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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' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THEIR MOTION FOR RECONSIDERATION AND/OR CLARIFICATION

Date: May 20, 2011
Time: 1:30 pm
Courtroom: 2
Judge: Hon. Frank C. Damrell, Jr

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

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I. INTRODUCTION

In its December 8, 2010, order on the motion for summary judgment by the individual Defendants on Plaintiffs' Equal Protection Clause claim (arising under 42 U.S.C. § 1983), this Court held that this claim was timely insofar as it was based on a claim of systemic discrimination impacting Plaintiffs through their filing of this case and graduation. (Dkt. 509.) This motion does not seek to disturb that ruling. Rather, Plaintiffs move the Court to either clarify or reconsider its finding that *part* of that claim, specifically the removal of Plaintiffs from the wrestling program and the imposition of Defendants' policy requiring women to wrestle-off against men, are time-barred, even though the Court found that evidence of such events would be relevant to Plaintiffs' claims. Given discussions with Defendants in pretrial preparations, Plaintiffs think it important to clarify this portion of the Court's order and to ask the Court's reconsideration of it based on the arguments set forth herein.

First, procedurally, the doctrines of law of the case and mandate precluded the Court from reopening the statute of limitations issue. Both the Ninth Circuit and this Court previously held that Plaintiffs' Equal Protection claims are timely because they arise from a systemic and facially discriminatory policy against women at the University of California at Davis ("UCD") that took various forms against Plaintiffs specifically during their time at UCD. (Dkt. 25 at 15:23-16:1.) *Mansourian v. Regents of Univ. of Cal.*, 602 F.3d at 957, 974 (2010). These holdings are the law of the case that this Court is bound to follow. Plaintiffs are entitled, therefore, to seek redress for all of the ways in which Defendants' systemic violations of equal protection injured them, including Defendants' removal of Plaintiffs from the wrestling program and their ongoing refusal to reinstate Plaintiffs and allow them to play against other women according to freestyle rules, as they had been permitted to do.

Second, substantively, no part of Plaintiffs' Equal Protection claims are barred because Plaintiffs challenge a systemic, facially discriminatory policy that took various forms, rather than one or two "discrete" acts. Defendants' removal of women from the roster and the 2001 wrestle-off were part and parcel of their systemic discrimination against Plaintiffs and other women in the

provision of athletic opportunities. Indeed, Defendants' policy of exclusion was renewed each year when it continued to deny Plaintiffs and other women female participation opportunities in wrestling and other sports, even after Plaintiffs filed suit as current students demanding this equal treatment. A claim for damages arising from refused wrestling opportunities is necessarily timely in light of these circumstances. The various ways in which Defendants violated Plaintiffs' rights should not be parsed out for the purpose of damages or otherwise because all form the systemic policy of ineffective accommodation and discrimination challenged in this case. The Court's reading otherwise was in error.

Third, the Court's decision erroneously relies upon *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 550 U.S. 618, 628, 127 S. Ct. 2162 (2007). Not only was that case retroactively overturned by the Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (2009), a recent decision by the Seventh Circuit provides persuasive guidance on why the reasoning of *Ledbetter* no longer applies to Plaintiffs' Equal Protection claims. *See Groesch v. City of Springfield, Ill*, --- F.3d ---, 2011 WL 1105593, at *5-7 (7th Cir. Mar. 28, 2011). While not controlling precedent, this intervening case warrants consideration by this Court. *Ledbetter*'s holding that victims of discrimination cannot recover for the effects of past discrimination, even if it ever was applicable here, is no longer viable.

This Court "has the inherent power to reconsider and modify its interlocutory orders prior to the entry of judgment." *Smith v. Mass.*, 543 U.S. 462, 125 S. Ct. 1129, 1139 (2005) (quoting *United States v. LoRusso*, 695 F.2d 45, 53 (1982)). The standards for reconsideration of final judgments and orders under Federal Rules of Civil Procedure, rules 59(e) and 60(b) provide guidance to reconsideration of interlocutory orders. Reconsideration is appropriate where (1) the court is presented with newly-discovered evidence; (2) the court "committed clear error" or (3) there is an intervening change in the controlling law. *Carroll v. Nakatani*, 342 F.3d 934, 945 (9th Cir. 2003).[1]

[1] There is no deadline for a motion for reconsideration of a court's interlocutory order. In the process of preparing for trial, it has become evident that Defendants intend to seek exclusion of evidence related to their removal of Plaintiffs and other women from the wrestling program, and their imposition of the wrestle-off policy that continued to apply to Plaintiffs until they graduated. (continued on next page)

Here, where the timeliness of Plaintiffs' Equal Protection claims had been conclusively determined by this Court and by the Ninth Circuit; not applying the law of the case to Defendants' fourth attempt to defend against this claim on procedural statute of limitations grounds constitutes clear error. In addition, reconsideration is warranted by an intervening change in the law. If allowed to stand, the Court's ruling with respect to the statute of limitations risks improperly limiting Plaintiffs' right to recover damages for the harm they suffered at the hands of Defendants. Plaintiffs respectfully request that the Court reconsider its ruling and find that Plaintiffs' Equal Protection claims are, in their entirety, timely.

II. PROCEDURAL BACKGROUND AND PRIOR COURT RULINGS REGARDING THE STATUTE OF LIMITATIONS

Defendants first argued that Plaintiffs' Equal Protection claims are barred by the statute of limitations in 2004 when they filed their initial motion to dismiss in this case. At that time, this Court rejected the argument, holding that Plaintiffs:

> are current UCD students who are currently being subjected to defendants' allegedly sex discriminatory practices. (Complaint [Dkt. 1] ¶¶ 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. (*Id*. at ¶¶ 22, 66, 88-89, 133, 159.) 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 at 12:2-13 (footnote omitted).) It further 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*. at 15:23-16:1.)

On June 5, 2007, Defendants moved for judgment on the pleadings. Defendants argued that Plaintiffs' Equal Protection claims were subsumed by Title IX. Defendants also asked the Court to revisit its earlier conclusion that Plaintiffs' claims were timely. (Dkt. 189 at 5:20-7:8; Dkt. 226 at

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(Footnote continued from previous page)
(*See generally* Defendants' Points of Law in the Joint Pretrial Statement (Dkt. 533 at 18:6-20:10).) This position has highlighted the need to seek reconsideration/clarification of this issue. Additionally, the *Groesch* opinion was just issued on March 28, 2011. Plaintiffs' motion is therefore timely and results in no prejudice to Defendants.

33:26-28 n.15.) The Court granted Defendants' motion, dismissing Plaintiffs' Equal Protection claim without addressing Defendants' renewed statute of limitations argument.

On January 11, 2008, Defendant Regents filed a motion which argued that it did not have notice of its own discriminatory acts and did not respond to them with deliberate indifference. (Dkt. 280-308.) The Court granted the motion, dismissing the Title IX claim. (Dkt. 368.) Plaintiffs then filed a notice of appeal covering the dismissal of both their Title IX and their Equal Protection claims. (Dkt. 376.)

In the meantime, the United States Supreme Court issued its decision in *Fitzgerald v. Barnstable Schools Committee,* 555 U.S. 246, 129 S. Ct. 788 (2009), which adopted Plaintiffs' position that constitutional Equal Protection Clause are not subsumed by statutory Title IX claims. Although Defendants conceded that the intervening case required reinstatement of Plaintiffs' Equal Protection claims, they asked the appellate court to uphold the judgment on the grounds that they were untimely.[2] The Ninth Circuit refused, holding that Plaintiffs' claims are timely. *Mansourian*, 602 F.3d at 974.

Upon remand, Defendants filed their fourth set of dispositive motions, this time asserting qualified immunity on Plaintiffs' Equal Protection claims. Defendants also reasserted their statute of limitations defense for a *fourth* time. This Court rejected Defendants' qualified immunity defense. It also rejected Defendants' statute of limitations argument with respect to Plaintiffs' claims that Defendants violated the Equal Protection Clause by denying women equal access to athletic participation opportunities. (Dkt. 509 at 23:1-25:5.) However, the Court found Plaintiffs' claims are time-barred to the extent that they are based upon Defendants' removal of Plaintiffs from the wrestling program and Defendants' application of the wrestle-off policy. (*Id*. at 20:5-22:11.)

[2] It is worth noting that, in raising the statute of limitations defense with the appellate court, Defendants failed to inform the Ninth Circuit that this Court had already considered and rejected this defense when it ruled on their first motion to dismiss, and failed to include that relevant order for the Ninth Circuit's review. Instead, Defendants pointed to this Court's order on the motion for judgment on the pleadings and stated that this Court "did not rule on whether the section 1983 claim was time-barred," which, as this Court is aware, is patently incorrect. (Declaration of Monique Olivier ("Olivier Decl."), filed herewith, Ex. A.)

III. ARGUMENT

Defendants' efforts to have this Court rule in their favor on the grounds of statute of limitations gives life to the old adage "If at first you don't succeed, try, try again." Defendants have raised the same statute of limitations defense *four* times in this case. While their persistence may be admirable, the most recent order on this issue procedurally violates the doctrines of law of the case and remand, substantively misapplies the law, and completely overlooks Plaintiffs' claims as they existed in 2003 rather than 2001. These errors threaten to deprive Plaintiffs a portion of the remedies to which they are entitled as full redress for the injuries they have suffered.

A. The Law of the Case Doctrine and the Ninth Circuit's Mandate Command the Conclusion that Plaintiffs' Equal Protection Claims Are Timely.

Both this Court and the Ninth Circuit have previously held that Plaintiffs' Equal Protection claims are timely in their entirety because they arise from a systemic and facially discriminatory policy against women at UCD that took various forms against Plaintiffs specifically during their time at UCD. These holdings are the law of the case that this Court is bound to follow. Plaintiffs are entitled, therefore, to seek redress for all of the ways in which Defendants' systemic violations of equal protection injured them, including Defendants' removal of Plaintiffs from the wrestling program.

Under the "law of the case" doctrine, "a court is generally precluded from reconsidering an issue that has already been decided by the same court, or a higher court in the identical case." *Thomas v. Bible*, 983 F.2d 152, 154 (9th Cir. 1993). Courts should reopen a previously decided matter in only three instances: (1) the first decision was clearly erroneous and would result in manifest injustice; (2) an intervening change in the law has occurred; or (3) the evidence on remand was substantially different. *Eichman v. Fotomat Corp.*, 880 F.2d 149, 157 (9th Cir. 1989); *Milgard Tempering, Inc. v. Selas Corp. of Am.*, 902 F.2d 703, 715 (9th Cir. 1990).

The law of the case doctrine is "a judicial invention designed to aid in the efficient operation of court affairs," *United States v. Lummi Indian Tribe,* 235 F.3d 443, 452 (9th Cir. 2000) (quoting *Milgard Tempering, Inc.*, 902 F.2d at 715). It is "founded upon the sound public policy that litigation must come to an end," *Old Person v. Brown,* 312 F.3d 1036, 1039 (9th Cir. 2002). "Issues

that a district court determines during pretrial motions become law of the case." *United States v. Phillips,* 367 F.3d 846, 856 (9th Cir. 2004) (citation omitted).

The law of the case doctrine goes hand in hand with the mandate rule, which provides that "[w]hen a case has been decided by an appellate court and remanded, the court to which it is remanded must proceed in accordance with the mandate and such law of the case as was established by the appellate court." *Odima v. Westin Tucson Hotel,* 53 F.3d 1484, 1497 (9th Cir. 1995); *see* 28 U.S.C. § 2106 ("The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."). "The mandate rule serves two key interests, those of hierarchy and finality. … The principle of hierarchy is no empty shell. It protects the very value and essential nature of an appeal, …." *Doe v. Chao*, 511 F.3d 461, 465 (4th Cir. 2007). "This is not to say that appellate courts are somehow superior or always correct, but only that our system has been served well by the availability of review and the need for appropriate review to be final." *Id.*; *see United States v. Thrasher*, 483 F.3d 977, 983 (9th Cir. 2007) (Berzon, J., concurring) ("there are … very limited circumstances … in which the district court may not be required to follow the directions we have given in our mandate").

Based upon the doctrines of law of the case and mandate, this Court is bound by its prior determination, and the Ninth Circuit's determination, that Plaintiffs' Equal Protection claims are timely.

Defendants first argued that Plaintiffs' Equal Protection claims were time-barred in their original motion to dismiss. This Court disagreed, finding that Plaintiffs "claims accrue each and every day they are denied equal access to athletic participation." (Dkt. 25 at 12:5-7.) Defendants made the exact same argument to the Ninth Circuit as an alternative basis to affirm judgment in their favor on Plaintiffs' Equal Protection claims. The Ninth Circuit considered and rejected it. Specifically, the Ninth Circuit held:

> UCD first contends that the § 1983 claim for damages is precluded by the statute of limitations and that the district court did not address this argument. In fact, the

> district court considered and rejected the statute of limitations defense as to both the Title IX effective accommodation and § 1983 equal protection claims in response to UCD's original motion to dismiss. The court held that because the students claimed that they were "currently being subjected to defendants' allegedly sex discriminatory practices . . . their claims accrue each and every day they are denied equal access to athletic participation."
>
> The district court was quite correct. Section 1983 "is presumptively available to remedy a state's ongoing violation of federal law." *AlohaCare v. Haw. Dep't. of Human Servs.*, 572 F.3d 740, 745 (9th Cir. 2009) (quotation omitted). A plaintiff has adequately pled an ongoing claim if she can "show a systematic policy or practice that operated, in part, within the limitations period − a systematic violation." *Douglas v. Cal. Dep't. of Youth Auth.*, 271 F.3d 812, 822 (9th Cir. 2001) (quotation omitted); *see also Gutowsky v. County of Placer*, 108 F.3d 256, 259 (9th Cir. 1997) (holding plaintiff's § 1983 claims timely because she alleged "widespread policy and practices of discrimination [that] continued every day of her employment, including days that fall within the limitation period"). A university's ongoing and intentional failure to provide equal athletic opportunities for women is a systemic violation. As the plaintiffs were students and therefore subject to the policy that allegedly discriminated on the basis of sex at the time they filed their complaint, their § 1983 claim is not time-barred.

Mansourian, 602 F.3d at 973-74. In a footnote, the Ninth Circuit added: "*Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 114 (2002), held that each "[d]iscrete act[ ] such as termination, failure to promote, denial of transfer or refusal to hire … constitutes a separate actionable 'unlawful … practice'" for the purposes of triggering the statute of limitations period in a Title VII case. *Morgan* left undisturbed our case law governing continuing systemic violations." *Id.* at 974 n.22.

Thus, the Ninth Circuit held – without qualification or limitation – that Plaintiffs' Equal Protection claims are timely. The Ninth Circuit did not find any part of Plaintiffs' claims barred; rather, it expressly found the claims timely. It remanded the case with this mandate.

Nevertheless, Defendants again made the *same* arguments based upon the *same* facts in its 2010 motions for summary judgment to this Court on remand. In doing so, Defendants did not argue (nor could they), that this Court should revisit the law of the case because an exception to that doctrine applied here, *i.e.*, the prior ruling was clearly erroneous, there was an intervening change in the law, or the evidence on remand was substantially different. Quite to the contrary, Defendants presented no basis whatsoever for this Court to stray from the law of the case or the mandate of the Ninth Circuit. *See United States v. Pend Oreille County Public Utility Dist. No. 1.*, 135 F.3d 602,

608 (9th Cir. 1998) (district court properly applied law set forth in first appellate decision as law of the case, and its consequent holding would not be disturbed on appeal); *Bean v. Calderon*, 163 F.3d 1073, 1078 (9th Cir. 1998) ("Heeding the interests of consistency and finality … we accordingly decline to disturb our own previous resolution of this procedural dispute."). Accordingly, this Court should not have revisited the statute of limitations issue, let alone partially reversed itself (and the Ninth Circuit).

Indeed, examples abound in which courts have found that prior rulings on the statute of limitations are covered by the law of the case doctrine and should be undisturbed absent exceptional circumstances. *See, e.g., Minidoka Irrigation Dist. v. Dep't of Interior of U.S.*, 406 F.3d 567, 573 (9th Cir. 2005) (holding that court was bound by law of the case to follow earlier appellate panel holding regarding statute of limitations, and plaintiff could not demonstrate any applicable exception to law of the case); *Crowley v. Peterson*, 206 F. Supp. 2d 1038, 1041 (C.D. Cal. 2002) (refusing to reconsider earlier order that the statute of limitations was tolled where plaintiffs failed to raise new facts relevant to the issue); *Springfield v. United States*, 873 F. Supp. 1403, 1407-08 (S.D. Cal. 1994) (prior ruling in district court on motion to dismiss with respect to statute of limitations was law of the case that could not be revisited), *overruled on other grounds*, 88 F.3d 750 (1996). No such "exceptional circumstances" apply here. Nor did Defendants raise any.

The law of the case doctrine puts the burden on Defendants to articulate a legally appropriate reason for allowing the Court to reverse its prior holdings. Defendants failed to offer any reasons, let alone cognizable ones. They merely made the exact same arguments they unsuccessfully had made three times before. Plaintiffs' Equal Protection claims are timely in their entirety. Thus, it was inappropriate for the Court to address the argument, let alone reverse it. Moreover, the Ninth Circuit mandate could not be clearer and this Court remains bound by it. Plaintiffs Equal Protection claims are timely in their entirety.

B. The Statute of Limitations Does not Bar any Portion of Plaintiffs' Equal Protection Claims Because They Arise from a Systemic, Facially Discriminatory Policy and not a Single or a Series of Discrete Acts.

This Court has held Plaintiffs' Equal Protection claim is timely insofar that it relies on a

claim that Plaintiffs were harmed by systemic and facially discriminatory policy depriving them equal athletic opportunities through graduation. Plaintiffs do not ask for reconsideration of this portion of the Court's December 2010 order. The Court, however, held certain examples of this ongoing policy time-barred, based on its finding that these were discrete acts outside the applicable statute of limitations. In reaching this decision, the Court indicated its view that the Ninth Circuit "did not address the court's rulings regarding plaintiffs' claims based upon discrete acts." (Dkt. 509 at 18 n.15.) However, Plaintiffs' Equal Protection claims are not, in fact, "based upon" discrete acts. Rather, Plaintiff contend that Defendants engaged in systemic discrimination in denying its female students equal athletic opportunities for decades and that this policy was applied to Plaintiffs in various forms throughout their years at UCD.

The Court's ruling with respect to the statute of limitations of the Equal Protect claim reflects a fundamental misreading of Plaintiffs' claims and applicable law. Plaintiffs' Equal Protection claims are not barred by any statute of limitations because they arise from Defendants' systemic, facially discriminatory policies against female students. Defendants discriminate against female students by segregating athletic teams by sex and then by allocating too few of those sex segregated opportunities to women. The discriminatory allocation recurs each school year as Defendants decide which sports to sponsor for each sex and how many athletes to allow on each team for each sex. As part of this unlawful policy, Defendants discriminated against Plaintiffs and other women by refusing to allow them female wrestling participation opportunities, wrestling against women using freestyle rules. Defendants persisted in this discriminatory policy of exclusion by refusing to allow such opportunities, even after Plaintiffs filed suit as current students demanding them.

This policy is no different from the facially discriminatory policies of the Mississippi University for Women, which barred men but not women from its nursing school, and the Virginia Military Institute, which barred women but not men from admission because of its adversative military training methods. *Miss. Univ. for Women v. Hogan,* 458 U.S. 718, 1102 S. Ct. 3331 (1982); *United States v. Virginia,* 518 U.S. 515, 116 S. Ct. 2264 (1996). Those students were not barred from challenging the schools' facially discriminatory policies just because those policies had existed

since the schools opened (over 100 years in the case of Virginia Military Institute). The plaintiffs therein timely filed the cases because the policies still existed when they wanted to enroll but were barred from doing so because of those discriminatory policies.[3]

Rather than constitute "discrete" or separable acts from the policy of denying equal opportunity, Defendants' removal of women from the varsity wrestling program and their continued refusal to provide female opportunities (including through the wrestle-off policy) are part and parcel of Plaintiffs' claim of a facially discriminatory and systemic policy of discrimination that was ongoing when this case was filed.[4] Those events were squarely before the Ninth Circuit as part of the factual predicate for Plaintiffs' Equal Protection claims. Yet, the appellate court did not determine that *some* events were actionable while others were not; instead, it held that Plaintiffs' claims were timely. Excising those events from Plaintiffs' Equal Protection claims is, thus, improper.

The Ninth Circuit and courts within the Ninth Circuit have understood and applied this concept accordingly. *See Douglas v. Cal. Dep't. of Youth Auth.*, 271 F.3d 812, 822 (9th Cir.) ("if both discrimination and injury are ongoing, the limitations clock does not begin to tick until the invidious conduct ends" (citations omitted)), *amended by* 271 F.3d 910 (9th Cir. 2001); *Gutowsky v. County of Placer*, 108 F.3d 256, 259 (9th Cir. 1997); *see also Californians for Disability Rights, Inc.*

[3] The Seventh Circuit aptly addressed these statute of limitations issues in *Palmer v. Bd. of Educ. of Community Unit School Dist.*, 46 F.3d 682 (7th Cir. 1995). There, the parents of African-American children asserted that the school assignment policy which the defendant adopted in 1987 amounted to race discrimination. The school raised a statute of limitations defense because the parents did not file the action until 1990. The district court agreed and dismissed the case. The Seventh Circuit reversed, holding that such an application of the statute of limitations would mean that a student assigned to a segregated, inferior school in kindergarten would be condemned to continue in the inferior school environment if the parents failed to challenge the discrimination in the first two years of their children's education. The court poignantly noted that if the defendant's view of the statute of limitations were correct, *Brown v. Board of Education* could not have been possible, because the challenged segregation has existed for over a century. What mattered was that the students were then being subjected to a then-existing discriminatory policy.

[4] For example, in reaching its conclusion about the statute of limitations, this Court noted in its order that its analysis might be different if it had found evidence that Defendants continued to use the wrestle-off policy within the limitations period. (Dkt. 509 at 20-21 n.16.) However, this Court's focus on the occasion of a "wrestle-off" on October 2001 is misplaced. Challenged here is Defendants' facially discriminatory policy of excluding women from an equal number of participation opportunities, in its many forms.

v. California Dep't. of Trans., 2009 WL 2982840, at *1 (N.D. Cal. Sept. 14, 2009) ("Plaintiffs' case is based on a systemic policy or practice of discrimination. As such, there is no merit to Defendants' contention that Plaintiffs are precluded from presenting evidence of non-compliant new construction or alterations occurring more than two (or three) years prior to the filing of the complaint."); *K.S. ex rel P.S. v. Fremont Unified School Dist.*, 2007 WL 915399, at *4 (N.D. Cal. Mar. 23, 2007) (all of the alleged acts of discrimination against plaintiff, including those before the limitations period, were part of defendant's policy and practice that resulted in violating plaintiff's rights and thus were actionable). In *Gutowsky*, for example, the Ninth Circuit addressed whether a current employee asserted a timely equal protection claim against her employer. The Ninth Circuit noted that plaintiff "presents specific examples of discrimination which 'are not the basis of her charge of discrimination' but rather 'are but evidence that a *policy* of discrimination pervaded her employer's personnel decisions. Indeed, Gutowsky contends that the widespread policy and practices of discrimination of which she complains continued every day of her employment, including days that fall within the limitations period." *Gutowsky*, 108 F.3d at 260 (citation omitted). Similarly, Defendants' removal of women from the varsity wrestling program and their imposition of the wrestle-off policy are simply ways in which Defendants enforced their continuing discriminatory policy and practice to deprive Plaintiffs of their opportunity to participate equally in athletics. Plaintiffs should not be precluded from recovering damages for the specific ways in which Defendants' systemic violations of equal protection injured them. *See Beasley v. Ala. State Univ.*, 966 F. Supp. 1117, 1129-30 (M.D. Ala. 1997) (where allegations were that plaintiff's right to participate in varsity athletics was violated in an ongoing, continual fashion throughout her time as a student and the university made no showing that it ended the discriminatory policy, even after the student ceased participating in the sport, but was still a student, "the alleged violation was renewed or repeated on at least a semester-by-semester basis," and her claims were timely); *see also 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 have never offered any on-point precedent in support of their position. Instead, Defendants try to fit the square peg of individual, Title VII employment discrimination cases into the round hole of the inherently systemic, program-wide discrimination of sex segregated educational athletics. Yet, even the cases upon which Defendants rely expressly state that they do not apply in circumstances such as this. *Nat'l R.R. Passenger Corp. v. Morgan,* 536 U.S. 101, 122 S. Ct. 2061 (2002); *Ledbetter, supra,* 550 U.S. 618.

Morgan and *Ledbetter* were decided based upon the plain language of the Title VII statute itself and its unique administrative enforcement scheme, including its unique 300-day limitations period for filing administrative complaints. The Supreme Court noted that by expressly including such a short administrative complaint process in the statute itself, Congress stated its intent to have such cases move along quickly so that employers do not have potential claims hanging over their heads for extended periods of time. No such statutory administrative exhaustion or limitations period exists for Title IX. No such expression of congressional intent exists for Title IX. Nor does it make sense to apply it to sex segregated activities like athletics. *Morgan*, 536 U.S. at 110-111.

Both *Morgan* and *Ledbetter* expressly stated that their holdings and reasoning do not apply to cases involving systemic or policy and practice discrimination. *Morgan,* 536 U.S. at 115 n.9; *Ledbetter,* 550 U.S. at 633-35. Indeed, Ledbetter expressly reaffirmed the Court's prior holding in *Bazemore v. Friday,* 478 U.S. 385, 106 S. Ct. 3000 (1986), which involved an employer's segregation of employees by race and then its payment of employees at the "White branch" more than its payment of employees at the "Negro branch." There, the Court held that the longstanding existence of the policy did not excuse the continuance of the discrimination or preclude employees still covered by the policy from challenging it. "To hold otherwise would have the effect of exempting from liability those employers who were historically the greatest offenders." *Bazemore,* 478 U.S. at 395. The Ledbetter Court went on to state that whenever an employer adopts a "facially discriminatory" pay structure, that policy can be challenged "as long as the structure is used." *Ledbetter,* 550 U.S. at 634. The *Bazemore* facts of segregation by race followed by allocation of

more money to the "White branch" mirror Defendants' segregation of athletes by sex and then the allocation of more opportunities to the "male branch" than to the "female branch." *Ledbetter* held that its own reasoning did not apply to such situations. *Id.*

The Court's consideration of the statute of limitations for this claim is not dependent on an affirmative "act." The absence of opportunities is evidence of a continued discriminatory policy. There is no evidence in the record that Defendants subsequently allowed women to participate in the wrestling program as women wrestling against women using unique freestyle rules. Defendants do not claim otherwise. The law does not require Plaintiffs to engage in the futile act of asking Defendants whether the policy still applies to them when their status, and the existence of the policy, remains unchanged. *See Angelucci v. Century Supper Club*, 41 Cal. 4th 160, 168-69 (2007) ("We note that the federal Constitution uses the term 'deny' in the equal protection clause and other provisions, but we are unaware of any authority supporting the startling proposition that a right acknowledged by these provisions is not 'denied' if the victim is a passive sufferer of discrimination rather than a person who expressly demands his or her rights and is refused."). Moreover, as noted above, Plaintiffs did ask for women's wrestling opportunities, as women competing against women using unique freestyles rules, when they filed suit. UCD continued to refuse to this request and continued its policy of exclusion through Plaintiffs' graduation. Where Plaintiffs bring suit to challenge a facially discriminatory policy of exclusion (a policy that includes the continued refusal to provide wrestling opportunities) as a denial of equal protection, that claim must be timely in its entirety. *See, e.g., RK Ventures, Inc. v. City of Seattle*, 307 F.3d 1045, 1063 (9th Cir. 2002) (facial challenge under First Amendment timely where statute enforced against plaintiffs during limitations period); *Maldonado v. Harris*, 370 F.3d 945, 955 (9th Cir. 2004) (expressing "serious doubts" that a facial challenge to the constitutionality of a statute or policy "can ever be barred by a statute of limitations").

C. Intervening Law Clarifies that *Ledbetter* Does Not Apply Here.

Grounds for reconsideration of this Court's determination that part of Plaintiffs' Equal Protection claim is time-barred also exist because of an intervening change in the law. This Court's order relies upon *Ledbetter*, 550 U.S. at 628, for the proposition that if a defendant engages in a

"series of acts each of which is intentionally discriminatory, then a fresh violation takes place when each act is committed," but the effects of such conduct "cannot breathe life into prior, uncharged conduct." *Id.* (Dkt. 509 at 19:7-17.)

Even if the *Ledbetter* Court itself had not expressly excluded systemic and policy discrimination from its reasoning, Congress mooted its discrete acts and continuing violation reasoning entirely by enacting the Ledbetter Fair Pay Act of 2009.[5] In doing so, Congress stated that the Court misperceived congressional intent and thus misapplied the law. It thus made the new law retroactive to the date before the Supreme Court issued the decision, so that it could be applied as if the Supreme Court decision had never been issued.[6] Because part of the Court's holding was retroactively overturned by Congress in 2009, it should not have been relied upon by this Court.

The Seventh Circuit recently confirmed that the reasoning of *Ledbetter* is no longer viable in *Groesch*, *supra*, 2011 WL 1105593, at *5-7, holding that there is no "principled reason" to apply the accrual rule established by the Act to Title VII claims, but not extend that rule, and the reasoning behind it, to Equal Protection Clause claims that were subjected to the original *Ledbetter* decision only by way of analogy to begin with. *Id.* at *5. Although not controlling, Plaintiffs urge the Court to consider the thoughtful analysis set forth in *Groesch*, the first appellate opinion to consider the impact of the Ledbetter Act on the *Ledbetter* decision's impact on Section 1983 claims. The Seventh Circuit reasoned as follows:

> if *Ledbetter* was understood to extend logically to Section 1983 claims, as, for example, we had earlier understood *Morgan*'s Title VII reasoning to extend to

[5] The Act amends Title VII by providing that an "unlawful employment practice" occurs in the following situations: (1) "when a discriminatory compensation decision or other practice is adopted," (2) "when an individual becomes subject to a discriminatory compensation decision or other practice," and (3) "when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice." 42 U.S.C. § 2000e-5(e)(3)(A).

[6] For example, in reaching its conclusion about the statute of limitations, this Court noted in its order that its analysis might be different if it had found evidence that Defendants continued to use the wrestle-off policy within the limitations period. (Dkt. 509 at 20-21 n.16.) However, this Court's focus on the occasion of a "wrestle-off" on October 2001 is misplaced. Challenged here is Defendants' facially discriminatory policy of excluding women from an equal number of participation opportunities, in its many forms.

> Section 1983 claims, then we see no reason that the Ledbetter Act would not now restore our pre-*Ledbetter* precedent and allow us to extend the paycheck accrual rule to Section 1983 claims.
>
> * * *
>
> Neither the *Ledbetter* decision nor the Ledbetter Act addresses constitutional claims asserted under Section 1983. In the absence of any clearer directive, we believe the best course is to treat the Ledbetter Act as removing the *Ledbetter* decision as an obstacle to following our earlier precedents, which recognized the paycheck accrual rule for all allegations of unlawful discrimination in employee compensation. We hold that the paycheck accrual rule applies to pay discrimination claims under Section 1983.

Id. at *6 (citations & footnote omitted).

The application of *Ledbetter* to this case, which does not involve pay disparities at all but rather a facially discriminatory policy of a university and its officials that deprives women of equal opportunity in athletics, was already attenuated. In light of the Ledbetter Act, and the reasoning in *Groesch*, it should not be applied to the claims here to deprive Plaintiffs of their right to seek redress for all of Defendants' conduct that caused them injury.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court reconsider its December 2010 holding regarding the application of the statute of limitations to Plaintiffs' Equal Protection claims and that it find the claims are timely in their entirety.

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Respectfully submitted,

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