanding" is disputed. While Franks placed the women back on the wrestling roster in May 2001 after the season was completed, this did not resolve Plaintiffs' complaints in an equitable manner. The reinstatement occurred after the 2000-2001 wrestling season was over and there were no opportunities for the women to participate. (Response to Franks UMF 9; ADF 30, 38.)

Third, Franks approved the decision to apply a single roster cap that was inclusive of men and women, even though he believed Plaintiffs' position that men should be within a separate cap was reasonable. He was also unable to articulate a reason for this decision other than that a separate cap was purportedly not required. (ADF 96.) When pressed, Franks admitted that he did not personally contact any gender equity experts on this point and admitted that he had no idea whether any of them supported his decision on roster caps. (Response to Franks UMF 15.) Indeed, UCD's own expert decried the application of a single roster cap inclusive of female opportunities because this would lead to the effective elimination of the women's program. (Response to Franks UMF 8; ADF 36.)

Fourth, Franks responded to Plaintiffs' discrimination complaint by imposing on them the impossible requirement that they beat men using different rules for an opportunity in the program, despite the fact that they competed only against women. (ADF 98.) This is akin to forcing female track athletes to compete against male track athletes in their events as a condition of the participation in the program. While Franks imposed new and impossible burdens on the participation of women in the program, he did not change the terms of male participation by, for example, forcing them to pin much larger football players for a spot on the team. While Franks contends that he had "no involvement" with try-outs for the wrestling team in the fall of 2001, he admitted that he meant only that he was not physically present during the try-out. (Response to Franks UMF 24, ADF 98.) Franks approved UCD's decision to impose the requirement that Plaintiffs wrestle off against men

for their reinstatement in the program. (ADF 98.)

Franks suggests that he should not be held liable because he did not have multiple or substantive contacts with all of the Plaintiffs. However, his liability does not hinge on his direct contact with Plaintiffs. *al-Kidd*, 580 F.3d at 965 ("direct, personal participation is not necessary to establish liability for a constitutional violation"). Franks was involved in and approved decisions that harmed all of the Plaintiffs, including UCD's removal of the women from the varsity wrestling roster in 2000 and the decisions requiring a wrestle off against men in 2001. (Response to Franks UMF 3, 29, 34; ADF 97, 98.) Similarly, Franks' purported lack of direct contact with the OCR is of no import where he admits that he directed UCD's response to the OCR complaint. (Response to Franks UMF 23; ADF 95, 97.)

Finally, a jury may find that Franks intentionally discriminated against Plaintiffs by ensuring the elimination of female wrestling opportunities at a time when he was not providing women equal opportunities program-wide. Franks admits that he reviewed UCD's proposed addition or elimination of teams and that he was responsible for ensuring that UCD was providing women with equitable athletic participation opportunities. (ADF 84, 87.) Nonetheless, Franks took no action when faced with memos expressing serious concern about UCD's compliance with gender equity laws in terms of participation opportunities or EADA reports that confirmed that UCD was short by hundreds of female opportunities. (ADF 86, 88, 46, 47, 50, 57-59, 61; *see also* Evid A:48 at 11 & appendix A to ADF.) While Franks and the other Defendants revere UCD's club sport program, club sports do not offer the vast and significant benefits of the intercollegiate/varsity sports program. (Response to Warzecka UMF 3.) Franks ignored the advice of a gender equity expert, Donna Lopiano, to convene a panel of experts to evaluate the lawfulness of his actions. (ADF 14.) Indeed, as Plaintiffs were being excluded from wrestling, EADA reports (that Franks carefully reviewed) revealed that the athletic department was cutting dozens of female opportunities in other women's sports despite an increase in female student enrolment. (ADF 57-61.) Franks' failure to ensure that female students, including Plaintiffs, had an equal opportunity to participate in varsity athletics is sufficient to establish a violation of the equal protection clause. *Haffer*, 678 F.Supp. at 526-27.

Further, for the reasons set forth above, the fact that UCD reached a resolution of Plaintiffs' Title IX claims with the OCR does not defeat evidence of intentional discrimination by Franks with respect to Plaintiffs' constitutional claims. (ADF 24, 31-33; Response to Franks UMF 23.) Indeed, if proven at trial, the many facts cited above are sufficient to establish that Franks violated the constitutional rights of Plaintiffs.

c. Disputed Facts Establish Defendant Warzecka's Liability.

Warzecka has been responsible for the overall direction, leadership, and management of the UCD Intercollegiate Athletic program since 1995. (ADF 101.) Warzecka was responsible for ensuring gender equity in the athletic department. (ADF 102, 104-106.) Warzecka was well aware that UCD was offering women far fewer intercollegiate participation opportunities than it did men based on these EADA Reports and other documents reviewed or prepared by him. (ADF 46, 47, 50, 57-9, 61, 107, 108; *see also* Evid A:48 at 11 & appendix A to ADF.) Indeed, in October 2000, shortly before women were removed from the wrestling roster, Warzecka acknowledged in a letter to Coach Burch that it "remains a challenge" for UCD to achieve its gender equity goals. (ADF 109.) While Warzecka admits that the addition of opportunities every 4-6 years was required of UCD to achieve gender equity compliance (ADF 110), he failed to respond to the drastic reduction in female opportunities over a nearly ten year period including the elimination of female wrestling opportunities. These disputed facts alone are sufficient to defeat summary judgment on Plaintiffs' claim that Warzecka intentionally treated them differently because of their gender. *Haffer*, 678 F.Supp. at 526-27.

Warzecka admits that he knew that women were participating in the varsity wrestling program competing against women. (ADF 111.) Yet, in October 2000, Warzecka ordered Burch to remove the women wrestlers, which resulted in their loss of significant varsity benefits. (ADF 112, 116-117, 119-120). Burch denies Defendants' contention that the women were removed because they were supposed to be counted under a single roster cap for the program. (Response to Franks UMF 8.) This disputed fact lies at the very heart of this case. Warzecka ordered the removal of the women from the roster because they were women and only later relied on caps to justify his actions. (Response to Warzecka UMF 4, 15, 17.) Warzecka admits that he later confirmed with the women

directly that they were no longer part of the program. Plaintiffs testified that he did so in a loud, angry and intimidating manner. (ADF 116-117.) Notably, Warzecka did not order the removal of any men from the program. Nor did he suggest that any men from the roster join a club team, as he suggested to the female Plaintiffs. (ADF 119-120.) Warzecka's removal of women from the roster (ADF 112, 116-117) and his suggestion that they accept a demotion to the club level instead (ADF 118-120) are disputed facts that are also sufficient to defeat summary judgment. (*See* Response to Warzecka UMF 3, 4, 13, 30-33.)

A jury may also find that the insistence of Warzecka and other Defendants in 2001 that Plaintiffs wrestle off against men using male wrestling rules as a condition of their continued participation in the program was intentional gender discrimination. (ADF 122; Response to Warzecka UMF 4.) For the reasons set forth above, the fact that UCD's unilateral agreement with the OCR with respect to Plaintiffs' Title IX claims contained this requirement does not absolve Warzecka's constitutional misconduct, especially where Warzecka admits that he does not recall advising the OCR that women previously competed against women, not men. (ADF 33.)

Warzecka contends that the requirement that they wrestle off against men was the only way to ensure that the most skilled wrestlers fell within the single roster cap for the program. He also argues that the requiring Plaintiffs to wrestle off against men did not deprive them of equal protection of the law because men were also required to try out for a spot in the varsity program. (Warzecka MPA (Dkt. #452-3) at 12.) Yet, men were required to wrestle off against their own gender while the women were required to wrestle off against the opposite gender.

Like Gill-Fisher, Warzecka even goes so far as to claim that UCD would have been engaging in reverse discrimination against men if Plaintiffs were allowed on the team without the skills to beat men. This argument fails, however, because it was Warzecka's decision to impose a single roster cap that included female members of the team, contrary to the gender equity purposes of the cap. (ADF 113-115; Response to Warzecka UMF 21, 22.) Further, UCD has *never* previously or since imposed roster caps on its women's intercollegiate varsity teams. (Response to Franks UMF 8, Response to Warzecka UMF 15.)

Nothing prevented Warzecka or anyone else at UCD from simply allowing women the continued opportunity to wrestle by not counting women members in a men's roster cap. Plaintiffs dispute that UCD's wrestling program was a "men's team" or that they wanted a guaranteed spot on a men's team. They wanted to continue to compete against women using rules unique to women's wrestling. Thus, Warzecka's contention that he did not engage in sex discrimination because he also required men to wrestle off men for a spot on the team rings hollow. The ability of women does not have to be equal to that of men where they compete against women and use different competitive rules. (Response to Franks UMF 31). At a time when Warzecka approved the elimination of female participation opportunities program-wide (ADF 112, 114, 122), disputed facts establish that Warzecka purposefully changed the terms of Plaintiffs' previous participation in order to exclude them from the varsity program. Again, Warzecka did not similarly require male wrestlers to compete against football players or similarly disproportionately skilled athletes. These disputed facts also preclude summary judgment.

d. Disputed Facts Establish Defendant Gill-Fisher's Liability.

Defendant Pam Gill-Fisher was the Senior Associate Athletic Director with significant responsibility in the intercollegiate athletic department. She was deeply involved in gender equity issues in the department and relied on by the other Defendants for her purported expertise. (ADF 126-132.) Like other Defendants, she was well aware of the failure of UCD to provide women with the same opportunity to play varsity sports as it did men. (ADF 46, 47, 50, 57-59, 61, 127, 107, 108; *see* Evid A:48 at 11 & Appendix A to ADF for reports reflecting inequities).) These disputed facts are sufficient to defeat summary judgment on Plaintiffs' equal protection claim. *Haffer*, 678 F. Supp. at 526-27.

Gill-Fisher also influenced the decision to remove women from the wrestling program and terminate the coach once he complained of sex discrimination. (ADF 133, 134.) Gill-Fisher's unusual hostility towards the women wrestlers was a factor in the steps taken by UCD that ensured that women no longer had the opportunity to wrestle at the varsity level. (ADF 134.) Significantly, while Gill-Fisher contends that she had "no involvement" with wrestling try-outs in 2001, she was a key member of the decision making team that forced the women to wrestle off against men for a spot

on the men's wrestling team. (ADF 135; Response to Gill-Fisher UMF 33.) After the women were removed from the roster by UCD administrators, Gill-Fisher was also integral to UCD's response, which included the decision to refuse to allow women to be reinstated on the team on equal terms. (ADF 136.) For example, she had numerous meeting with Franks and Warzecka, prepared memoranda, gathered related facts, and took follow-up steps. (ADF 137.) She met with the OCR representatives and was one of the decision-makers who developed UCD's resolution with the OCR. (ADF 138.) Finally, she went so far as to meet with local Assemblywoman Helen Thompson to present UCD's version of events. (ADF 139.)

Gill-Fisher admits that she thought the women should be demoted to a club level, because in her opinion that was a preferable method to develop the sport of women's wrestling. Her post ad-hoc justification for her actions is not credible and not relevant, especially where disputed facts establish that she refused to actually review any materials Coach Burch provided her about women's wrestling and otherwise had no knowledge of the level of interest in women's wrestling. (Response to Gill-Fisher UMF 9, 10.) Gill-Fisher's inadmissible opinion about available competition for women wrestlers is also disputed. (Response to Gill-Fisher UMF 9.) Gill-Fisher's opinions assumed the disputed contention that the Plaintiffs were not already varsity athletes. (ADF 4.) The fact that Gill-Fisher never advocated for the demotion of less skilled male athletes in the program to the club level or otherwise urged their exclusion from the program raises a genuine issue of as to whether she intentionally singled Plaintiffs out for mistreatment based on their gender.

Like Warzecka, Gill-Fisher's attempts to justify the wrestle off requirement by relying on UCD's roster management program and by suggesting that it would have been reverse discrimination to allow women in the program who were not skilled enough to beat men. These arguments are red herrings. Under a separate male cap, male athletes would not have been impacted whatsoever by female participation in the program. Defendants themselves imposed a single cap because it wanted to justify the wrestle off, not because a single cap was required by any law or policy.[4] UCD has never imposed roster caps on women's opportunities because its purpose for the

[4] Gill-Fisher's testimony that she supposedly relied on unnamed experts in reaching her opinions (continued on next page)

caps was to reduce the number of male opportunities, which far outnumbered those afforded to women proportionate to their respective enrollment. Additionally, as noted above, Plaintiffs wanted to compete against women, not men. Their ability to compete against men was irrelevant. Again, the failure of UCD to advise OCR of this fact is but one reason (among many) to discount her purported reliance on the agreement reached with OCR in taking her actions. (ADF 33.)

Gill-Fisher relies heavily on her history as a female athlete and other accolades to suggest that she did not intentionally discriminate against Plaintiffs. These facts are not material, given the competent evidence that establishes Gill-Fisher's misconduct toward Plaintiffs based on gender. If anything, it simply explains why UCD administrators relied on Gill-Fisher to inform their understanding of gender equity and the decisions in this case. (ADF 140.) Her insistence that women should be required to wrestle off against men in order to continue wrestling at UCD was a primary reason UCD's created this new requirement. (ADF 141.)

Finally, Gill-Fisher's limited contact with some of the Plaintiffs is not material to the issue of her liability where these facts establish that she wanted the women removed from the varsity program and imposed the discriminatory wrestle off requirement. Plaintiffs raise a genuine issue of material fact as to Gill-Fisher's intentional discrimination and her motion should be denied accordingly.

B. Defendants' Qualified Immunity Defense Does Not Pass Muster on Summary Judgment.

Defendants seek summary judgment on the alternative ground that they are entitled to qualified immunity from suit. They argue that Plaintiffs seek the vindication of rights that were not clearly established in 2000. They also contend that they acted reasonably in believing that their actions were lawful. Defendants' arguments fall flat in the face of years of precedent affirming the constitutional right to be free from sex discrimination, even in athletics. They also contradict a plethora of undisputed and disputed facts, including Defendants' own admissions about their

---

(Footnote continued from previous page)
about caps lacks foundation and is inadmissible hearsay. (*See* Plaintiffs' Objections to Defendant's Evidence Submitted in Support of Reply Brief and Amended Objections to Defendant's Evidence Submitted in Support of Motion For Summary Judgment, filed herewith.)

knowledge of the law (ADF 80-82, 103, 128), facts establishing ample notice to Defendants that their actions were unlawful (ADF 28-29, 45-47, 51, 54, 71, 93-94, 123-124), and facts that would allow a trier of fact to find their reliance on the OCR resolution unreasonable (ADF 24-27, 30-38, 70, 96, 122, 134, 137). Well-settled law and material issues of fact preclude summary judgment in Defendants' favor on the qualified immunity defense.

The parties agree that the test for qualified immunity is whether a plaintiff has alleged facts of a violation of a constitutional right, and whether that constitutional right was "clearly established" at the time of the violation. *Pearson v. Callahan*, 129 S. Ct. 808, 811 (2009). If the official is alleged to have violated a clearly established constitutional right, the official is not entitled to qualified immunity. *Id*. at 816. The Supreme Court has clarified that lower court judges are permitted to exercise their discretion in determining which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances of the particular case at hand. *Id.* at 818, 821-22.

Regardless of the order of the inquiry, Defendants' qualified immunity defense fails.

1. Plaintiffs Allege Facts Of A Constitutional Right.

For the reasons set forth above, Plaintiffs allege facts of a constitutional right. Defendants' construction of this case as narrowly seeking a guaranteed spot on a male wrestling team not only misstates the right at issue, but also is contradicted by disputed facts, as set forth above. Correctly viewed, Plaintiffs have three bases for their constitutional claim. First, Plaintiffs allege that Defendants provided them and other women fewer opportunities to participate in the athletic program than they did men. Second, Plaintiffs allege that Defendants stripped them of varsity status based on their gender. Third, Defendants imposed barriers that ensured their permanent exclusion from the wrestling program based on their gender. There can be no doubt that this alleged misconduct violates a constitutional right, where, as noted in Section V.A.1 above, the United States Supreme Court and the Ninth Circuit have affirmed that the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution creates the right to be free from purposeful sex discrimination by state actors. *Mississippi Univ. of Women*, 458 U.S. at 731; *United States v. Virginia*, 518 U.S. at 519; *Bator*, 39 F.3d at 1029; *Oona*, 143 F.3d at 474-75; *Lindsey*, 29 F.3d at

1386.

2. Plaintiffs' Constitutional Rights Were Clearly Established in 2000.

Defendants also fail on the inquiry regarding whether the rights at issue in this case were clearly established at the time of their alleged misconduct. Relying inappropriately on Title IX standards, Defendants contend that no case clearly establishes a constitutional right to be a member of a team without the requisite skill and competitive ability. Since this is not the alleged misconduct at issue, the absence of case law on this particular point is irrelevant. Plaintiffs allege that they were kicked out and kept out of the wrestling program because they were women and that UCD was not giving women a fair share of athletic opportunities program-wide. These allegations state a claim of sex discrimination in violation of the Equal Protection Clause that was clearly established at the time of the alleged misconduct.

In 1971, the Supreme Court recognized that a law that treats women unequally violates the Equal Protection Clause. *Reed v. Reed*, 404 U.S. 71 (1971) (statutory preference for men as estate administrators); *Stanton v. Stanton*, 421 U.S. 7 (1975) (different parental support obligations for sons and daughters); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (different requirements for entitlement to fringe benefits for spouses of male armed services members and spouses of female armed services members). In 1979, the Supreme Court held that the Equal Protection Clause conferred a "federal constitutional right to be free from gender discrimination" in the workplace at the hands of government actors, including a discriminatory termination. *Davis v. Passman*, 442 U.S. 228, 234-35 (1979). The Supreme Court extended this finding to the educational context long before the events at issue in this case. *Mississippi Univ. of Women*, 458 U.S. at 731 (1982 case regarding denial of school admission to male applicants); *United States v. Virginia*, 518 U.S. at 519 (1996 case regarding denial of admission by female applicants).

Citing these cases, the Ninth Circuit repeatedly denied claims of qualified immunity by 2000 on the basis that equal protection claims of gender discrimination implicate well-established constitutional rights. *Oona*, 143 F.3d at 476 (denying in 1998 a qualified immunity claim by a school official because the right to be free from gender discrimination by state actors was clearly

established as early as 1988); *Lindsey*, 29 F.3d at 1385 (denying in 1994 qualified immunity on grounds that equal protection clause prohibits gender discrimination (citing *Washington v. Davis*, 426 U.S. 229, 239 (1976)); *Bator*, 39 F.3d at 1027-28 (1994 decision denying qualified immunity for employer who subjected employee to discrimination on basis of sex); *Lowe v. City of Monrovia*, 775 F.2d 998, 1011 (9th Cir.1985) (denying qualified immunity), *amended on other grounds*, 784 F.2d 1407 (9th Cir.1986).

Defendants suggest that they are entitled to qualified immunity unless a case has held it is unconstitutional to remove existing female members of a varsity wrestling program because they are women. However, the Ninth Circuit has made clear that closely analogous preexisting case law is not required to show that a right was clearly established. *White v. Lee*, 227 F.3d 1214, 1238 (9th Cir. 2000). "For a legal principle to be clearly established, it is not necessary that 'the very action in question has previously been held unlawful. …'" Rather, "[t]he dispositive inquiry is 'whether it would be clear to a reasonable [official] that his conduct was unlawful in the situation he confronted'." *Tennison v. City and County of San Francisco*, 548 F.3d 1293, 1303, 1305 (9th Cir. 2009) (citations omitted). In *LSO, LTD v. Stroh*, 205 F.3d 1146, 1158 (9th Cir. 2000), the Ninth Circuit rejected a defendant's effort to define the right allegedly violated too narrowly, stating: "[T]he Officials' formulation is too particularized. To phrase the 'right allegedly violated' in such detail and in terms so closely paralleling what allegedly happened here would be to allow [the Officials], and future defendants, to define away all potential claims." *Id.* at 1148 (citing *Kelley v. Borg*, 60 F.3d 664, 667 (9th Cir.1995)).

The reach of the Equal Protection Clause to challenge gender discrimination is athletics was well-settled in 2000. *Haffer*, 678 F.Supp. at 526-27 (1987 decision confirming application of the equal protection clause where denial of equal athletic opportunities and citing numerous cases decided since 1973 that have held that regulations that prohibit girls from participating in particular sports deny girls equal protection). The Ninth Circuit embraced the important governmental interest in equality in athletic opportunities and in redressing past discrimination before 2000. *Clark*, 695 F.2d at 1131 (1982 decision); *Neal*, 198 F.3d at 769-72 (1999 decision).

A long line of cases decided well before 2000 also affirmed that an institution's elimination of a women's sports team and its refusal to provide equal athletic opportunities program-wide is a form of sex discrimination in violation of Title IX. *See, e.g., Roberts*, 998 F.2d at 828 (1993 case held: "It is well-established that 'an institution may violate Title IX simply by failing to accommodate effectively the interests and abilities of student athletes of both sexes"); *Cohen*, 991 F.2d at 897-98 (1993 decision); *Favia v. Ind. Univ. of Pa.*, 812 F. Supp. 578, 584-85 (W.D. Pa. 1993), *aff'd*, 7 F.3d 332 (3d Cir. 1993). The Ninth Circuit has held that the development of jurisprudence under other laws prohibiting the same conduct is relevant to its analysis of whether a constitutional right was "clearly established." In *Bator*, 39 F.3d at 1028, the Ninth Circuit affirmed that the development of jurisprudence under Title VII of the 1964 Civil Rights Act clearly established a constitutional prohibition against gender discrimination, stating:

> Title VII cases are relevant to the discussion of when the constitutional right to be free of sexual harassment became clearly established because Title VII and equal protection cases address the same wrong: discrimination. Title VII case law establishes that sexual harassment is prohibited sex discrimination, and it reflects our collective understanding of what conduct violates a person's rights.

This authority is sufficient to establish that UCD's actions violated a constitutional right that was clearly established in 2000. Indeed, Defendants admitted that they knew that sex discrimination in athletics was prohibited by law. (ADF 65, 80-82, 103, 128.) Some expressly admitted that they knew that the Constitution also prohibited sex discrimination. (*Id.*) Most admitted that they were well-trained in laws requiring gender equity. (*Id.*) They admitted that they were aware that UCD was not providing men and women the same number of athletic opportunities. (ADF 51-53.) Defendants' misconduct continued for years. A jury could find that it was unreasonable for Defendants to ignore, not only the public outcry about their actions, but also the advice of gender equity expert Donna Lopiano, who strongly suggested that they convene a "blue ribbon panel" of gender equity experts to evaluate the lawfulness of their conduct.

Defendants argue that that they reasonably relied on OCR's Voluntary Resolution Plan to assume that their actions were lawful. However, as noted above, OCR did not consider or resolve

the constitutional questions presented here, which are governed by different legal standards as set forth above. Moreover, Plaintiffs raise a genuine issue of material fact as to the adequacy of the OCR process to resolve any claims. Moreover, the evidence suggests that Defendants never advised the OCR that the women previously competed against women in the program, not men. (ADF 24, 31, 33) These facts certainly prevent Defendants from relying on this process to establish qualified immunity on the constitutional claim on summary judgment.

Defendants rely on *Vasquez v. De La Rosa*, 414 F. Supp. 2d 124, 133 (D.P.R. 2006) for the premise that reliance on the OCR settlement agreement was reasonable. However, *Vasquez* is readily distinguishable. In *Vasquez*, plaintiffs alleged that they were terminated based on their political affiliation in violation of due process. *Id.* at 127. The court found sufficient evidence that plaintiffs' constitutional rights were violated, but held that defendants' decision to terminate plaintiffs' employment was not unreasonable because defendants initiated the terminations due to concerns that plaintiffs' appointments violated existing law. *Id*. at 132-33. Conflicting mandates of the law, combined with the fact that the defendants conducted a thorough internal investigation, and the fact that the Secretary of Justice, a human resources expert, and an external legal advisor *all* recommended the same course of action distinguish *Vasquez* from this case. Defendants failed to conduct an independent investigation into the female wrestlers' allegations and failed to assess these complaints, despite their knowledge that they were providing women fewer athletic opportunities overall. The *Vasquez* defendants were concerned that the plaintiffs' job appointments violated state law, which the court found to be a valid justification for the terminations. *Id*. at 127. Here, defendants have offered no such justification.

Plaintiffs allege sufficient facts to establish not only a constitutional violation, but also a right that was clearly established in 2000. Accordingly, the Court should reject Defendants' qualified immunity defense.

C. The Court Should Also Deny Summary Judgment Because It Has Already Considered and Rejected Defendants' Timeliness Challenge to Plaintiffs Equal Protection Claim.

Defendants boldly ignore multiple orders of this Court as well as the Ninth Circuit in seeking

dismissal of the equal protection claim on statute of limitations grounds yet again. This Court has previously considered and rejected Defendants' statute of limitations defense when it ruled on their first motion to dismiss. Significantly, the Ninth Circuit also considered and rejected this same argument. *Mansourian, supra*, 602 F.3d 957.

Specifically, the Ninth Circuit found that Plaintiffs in this case had adequately pled that Defendants had alleged an "ongoing violation" that constitute a "systemic violation," rather than a one-time act. *Id*. at 974. Remarkably, Defendants acknowledge that the Ninth Circuit found that Plaintiffs alleged a systemic policy of discrimination denying them opportunity each day they attended the university. (Warzecka MPA (Dkt. #452-3) at 7.) Yet despite the ruling of the Ninth Circuit, with this argument regarding timeliness, Defendants (incorrectly) seek to convince this Court that Defendants' acts were not systemic by presenting the same unmeritorious argument.

Similarly, in ruling on the motion to dismiss, this court previously held:

> Plaintiffs Mansourian [and Mancuso allege that they] are current UCD students who are currently being subjected to Defendants' allegedly sex discriminatory practices. (Compl. [Dkt. #1] at ¶¶ 9-11, 22, 85-86, 88, 89.) As UCD students, their claims accrue each and every day they are denied equal access to athletic participation and scholarship opportunities. At the time Plaintiffs filed the instant complaint, Plaintiffs allege they should have been wrestling for UCD and receiving all the varsity benefits and scholarships provided to male wrestlers but Defendants refused, and continue to refuse, to date, to allow their participation. (*Id*. at ¶¶ 9-12, 32, 42, 66, 88-89.)

(Dkt. 25.) This Court then concluded that Plaintiffs' allegations thus "sufficiently state facts within the applicable statute of limitations (one or two years) to sustain claims under Section 1983. (*Id*.)

To side-step this Court's previous order on the motion to dismiss, Defendants point the Court to its order on their motion for judgment on the pleadings. That order, however, did not address the statute of limitations on Plaintiffs' equal protection claim at all. The Court declined Defendants' request to revisit this ruling on their motion for judgment on the pleadings. (Dkt. #376.)

1. The Fact that Plaintiff's (Non-existent) Unequal Treatment Claim may have been Time-barred is Irrelevant to the Timeliness of Plaintiffs' Equal Protection Claim.

Defendants now try to take a *fourth* bite at the apple, contending that Plaintiffs' equal protection claim against the Defendants is time-barred because this Court determined that Plaintiffs'

Title IX unequal treatment claim is time-barred. This argument is without merit. Significantly, Plaintiffs never alleged a Title IX equal treatment claim.[5] Moreover, whatever conclusion this Court reached with respect to Plaintiffs' (non-existent) equal treatment claim under Title IX, it has held that Plaintiffs' Title IX ineffective accommodation claim is timely. (Dkt. # 25.) The allegations in the complaint that support Plaintiffs' ineffective accommodation claim are the same ones that support Plaintiffs' equal protection claim, which are the *same* allegations upon which the district court relied in rejecting Defendants' statute of limitations defense the first time, *i.e.*, that Plaintiffs were being denied equal access to athletics each and every day they were students at UCD. (Dkt. # 1.) Defendants' failure to seek reconsideration of *this* finding is fatal to its request that the Court do so now.

2. Disputed and Undisputed Facts Establish that Each Individual Defendants Created, Participated in, and Maintained the Ongoing Policy of Discrimination Against the Plaintiffs.

Defendants argument that, notwithstanding this Court's and the Ninth Circuit's ruling that UCD's discriminatory acts against the Plaintiffs were ongoing, the acts of the individual Defendants are one-time, is nonsensical. As the facts in this case illustrate, Plaintiffs allege that Defendants were the policy-makers for UCD who implemented and then continued to enact decisions that denied Plaintiffs the ongoing opportunity to wrestle. (*See, e.g.*, ADF 18, 65, 76-79, 101-102, 126, 133.) *See also Heyne v. Metropolitan Nashville Public Schools*, 686 F. Supp. 2d 724, 733 (2009) (holding that individual employees who enforced school district's policy that allegedly violated equal protection could be held liable). Thus, the contention that these acts were systemic and ongoing by UCD, yet one-time acts that could be time-barred for the individual Defendants, is entirely inconsistent.

Plaintiffs alleged that Defendants' acts in this regard created a discriminatory policy of failing to provide equal athletic participation opportunities to women in violation of the Equal

[5] As Plaintiffs have indicated, they did not plead a Title IX unequal treatment case. Unequal treatment claims look to whether students who already play varsity athletics are treated equally in several specific categories delineated in the regulations, e.g., equipment, scheduling, traveling, and medical and training services. *See* 34 C.F.R. § 106.41(c).

Protection Clause. (Dkt. # 1.) Plaintiffs were still students, and thus were continuing to be denied equal opportunities, at the time the complaint was filed. It is axiomatic that a plaintiff who is being harmed by a facially discriminatory policy at the time she has filed a lawsuit challenging that policy has pled a timely claim. *See, e.g., E.E.O.C. v. Local 350, Plumbers & Pipefitters*, 998 F.2d 641, 645 (9th Cir. 1992) (holding that facially discriminatory policy may be challenged at any time); *Reed v. Lockheed Aircraft Corp.*, 613 F.2d 757, 760-61 (9th Cir. 1980) (holding that plaintiff stated timely claim by alleging policy of discrimination under Title VII that pervaded employer's personnel decision).

Defendants only cite inapposite case law. For example, their reliance on *Cherosky v. Henderson*, 330 F.3d 1243 (9th Cir. 2003), is misplaced. *Cherosky* involved the specific denial of a request for accommodation that the parties agreed occurred outside of the limitations period. *Id.* at 1247. Moreover, the reasoning of *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002) with respect to "discrete acts" such as a denial of a promotion, does not extend to situations where, as here, individuals are being subjected to an ongoing policy of discrimination.

Because Plaintiffs had a right each and every day of their enrollment to equal access to educational benefits, their equal protection claim continued to accrue until they left UCD. As each Defendants' acts created the policy and continued to deny Plaintiffs the equal opportunity to participate in athletics, the individual Defendants' acts are not time-barred.

///

///

///

///

///

///

///

///

///

VI. CONCLUSION

For all of the foregoing reasons, the Court should deny the motions for summary judgment by Defendants' Vanderhoef, Franks, Warzecka, and Gill-Fisher seeking judgment as a matter of law on Plaintiffs' claim that they violated their constitutional rights. Plaintiffs also request that the Court decline to afford any Defendants qualified immunity from suit on these motions.

DATED: November 9, 2010

Respectfully submitted,

THE STURDEVANT LAW FIRM
A Professional Corporation

EQUAL RIGHTS ADVOCATES

DUCKWORTH PETERS LEBOWITZ OLIVIER LLP

EQUITY LEGAL

By: /s/ *Noreen Farrell*
Noreen Farrell
Attorneys for Plaintiffs