No. ______

In the Supreme Court of the United States

MICHIGAN STATE UNIVERSITY AND MICHIGAN STATE UNIVERSITY BOARD OF TRUSTEES,

Petitioners,

v.

SOPHIA BALOW, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex in any educational program or activity that receives federal financial assistance. 20 U.S.C. § 1681(a). Regulations implementing Title IX require that recipients of such assistance "shall provide equal athletic opportunity for members of both sexes." 34 C.F.R. § 106.41(c). An interpretative guidance issued in 1979, following notice and comment, clarifies this equal-opportunity mandate and establishes a safe harbor where "intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments." 44 Fed. Reg. 71,413, 71,418 (Dec. 11, 1979). Compliance with this safe harbor is critical to virtually every school that operates an intercollegiate athletics program.

The question presented—on which there is an acknowledged circuit split—is whether, in determining compliance with Title IX and the substantial proportionality rule, the athletic participation gap between male and female students must be assessed in raw numerical terms, or, instead, may be assessed as a percentage figure.

PARTIES TO THE PROCEEDINGS

Petitioners Michigan State University and the Michigan State University Board of Trustees were defendants-appellees in the Sixth Circuit below.

Respondents Sophia Balow, Ava Boutrous, Julia Coffman, Kylie Goit, Emma Inch, Sheridan Phalen, Madeline Reilly, Olivia Starzomski, Sarah Zofchak, Taylor Arnold, and Elise Turke were plaintiffs-appellants in the Sixth Circuit below.

Samuel L. Stanley, Jr. and Bill Beekman—the President of Michigan State University and the former athletic director of Michigan State University, respectively—were defendants-appellees in the Sixth Circuit below, and were represented by counsel for petitioners. Respondents' claims against Mr. Stanley and Mr. Beekman were dismissed by order of the district court on September 22, 2021.

RULE 29.6 STATEMENT

Pursuant to this Court's Rule 29.6, Petitioners Michigan State University and the Michigan State University Board of Trustees respectfully submit the following corporate disclosure statement.

Michigan State University is a state educational institution governed by the Michigan State University Board of Trustees, and is not a subsidiary or affiliate of a publicly owned corporation.

LIST OF RELATED PROCEEDINGS

The following proceedings are directly related to this petition:

Balow v. Michigan State University, No. 21-1183, U.S. Court of Appeals for the Sixth Circuit, judgment entered February 1, 2022, rehearing denied March 31, 2022.

Balow v. Michigan State University, No. 1:21-cv-44, U.S. District Court for the Western District of Michigan, preliminary injunction denied February 19, 2021.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Michigan State University and the Michigan State University Board of Trustees respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-36a) is reported at 24 F.4th 1051. The order of the court of appeals denying rehearing (App. 66a-67a) is available at 2022 WL 1072866. The opinion of the district court denying a preliminary injunction (App. 37a-65a) is available at 2021 WL 650712.

JURISDICTION

The court of appeals entered its judgment on February 1, 2022 (App. 1a, 20a) and denied rehearing on March 31, 2022 (App. 66a-67a). On June 21, 2022, Justice Kavanaugh extended the time to file a petition for a writ of certiorari through July 29, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant statutory and regulatory provisions are reproduced at App. 68a-75a.

INTRODUCTION

This case presents a question of critical importance to the administration of Title IX in intercollegiate athletics programs across the country: Whether, in determining the "participation gap" between men and women in college athletics, the gap must be assessed in numerical terms, or, instead, may be assessed as a percentage. In holding that the

participation gap must be assessed "in *numerical* terms, not as a percentage," App. 13a, the divided Sixth Circuit panel below split with the "consensus among the other federal circuit courts," *id.* at 36a (Guy, J., dissenting). The court's inflexible and unworkable compliance standard will wreak havoc with intercollegiate athletics programs.

Title IX has unquestionably transformed college athletics for the better. When Title IX was enacted 50 years ago, women and men participated in college athletics at starkly different rates relative to student enrollment. *See* Title IX of the Education Amendments of 1972: a Policy Interpretation, Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,419 (Dec. 11, 1979). Today, women and men participate in college athletics at more equitable rates than ever before, and that trend is especially pronounced in Division I athletics. But Title IX's continued success depends on maintaining an achievable and workable standard that schools can meet without judicial micromanagement and never-ending litigation.

Petitioner Michigan State University (MSU), one of the Nation's largest public universities, is deeply committed to ensuring gender equality in its athletic programs (as in all of its programs). MSU proudly fields hundreds of student-athletes to compete at the highest level across a wide range of Division I sports. In percentage terms, the rate of participation among women and men in MSU's athletic programming is virtually identical to the rate of undergraduate enrollment at MSU. In the 2019-2020 school year, for example, women accounted for 50.93% of MSU's student population and 50.28% of MSU's intercollegiate athletes. Federal courts of appeals and district courts around the country have

recognized that such substantial proportionality in athletic participation rates—viewed in percentage terms—establishes compliance with Title IX.

Running a college athletics program, especially at a major university like MSU, requires difficult decisions and tradeoffs. In the midst of a once-in-a-century pandemic, MSU faced extraordinary financial challenges in operating its athletics department and concluded that it needed to make substantial cuts. In October 2020, MSU announced that it would not continue the combined men's and women's swimming and diving program following the 2020-2021 season. In response, Plaintiffs—several members of the women's half of the swimming and diving team—brought this Title IX action, and moved for a preliminary injunction requiring MSU to reinstate only the women's component of the team. The district court denied that motion, holding that the participation gap created by the elimination of the swimming and diving team was too small—in both numerical and percentage terms—to violate Title IX. App. 60a-63a. As the court explained, "Plaintiffs have not cited, and the Court is not aware, of any case where a gap lower than 2% failed to satisfy the test for substantial proportionality." *Id.* at 62a.

A divided panel of the Sixth Circuit, however, held that the district court erred in gauging the participation gap in percentage terms. Instead, the Sixth Circuit majority held that the participation gap must be assessed in "*numerical* terms, not as a percentage." *Id.* at 13a. Under this approach, "[a] school may fail to achieve substantial proportionality even if its participation gap is only a small percentage of the size of its athletics program." *Id.*

Judge Guy dissented. As he observed, "all but one federal appellate court to have considered the matter has viewed the participation gap as a percentage," and this is consistent with the fact that the "plain meaning of ['substantial proportionality'] inherently requires reference to a ratio or percentage." *Id.* at 28a, 29a-30a & n.6. In Judge Guy's view, the majority's numerical approach—which is violated any time the numerical discrepancy between male and female athletes exceeds the size of a "viable team"—"is tantamount to requiring perfection, not substantial proportionality." *Id.* at 33a.

The Sixth Circuit's decision warrants this Court's review. As both the majority and dissent below recognized, the Sixth Circuit's holding conflicts with the decisions of other circuits on the question presented. The Sixth Circuit's rule also is deeply flawed. Pursuant to longstanding guidance from the Department of Education, universities like MSU have demonstrated their compliance with Title IX by showing that the rates of athletic participation among women and men on campus are substantially proportionate in percentage terms. And that approach is consistent with the text of Title IX itself, which explicitly envisions that an "imbalance" in participation may be measured as a "percentage." 20 U.S.C. § 1681. Moreover, the Sixth Circuit's numerical approach is unworkable in practice—especially for large universities with tens of thousands of students and hundreds of student-athletes—given the natural fluctuations in enrollment and athletic rosters, both year-to-year and during a given academic year. The Sixth Circuit's decision invites endless Title IX litigation that will

ultimately harm the very expansion of athletic opportunity that the law is meant to encourage.

The question presented goes to the heart of Title IX's enforcement in university athletics programs around the country, and it implicates an acknowledged split among the federal courts of appeals. Certiorari is warranted.

STATEMENT OF THE CASE

A. Statutory And Regulatory Background

Title IX of the Education Amendments of 1972 provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). When Congress enacted Title IX, it stipulated that this statutory prohibition on discrimination should not be "interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area." *Id.* § 1681(b). Yet Congress also specifically envisioned that in "any hearing or proceeding under this chapter," a court may consider "statistical evidence" bearing on the question whether "an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex." *Id.*

Under a federal regulation adopted pursuant to Title IX in 1975, colleges and universities receiving federal funding must "provide equal athletic opportunity for members of both sexes." 34 C.F.R. § 106.41(c). The first and most significant factor with respect to "equal athletic opportunity" is "[w]hether the selection of sports and levels of competition effectively accommodate the interests and abilities of both sexes." *Id.* § 106.41(c)(1).

Shortly after the Department of Health, Education, and Welfare (HEW) promulgated this regulation, it issued a "Policy Interpretation" to "provide further guidance on what constitutes compliance with the law," and to "provide a framework within which" complaints of unequal athletic opportunity could be resolved. 44 Fed. Reg. at 71,413. The Policy Interpretation, which was preceded by a notice of proposed rulemaking and public comment, *see* 43 Fed. Reg. 58,070 (Dec. 11, 1978), states that "institutions must provide both the opportunity for individuals of each sex to participate in intercollegiate competition, and for athletes of each sex to have competitive team schedules which equally reflect their abilities," 44 Fed. Reg. at 71,418. The Policy Interpretation further states that a college or university can establish compliance with Title IX by showing that "intercollegiate level participation opportunities for male and female students are provided in numbers *substantially proportionate* to their respective enrollments." *Id.* (emphasis added.)

In the decades since the Policy Interpretation, the Department of Education (HEW's successor agency) has repeatedly explained that this substantial proportionality threshold is a regulatory "safe harbor" establishing compliance with Title IX. App. 81a-82a

(Dear Colleague Letter from Norma V. Cantú, Ass't Secretary for Civil Rights, U.S. Dep't of Educ., *Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test* (Jan. 16, 1996) (1996 Letter)); Gerald Reynolds, Ass't Secretary for Civil Rights, U.S. Dep't of Educ., Dear Colleague Letter, *Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance* (July 11, 2003), https://www2.ed.gov/about/offices/list/ocr/title9guidanceFinal.html. As the Department explained in a 1996 Dear Colleague Letter, this safe harbor was meant to "give[ ] institutions flexibility and control over their athletics programs." App. 105a.

The Department of Education has consistently recognized that colleges and universities qualify for the safe harbor where the "*percent[age]* of male and female athletes is substantially proportionate to the *percent[age]* of male and female students enrolled at the school." James F. Manning, Office for Civil Rights, U.S. Dep't of Educ., *Additional Clarification of Intercollegiate Athletics Policy: Three-Part Test – Part Three* at 1 (Mar. 17, 2005), https://www2.ed.gov/about/offices/list/ocr/letters/200503017-additional-clarification-three-part-test.pdf (emphasis added). Thus, in its 1996 Letter, the Department explained that, "[i]f an institution's enrollment is 52 percent male and 48 percent female and 52 percent of the participants in the athletic program are male and 48 percent female, then the institution would clearly" qualify for the safe harbor. App. 93a. The Department recognized that "natural fluctuations in an institution's enrollment and/or participation rates may affect the percentages," and that slight deviations from proportionality (measured in percentages) would not bring the university outside

the safe harbor, since "it would be unreasonable to expect the institution to fine tune its program in response" to such fluctuations. *Id.*

The Department has also recognized that, even when there is a significant participation gap in *percentage* terms, schools may still qualify for the safe harbor where such participation gap is small in absolute terms. Thus, for example, the Department has suggested that a large university with 600 athletes will likely not qualify for the safe harbor where there is a five-percentage-point participation gap—i.e., "women make up 52 percent of the university's enrollment, [but] only represent 47 percent of its athletes." *Id.* at 94a. But a smaller college with a 60-participant athletic program is differently situated. There, if women "make up 52 percent of the university's enrollment and represent 47 percent of [its] athletes," the participation gap is nevertheless so small in absolute terms that "the number of [additional athletic] opportunities that would be required to achieve proportionality would not be sufficient to sustain a viable team." *Id.* This numerical inquiry represents an *additional* way a school may establish that athletic opportunities are substantially proportionate—not the only way. *Id.*

Title IX is enforced not only by the Department of Education but also by private litigants through the implied right of action established in *Cannon v. University of Chicago*, 441 U.S. 677 (1979). For decades, colleges and universities have litigated Title IX claims concerning whether they have provided "substantially proportionate" intercollegiate athletic opportunities to members of each sex. And for decades, courts have evaluated those claims by looking to the relative *percentage* of men and women

among enrolled students as against the relative *percentage* of male and female participants in intercollegiate athletics. *See infra* at 19-23.

B. Factual And Procedural Background

1. MSU's Athletics Program

MSU is one of the Nation's oldest land-grant universities and was among the earliest public coeducational institutions of higher education in the United States. *See* Claudia Goldin & Lawrence F. Katz, *Putting the "Co" in Education: Timing, Reasons, and Consequences of College Coeducation from 1835 to the Present*, 5 J. Human Capital 377, 383 & n.10 (2011). At its founding, MSU was "the vanguard for a national movement to make useful advanced education available to a broad public." Mich. State Univ., *Strategic Plan: Mission & Values*, https://strategicplan.msu.edu/mission (last visited July 26, 2022). MSU adheres to that commitment today, educating over 35,000 undergraduates—approximately half of whom are women—on a yearly basis, paid for through a combination of tuition revenues and state taxpayer assistance.

As a major university with tens of thousands of students, MSU maintains a large athletics department whose programming allows over 800 student-athletes—approximately half of whom are women—to compete in NCAA Division I sports. Dkt. No.[1] 8 at 4. Until 2021, MSU fielded athletes on 19 different intercollegiate teams. Nine of those teams were women's teams (basketball, field hockey, golf,

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[1] Citations to "Dkt. No." refer to the district court docket below, *Balow v. Michigan State University*, No. 1:21-cv-44 (W.D. Mich.).

gymnastics, rowing, soccer, softball, tennis, and volleyball); eight were men's teams (baseball, basketball, football, golf, ice hockey, soccer, tennis, and wrestling); and two were combined men's and women's teams (track and field/cross country, and swimming and diving). *Id.* at 2.

In mid-2020, as the Nation fell into the grips of the devastating COVID-19 pandemic, MSU's athletics department was faced with a $22 million budget deficit for the 2020-2021 fiscal year, owing to a $40 million revenue shortfall. *Id.* at 7. To address that staggering deficit, the athletics department was forced to take a number of significant cost-saving actions. These measures included salary cuts, furloughs, and reductions in department and other university staff. *Id.* at 7-8. In addition, in October 2020, the athletics department announced a gender-neutral decision eliminating the university's combined men's and women's swimming and diving team after the conclusion of the 2020-2021 season—a decision impacting an almost identical number of male and female student-athletes. *Id.* at 7.

That decision rested, in large part, on the department's determination that eliminating the combined men's and women's swimming and diving team would save the university over $2 million per year. *Id.* at 8. It would also avoid additional capital outlays in connection with necessary upgrades and repairs to the university swimming and diving facilities. *Id.* The athletics department planned to redirect that money to the department's general fund, to be used for nutrition services, academic support, training, and mental and physical health services for MSU's hundreds of other student-athletes. *Id.* Yet MSU also committed to honoring its existing athletic

scholarships for the women and men on the swimming and diving team and to provide other assistance to those students. *Id.* at 25.

2. This Action

Plaintiffs are eleven women who were members of MSU's swimming and diving team during its final season in 2020-2021. In January 2021, they filed this action against MSU in federal district court alleging a violation of Title IX, and sought a preliminary injunction requiring MSU to reinstate only the women's component of the team.

In support of their Title IX claim, Plaintiffs asserted that MSU does not provide athletic opportunities for female students in numbers "substantially proportionate" to the number of female undergraduates at the university, and alleged that the elimination of the swimming and diving team (which had 62 members, 33 of whom were women, *see* App. 20a; *id.* at 55a n.5) would exacerbate the violation. Plaintiffs offered an expert report purporting to calculate the "participation gap" between female student enrollment at MSU and female athletic participation for the 2018-2019 and 2019-2020 academic years—i.e., the two full years preceding the university's October 2020 decision to eliminate the swimming and diving team. *Id.* at 47a.

As relevant here, Plaintiffs' expert presented her calculations of the participation gap in two different forms.[2] The first, rendered in percentage terms,

[2] Plaintiffs' expert developed her primary calculations for the 2018-2019 year using data derived from MSU's disclosures under the Equity in Disclosure Act (EADA)—even though there is no dispute that EADA and Title IX's respective standards for what qualifies as a "participation opportunity" (i.e., the number

reflects the difference between the percentage of women enrolled at MSU and the percentage of women participating in intercollegiate athletics at MSU. The second, in numerical terms, reflects the number of women who would need to be added to MSU's intercollegiate athletics rosters in order to reach exact proportionality. Her results were as follows:

Plaintiffs' Figures

Year	Female Students Enrolled (% of student body)	Female Athletic Participation Opportunities (% of overall athletic opportunities)	Participation Gap as %; Participation Gap as #
2018-2019	51.2%	49.9%	1.3%; 25 opportunities
2019-2020	50.9%	48.9%	2.0%; 35 opportunities
2019-2020 (w/o swim team)	50.9%	Not provided by expert	Not provided by expert

of existing student-athlete spots) differ. *See id.* at 49a-50a; *id.* at 14a-15a. For the 2019-2020 year, Plaintiffs' expert examined team rosters on the MSU athletics website and developed figures using her own methodology. *Id.* at 51a. Plaintiffs' expert also opined that she overestimated the number of female participation opportunities at MSU, based on speculation that MSU inflated the rosters of certain teams. The district court rejected the latter opinion as flawed, *id.* at 50a-54a, 58-60a, and the Sixth Circuit affirmed that determination, *id.* at 7a-9a.

App. 2a-3a, 14a; *id.* at 23a (Guy, J., dissenting); *see also id.* at 60a.

In response, MSU submitted a declaration from its Title IX compliance officer and an expert report. *Id.* at 54a-55a. That evidence showed an even smaller participation gap for each of the years at issue. Specifically, MSU submitted the following figures:

MSU's Figures

Year	Female Students Enrolled (% of student body)	Female Athletic Participation Opportunities (% of overall athletic opportunities)	Participation Gap as %; Participation Gap as #
2018-2019	51.23%	49.78%	1.45%; 27 opportunities
2019-2020	50.93%	50.28%	0.65%; 12 opportunities
2019-2020 (w/o swim team)	50.93%	50.06%	0.87%; 15 opportunities

App. 2a-3a, 14a; *id.* at 23a, 30a n.6 (Guy, J., dissenting); *id.* at 55a, 57a-58a, 60a.

Even though the two sides' calculations of the participation gap differed in numerical terms, there was no real dispute that in percentage terms, MSU's participation gap (actual or anticipated) was small. *See id.* at 14a, 23a. Nor could Plaintiffs identify any case in which a court had found that a university's

athletic offerings were not "substantially proportionate" to student enrollment when the participation gap was 2% or less in percentage terms. *See id.* at 62a. Instead, Plaintiffs argued that MSU's athletic programming was not substantially proportionate to student enrollment because the participation gap—in numerical terms—was large enough to "sustain a viable athletic . . . team" of women. Dkt No. 2-1, at 30-31, 38 (citation omitted).

3. District Court Decision

After a hearing, the district court concluded that Plaintiffs had not established a likelihood of success on the merits and denied their request for a preliminary injunction. App. 38a, 63a, 65a.

Parsing the two sides' numbers, the court found that, even under the Plaintiffs' proffered estimates for the 2018-2019 and 2019-2020 school years, "MSU's participation gap appears to be lower than 2%." *Id.* at 62a. And that was significant, the district court found, because "Plaintiffs have not cited, and the Court is not aware, of any case where a gap lower than 2% failed to satisfy the test for substantial proportionality." *Id.* at 62a-63a (citing cases holding that a gap of 2% or less does not violate Title IX).

In reaching that conclusion, the district court rejected Plaintiffs' argument that MSU should be deemed out of compliance so long as the participation gap, as an absolute number, was large enough to sustain an additional viable team. *See id.* at 60a-61a. The court reasoned that this approach would be inconsistent with the Department of Education guidance cautioning that in light of "natural fluctuations in an institution's enrollment and/or [athletic] participation rates," it is "unreasonable to

expect an institution to achieve exact proportionality." *Id.* at 61a (quoting *id.* at 93a). It would also ignore the Department of Education's instruction to take into account "the size of [a university's] athletics program," since larger schools are likely to experience "larger fluctuations" in enrollment or athletics rosters from year to year. *Id.* "Courts seem to recognize this point," the district court explained, because "[t]hey generally examine participation gaps *as a percentage* of the size of the athletic program at the school in question." *Id.*

Accordingly, the district court denied Plaintiffs' request for a preliminary injunction. *Id.* at 65a.

4. Decision Below

Plaintiffs appealed, and a divided Sixth Circuit panel vacated the district court's decision. App. 2a.

a. The Sixth Circuit majority did not question that the participation gap at MSU never exceeded 2% under any of the parties' proffered sets of data for the years at issue. Instead, the court held that the district court erred in holding "that participation gaps that are lower than two percent satisfy substantial proportionality." *Id.* at 12a. The court expressly acknowledged that "[m]any cases," including decisions from other courts of appeals, "have drawn a bright line around two percent," such that participation gaps of less than two percent establish compliance with Title IX's substantial-proportionality requirement as a matter of law. *Id.* at 13a n.3 (citing cases). But the Sixth Circuit dismissed that consensus as not "binding on this court." *Id.*

Rather, the Sixth Circuit held, "substantial proportionality should be determined by looking at the gap in *numerical* terms, not as a percentage." *Id.*

at 13a; *see id.* at 12a ("[T]he ultimate focus" of the inquiry "should be on the *numerical* participation gap"). Thus, the court reasoned, "[a] school may fail to achieve substantial proportionality even if its participation gap is only a small percentage of the size of its athletic program." *Id.* at 13a. Under this numerical approach, the court continued, athletic opportunities are substantially proportionate only when the participation gap at a school is so small that "the number of [additional] opportunities that would be required to achieve proportionality would not be sufficient to sustain a *viable team*," i.e., a "team for which there is a sufficient number of interested and able students and enough available competition to sustain an intercollegiate team." *Id.* at 17a (emphasis added) (citation omitted).[3]

The Sixth Circuit remanded for "further proceedings consistent with this opinion." *Id.* at 20a.

b. Judge Guy dissented. As he explained, "the majority announces legal standards that no other federal circuit court has adopted—and for good reason—because the standards blatantly contradict Title IX and agency guidance." *Id.* at 21a.

Contrary to the majority, Judge Guy concluded that "courts may consider the participation gap as a percentage *or* a number"; as he pointed out, "all but one federal appellate court to have considered the matter has viewed the participation gap as a

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[3] In formulating this standard, the Sixth Circuit majority adopted the position advanced in an amicus brief filed by the United States urging reversal. *See* CA6 United States Amicus Curiae Br., ECF No. 29. As explained *infra*, that position departs from longstanding agency guidance and prior briefs filed by the Department of Education.

percentage." *Id.* at 27a-28a. He agreed with the district court that evaluating the participation gap in percentage terms properly accounts for "larger athletic programs"—like MSU's—which are "likely to see larger fluctuations in participation numbers from year to year." *Id.* at 30a (citation omitted). The Sixth Circuit majority's approach, by contrast, "[i]gnor[es] the size of the participation gap in relation to the size of the athletics program" and thereby "significantly hinder[s] the ability of schools with larger programs to maintain compliance." *Id.* (citation omitted).

As Judge Guy further explained, the relevant participation gap here was only "0.87% or 15 [students] after the elimination of the men's and women's swimming and diving teams." *Id.* at 31a. "No court has gone so far as to enjoin a school for such a minimal disparity," he concluded. *Id.* Yet the majority's numbers only/viable-team standard would subject schools to the threat of Title IX liability and loss of federal funding even in cases of such minimal disparity, so long as "the participation gap is greater than *any* team for which there is interest, ability, and available competition (i.e., a 4-person tennis team)." *Id.* at 33a. As Judge Guy noted, "[t]hat is tantamount to requiring perfection, not substantial proportionality"—and renders it virtually impossible for a university to ever eliminate a team. *Id.*

c. MSU sought rehearing en banc, supported by the Board of Regents of the University of Michigan as amicus. The Sixth Circuit denied rehearing, with Judge Guy dissenting. *See id.* at 67a.[4]

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[4] On remand, Plaintiffs have renewed their request for a preliminary injunction, arguing that it is clear that they have

REASONS FOR GRANTING THE PETITION

The Sixth Circuit's divided decision in this case deepens an acknowledged circuit conflict on a threshold question of critical importance to the operation of Title IX and college athletics programs across the country. As Judge Guy explained, the Sixth Circuit's decision wrongly converts Title IX's substantial proportionality proxy into a mandate for "perfection," essentially eliminates a long-recognized regulatory safe harbor, and creates an unworkable mandate for colleges and universities that will subject schools to the constant threat of Title IX litigation and sanctions. This Court's intervention is needed.

I. The Question Presented Implicates An Acknowledged Circuit Split

The Court's review is needed to resolve a clear circuit split on the question whether a university may establish compliance with Title IX by showing that its athletic programming for women and men is substantially proportionate—in percentage terms—to the enrollment of women and men at the school.

a. *Circuits that gauge substantial proportionality on a percentage basis.* The Seventh Circuit has long held that universities may show that their athletic programming is substantially proportionate to student enrollment by reference to percentages. *See Boulahanis v. Board of Regents*, 198 F.3d 633 (7th Cir. 1999), *abrogated on other grounds by Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246 (2009).

In *Boulahanis*, a group of male student-athletes challenged Illinois State University's decision to

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shown a likelihood of success under the Sixth Circuit's new standard. *See* Dkt. No. 89 at 2.

eliminate two men's teams, and add one women's team, on the ground that such decision "violate[d] Title IX on its face" because it was "based solely on the sex of the participants." *Id.* at 636. The Seventh Circuit rejected that argument because it found that the university's decision resulted in substantially proportionate athletic programming. As the court explained, "the elimination of men's athletic programs is not a violation of Title IX as long as men's participation in athletics continues to be 'substantially proportionate' to their enrollment." *Id.* at 638 (citation omitted). And following "the elimination of men's soccer and men's wrestling at the University, the athletic participation of men remained within *three percentage points* of [male] enrollment." *Id.* at 638-39 (emphasis added).

Thus, in the Seventh Circuit's view, because male athletic participation rates "remained within three percentage points of enrollment," Illinois State had "achieved substantial proportionality between men's enrollment and men's participation in athletics," and so was "presumed to have accommodated the athletic interests of that sex." *Id.* at 639. Accordingly, the decision to "eliminat[e] the programs at issue [did] not constitute a violation of Title IX." *Id.*

Twelve years later, the Fourth Circuit followed *Boulahanis* and adopted substantially the same position when confronting similar facts. *See Equity in Athletics, Inc. v. Department of Educ.*, 639 F.3d 91 (4th Cir. 2011). Indeed, in *Equity in Athletics,* the Fourth Circuit squarely rejected the argument adopted by the Sixth Circuit majority in the decision below and, instead, upheld a university's assertion of a percentage-based safe harbor.

In *Equity in Athletics v. Department of Education*, an organization representing male student-athletes sued James Madison University (JMU), alleging that JMU's elimination of several men's teams violated Title IX. 675 F. Supp. 2d 660 (W.D. Va. 2009). The university moved to dismiss the claim, arguing that—based on projected percentages of female and male athletic participation—JMU had achieved "substantial proportionality." JMU Mem. Supp. Mot. Dismiss 11, No. 5:07-cv-00028 (W.D. Va.), 2009 WL 2389222. The district court agreed. It noted that "men made up 39.1% of the undergraduate population during the [relevant] school year, but only 37.1% of the university's athletes," a 2% participation gap. *Equity in Athletics*, 675 F. Supp. 2d at 681. And the district court concluded that the "mere fact that men became the 'underrepresented gender' by 2% as a result" of JMU's programming cuts was "insufficient to state a plausible claim for relief under Title IX." *Id.* at 683.

On appeal, the plaintiff organization challenged the district court's percentage-based safe harbor. Tracking the Sixth Circuit's position here, the plaintiff asserted that "there is no set percentage that defines 'substantial proportionality,'" and that courts should instead look to "whether the 'proportionality gap' is large enough to fit a viable team." *Equity in Athletics* Appellant's Br. 70, No. 10-1259 (4th Cir.), 2010 WL 1900320. Because JMU had a "two-percent gap, which equates to 17 male athletes"—"large enough to fit a men's cross country or men's gymnastics team"—the plaintiff argued that JMU fell outside the "substantial proportionality" safe harbor. *Id.* at 71. Notably, the Department of Education (a defendant in the case) declined to support the plaintiff

on these points. *See Equity in Athletics* Federal Appellees Br., No. 10-1259 (4th Cir.), ECF No. 24.

The Fourth Circuit rejected the plaintiff's argument and affirmed the judgment of the district court. *See Equity in Athletics*, 639 F.3d at 110. In doing so, the Fourth Circuit relied on the Seventh Circuit's decision in *Boulahanis*, which the Fourth Circuit characterized as having "found educational institutions to be in compliance with Title IX where the sex disparity was similar to [JMU's]." *Id.* Accordingly, the Fourth Circuit found "no support for [the plaintiff's] contention that a disparity as low as 2% . . . is substantially disproportionate." *Id.* Nor did the Fourth Circuit consider it relevant that the size of the gap in numeric terms—17 participation opportunities—could conceivably support another men's team of some kind. *See id.* at 109-10 (not discussing this consideration). And elsewhere in its opinion, the Fourth Circuit reiterated that JMU was in compliance with Title IX because the university had shown substantial proportionality and thereby qualified for the regulatory safe harbor.

It is thus clear that in the Fourth and Seventh Circuits, substantial proportionality may be assessed on a percentage basis. In those circuits, moreover, MSU would face no Title IX liability on the basis of a small participation gap like the one at issue here. The Sixth Circuit expressly recognized as much in its decision. App. 13a n.3 (citing *Boulahanis* and *Equity in Athletics* as among the "[m]any cases" that . . . have drawn a bright line around two percent").

Furthermore, *Boulahanis* and *Equity in Athletics* reflect the prevailing approach to participation-gap analysis in Title IX litigation nationwide. As one district court has explained, courts have "coalesced on

a few guideposts" in applying the Policy Interpretation and 1996 Letter, including the principle that "a deviation of less than 3.5 percentage points typically keeps the ratios [between enrollment and athletic participation] substantially proportionate." *Portz v. St. Cloud State Univ.*, 196 F. Supp. 3d 963, 975 (D. Minn. 2016); *see also id.* at 976 (assuming that a participation gap of that size would qualify for the safe harbor). Another district court has likewise noted the existence of a statistical safe harbor, observing that "numerous district courts have found that a percentage disparity in the 1%-3% range shows substantial proportionality." *Anders v. California State Univ., Fresno*, No. 1:21-cv-179, 2021 WL 3115135, at *2 (E.D. Cal. July 22, 2021); *see also Anders v. California State Univ., Fresno*, No. 1:21-cv-179, 2021 WL 1564448, at *4-5, *16 (E.D. Cal. Apr. 21, 2021) (holding that 1.57% disparity qualified for the safe harbor), *reconsideration denied*, No. 1:21-cv-179, 2021 WL 3115135 E.D. Cal. July 22, 2021). Judge Guy acknowledged similar precedent in his dissent. App. 28a-29a & n.5.

b. *Circuits that have rejected a percentage approach in gauging substantial proportionality.* The Sixth Circuit below squarely rejected the position adopted by the Fourth and Seventh Circuits. It held that "substantial proportionality should be determined by looking at the gap in *numerical* terms, not as a percentage." App. 13a. Thus, the Sixth Circuit refused to recognize "'a statistical safe harbor at [two percent] or any other percentage." *Id.* (alteration in original) (citation omitted). Instead, the Sixth Circuit held that courts must focus on "the *numerical* participation gap" and that a lack of substantial proportionality exists whenever that gap

is sufficiently large to sustain some kind of "viable team," regardless of whether the gap is exceedingly small in percentage terms. *Id.* at 12a-13a, 16a; *see id.* at 33a (Guy, J., dissenting). The decision thus adopts the standard unsuccessfully advocated by the plaintiff in *Equity in Athletics*. *See supra* at 21.

The Second Circuit has likewise held that, under Title IX, there is no "statistical safe harbor at . . . *any* . . . percentage." *Biediger v. Quinnipiac Univ.*, 691 F.3d 85, 106 (2d Cir. 2012) (emphasis added). *Biediger* concerned a 3.62% participation gap at Quinnipiac University—a gap that the Second Circuit described as "relatively small," and which the district court had described as a "'borderline case of disproportionate athletic opportunities.'" *Id.* (citation omitted). The Second Circuit acknowledged that the district court in *Equity in Athletics* had reported "finding no case in which a disparity of two percentage points or less has been held to manifest a lack of substantial proportionality." *Id.* Nevertheless, the Second Circuit reasoned that the Department of Education's 1996 Dear Colleague Letter could not be read to create a safe harbor at "any. . . percentage." *Id.* In refusing to gauge assess substantial proportionality as a percentage, the Sixth Circuit below expressly relied on *Biediger*. App. 13a.

Notably, however, the Second Circuit did not go as far as the Sixth Circuit below. In *Biediger,* the Second Circuit declined to hold that "no matter how small a disparity, if it can be closed by the creation of a new sports team, a school will be found not to have afforded substantially proportionate athletic opportunities." 691 F.3d at 107. Under the decision below, however, a numerical participation gap that exceeds the size of a viable team establishes a Title IX

violation. *See* App. 16a-18a; *id.* at 33a ("[T]oday's decision means that if the participation gap is greater than *any* team for which there is interest, ability, and available competition (i.e., a 4-person tennis team), a school must *always* add that team to comply with Title IX.") (Guy, J., dissenting).

Both the Sixth Circuit majority and dissent acknowledged that the decision below conflicts with the decisions of other circuits on whether the participation gap may be viewed as a percentage in gauging substantial proportionality. *See id.* at 13a & n.3 (citing cases); *id.* at 28a-29a & n.5 ("[A]ll but one federal appellate court to have considered the matter has viewed the participation gap as a percentage") (Guy, J., dissenting); *id.* at 36a (Sixth Circuit's decision announces new rule that is "contrary to . . . the consensus among the other federal circuit courts") (same).

Certiorari is warranted to resolve this conflict.

II. The Decision Below Is Wrong

The Sixth Circuit's decision is also wrong. Indeed, as Judge Guy explained, it is "contrary to Title IX" as well as "agency guidance." *Id.* And it creates an unworkable rule that will subject universities to endless Title IX litigation and, ultimately, impede good-faith efforts to provide equal athletic opportunities to women and men on campus.

A. The Sixth Circuit's Rule Is At Odds With The Text Of Title IX

The Sixth Circuit's categorical rule that "[p]ercentages" may not be used "for measuring the participation gap," *id.* at 11a, conflicts with the text of Title IX itself. Title IX explicitly contemplates that parties to a "hearing or proceeding under this

chapter" may make use of "statistical evidence" going to the question whether "an imbalance . . . may exist with respect to the total number *or percentage* of persons of that sex participating in or receiving the benefits of" federally supported educational programming "in comparison with the total number *or percentage* of persons of that sex in any community." 20 U.S.C. § 1681(b) (emphasis added).

Congress's reference to the consideration of "percentage[s]" in assessing "imbalance[s]" is telling. Absolute numbers often fail to communicate the contextualized scale of an "imbalance." Putting the numbers in "percentage"-based "statistical" terms, *id.*, puts them in their proper perspective. As Judge Guy observed, the concept of *proportionality* "inherently requires reference to a ratio or percentage." App. 30a n.6 (collecting dictionary definitions of "proportional" and "proportionality"). That is different than a pure numerical approach. In evaluating a participation gap of 15, for example, the answer to the question whether athletic participation is "substantially proportionate" to student enrollment will differ depending on whether the athletic program in question has 500 participants or 50 participants.

And that logic is consistent with the logic underlying the Department of Education's own guidance. As the Department has explained, a determination of substantial proportionality "depends on the institution's specific circumstances and the size of its athletic program[,]" and requires consideration of "natural fluctuations in enrollment and participation rates." *Id.* at 93a. Along the same lines, the district court correctly noted that "larger athletic programs are likely to see larger fluctuations in participation numbers from year to year," yielding

"'natural fluctuations in enrollment and participation rates' that may be somewhat large in absolute numbers but are relatively small in relation to the size of their programs." App. 61a. This understanding, which maps onto the statute's text, is critical to a workable interpretation of Title IX.

B. The Sixth Circuit's Rule Contravenes Longstanding Agency Guidance

The Sixth Circuit's decision also conflicts with longstanding agency guidance, upsetting long-held reliance interests. As Judge Guy explained, the Department of Education itself has looked to the participation gap as a percentage and as a number. App. 27a-28a. The Sixth Circuit stated that the Department's 1996 Letter "never discussed the *participation gap* as a percentage." *Id.* at 11a. But that is simply incorrect. The 1996 Letter specifically explains that where "an institution's enrollment is 52 percent male and 48 percent female and 52 percent of the of the participants in the athletic program are male and 48 percent female, then the institution would clearly" demonstrate substantial proportionality. *Id.* at 93a. That scenario effectively describes *this case*. Yet the Sixth Circuit's decision forbids MSU from showing a substantial proportionality on a percentage basis, concluding that "substantial proportionality should be determined by looking at the gap in *numerical* terms, not as a percentage." App. 13a. That conclusion subverts the substantial proportionality safe harbor long recognized by the Department of Education.

The rule adopted by the Sixth Circuit also collapses two independent ways that the Department has indicated that a school may satisfy Title IX. Since

the government began enforcing Title IX in the 1970s, the responsible government agency has advised that a university may establish compliance where "participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments." 44 Fed. Reg. at 71,418. As courts have long recognized, this safe harbor gives universities the most straightforward way of avoiding "extensive compliance analysis" and staying "on the sunny side of Title IX": by "simply . . . maintaining gender parity between [the university's] student body and its athletic lineup." *Cohen v. Brown Univ.*, 991 F.2d 888, 897-98 (1st Cir. 1993).

But the 1979 Policy Interpretation also provides that, even at an institution where "the members of one sex are underrepresented among intercollegiate athletes"—meaning that participation opportunities are *not* substantially proportionate to enrollment—a university may still establish compliance by demonstrating that "the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program." 44 Fed. Reg. at 71,418. That safe harbor turns on "whether there are concrete and *viable* interests among the underrepresented sex that should be accommodated by an institution." App. 82a (emphasis added). Where there is no "viable team for the underrepresented sex" that could fill an unmet interest, then the interests and abilities of the members of the underrepresented sex have been effectively accommodated. Russlyn Ali, Ass't Secretary for Civil Rights, U.S. Dep't of Educ., Dear Colleague Letter at 4, *Intercollegiate Athletics Policy Clarification: The Three-Part Test—Part Three* (Apr.

20, 2010), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-20100420.pdf. The Department has consistently treated this inquiry as an independent basis for compliance. App. 82a; *see also id.* at 89a.

Under the Sixth Circuit's numerical-only approach to assessing substantial proportionality, however, Title IX is violated whenever the participation gap in numerical terms is greater than a viable team for which there is interest, ability, and available competition. *Id.* at 17a (majority op.); *see id.* at 33a (Guy, J., dissenting). Thus, the Sixth Circuit's analysis cuts past the initial question whether athletic opportunities among men and women are "substantially proportionate" (even if not *exactly* proportionate) and substitutes the question whether a viable team could be formed that would make male and female athletic participation exactly proportionate. In doing so, the decision below effectively eliminates a separate safe harbor for athletic programs that provide substantially proportionate opportunities to women and men.[5]

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[5] The problems created by the Sixth Circuit's numerical-only approach are exacerbated by the fact that, under the Sixth Circuit's rule, courts are forbidden from considering average team size in determining whether the substantial proportionality requirement is met. As Judge Guy explained, that prohibition itself contravenes the Department of Education's prior guidance and enforcement practice. App. 31a (dissenting). For a school like MSU, the average team size for women (around 35 during the period in question) can significantly exceed the size of a viable team (e.g., a "4-person tennis team"). *Id.* at 33a. This separate departure from prior enforcement practice only heightens the problems with, and burdens of, the Sixth Circuit's numerical-only approach.

This departure from the Department's longstanding guidance materials upsets settled reliance interests and will greatly disrupt the administration of college athletics programs. And although the Sixth Circuit adopted the position advocated in amicus brief filed by the current Administration, *see supra* at 12 n.2, the position advanced by that brief is at odds with prior briefs filed by the Department and, in any event, cannot change the statute, regulations, or policy interpretation adopted after notice and comment.

C. The Sixth Circuit's Rule Is Unworkable

The Sixth Circuit's rule is also unworkable. The whole point of a regulatory safe harbor is to ensure that regulated parties will have a clear, predictable, and available means of complying with the law. *Cf. Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 106 (2015) (discussing safe harbors that "shelter regulated entities from liability when they act in conformance with" agency guidance). Yet the Sixth Circuit's decision deprives universities of any predictable way of ensuring compliance with Title IX on an ongoing basis. Under the Sixth Circuit's rule, small numerical participation gaps—which can pop up at any time, due to factors outside the university's control—can trigger a Title IX violation, eliminating virtually any margin for error. As Judge Guy explained, the Sixth Circuit's numerical approach "is tantamount to requiring perfection, not substantial proportionality." App. 33a (Guy, J., dissenting).

That rule is wholly impractical. The gender split among enrolled undergraduates and athletes at MSU and other universities is constantly shifting due to changes in enrollments and athletics rosters, which is

largely out of the schools' control. Needless to say, a global pandemic only accelerates such fluctuations. Whereas a percentage-based approach affords some degree of flexibility for schools (while still demanding substantial proportionality), the Sixth Circuit's numerical approach can trigger a Title IX violation with only incremental changes in the numbers of student athletes. *See id.* (observing that, under the majority's rule, whenever the participation gap exceeds the number of a "viable team"—even, say, "a 4-person tennis team"—"a school must *always* add that team to comply with Title IX"). Even when there is interest, ability, and competition, schools cannot create a new team simply with the wave of a magic wand. They must hire coaches, find facilities, schedule games, recruit students, and so on. The Sixth Circuit's numerical-only, "viable team" approach is completely unrealistic.

And, here again, that judicial mandate is at odds with longstanding agency guidance. The Department of Education has long recognized that it "would be unreasonable to expect the institution to fine tune its program in response to [such a] change in enrollment," App. 93a, and it is easy to see why. The development of new intercollegiate sports teams involves significant cost and planning, and any such planning may be overtaken by additional fluctuations (for instance, a temporary surge in enrollment for either gender). Demanding that universities build their athletic programming around such numerical minutiae does no favors to student-athletes of either sex, and it gives universities no room for coherent, systematic planning as to how best to "effectively accommodate the [athletic] interests and abilities of members of both sexes." 34 C.F.R. § 106.41(c)(1).

Ultimately, all of this will not just lead to more and more Title IX litigation, but it will impede efforts to create new athletic opportunities for women and men—as schools will be incentivized to freeze their existing athletic offerings in place, lest they trigger administrative scrutiny or liability by altering the existing gender balance of their programs in any way.

III. The Question Presented Is Exceptionally Important And Warrants Review Here

1. The question presented goes to the heart of the manner in which Title IX is implemented at university athletic departments around the country. The Department of Education's longstanding guidance was designed to offer colleges and universities "flexibility and control over their athletics programs." App. 105a. The Sixth Circuit's rule accomplishes just the opposite: It invites endless litigation over small numerical participation gaps (favoring men *or* women) that colleges and universities are powerless to control given that natural fluctuations in enrollment and athletic participation are out of their hands.

Under the Sixth Circuit's rule, universities must either accept the constant threat of litigation as small numerical participation gaps arise, or—as the University of Michigan suggested in an amicus brief below—they can engage in a series of never ending "quick fixes and constant policy revisions to address any small fluctuation in team or enrollment numbers." CA6 Bd. of Regents of Univ. of Mich. Amicus Curiae Br. 9, ECF No. 52. Either way, universities will be deprived of predictability and control over their athletic programming, and discouraged from undertaking the kind of long-range,

holistic evaluation of the athletic "interests and abilities of members of both sexes," 34 C.F.R. § 106.41(c)(1), that Title IX is meant to encourage.

As Judge Guy observed, the Sixth Circuit's rule will effectively prevent schools in the Sixth Circuit from removing an athletic team—men's or women's. That is because "when a school eliminates an athletic program and there is a participation gap, student-athletes (male and female alike) may establish a Title IX violation by simply relying on the prior existence of their team to show that there is enough interest, ability, and competition for their team." App. 33a; *see also id.* at 101a-02a. But Title IX was meant to expand athletic opportunity, not calcify the structure of existing athletic programming. And preventing the elimination or addition of teams is utterly impractical in light of budgetary demands and other factors.[6]

2. The United States' participation as amicus below underscores the importance of this case. In its appellate brief, the United States asserted that courts must "examine the size of the participation gap in absolute numbers," and that it was "not correct" for the district court to have "'examine[d] participation gaps as a percentage of the size of the athletic program at the school.'" CA6 United States Amicus Curiae Br. 14, ECF No. 29 (emphasis and citation omitted). That position contradicts prior administrative guidance, as well as amicus briefs filed by the United States in prior cases addressing

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[6] As Judge Guy noted, the very injunction that Plaintiffs sought in this case—the restoration of only the women's half of MSU's swimming and diving program—would generate "a participation gap of 21 for men," and thereby invite litigation to close *that* participation gap. App. 35a.

the "substantial proportionality" standard. *See, e.g.*, Amicus Curiae United States Br. 12, *Cohen v. Brown Univ.*, 991 F.2d 888 (1st Cir. 1995) (No. 95-2205), 1995 WL 17829532 (asserting that the substantial proportionality inquire requires only "a relatively simple comparison of the gender *ratio* of participating athletes with the gender *ratio* of the student population" (emphasis added)). And the United States' far-reaching litigation position in this case only heightens the need for this Court to resolve the circuit split over whether substantial proportionality may be assessed by percentages.

3. Finally, this case presents a clean vehicle to address the question presented. That question was a focal point of this case at both the district court and appellate level, and split the Sixth Circuit panel, generating opinions both ways. In addition, both the majority and dissenting opinion below acknowledged that the Sixth Circuit's ruling in this case rejecting the use of percentages in gauging substantial proportionality conflicts with the decisions of other circuits. And, while the Sixth Circuit remanded to the district court for "further proceedings consistent with [its] opinion," App. 20a, that opinion's resolution of the threshold question presented is fatally flawed.

Application of the rule adopted by other circuits allowing the calculation of the participation gap in percentage terms would have ended this case—as the district court correctly held and Judge Guy recognized. *Id.* at 13a n.3; *id.* at 28a-29a & n.5 (Guy, J., dissenting). And yet, MSU is still being subjected to the demands and uncertainties of litigation over Plaintiffs' request for injunctive relief, as this case proceeds under the Sixth Circuit's ruling. There is no reason to allow this case to proceed any further under

the erroneous standard adopted by the Sixth Circuit below. *Cf. Scheidler v. National Org. for Women, Inc.*, 547 U.S. 9, 16 (2006) (discussing issuance of certiorari in analogous circumstances). Moreover, if allowed to stand, the Sixth Circuit's standard not only will taint the proper resolution of this case and unnecessarily prolong the burden and expense of this litigation, but create needless uncertainty for other public and private universities in the Sixth Circuit.

This Court's intervention is needed here and now.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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July 29, 2022

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Sophia BALOW; Ava Boutrous; Julia Coffman; Kylie Goit; Emma Inch; Sheridan Phalen; Madeline Reilly; Olivia Starzomski; Sarah Zofchak; Taylor Arnold; Elise Turke, individually and on behalf of all those similarly situated, Plaintiffs-Appellants,

v.

MICHIGAN STATE UNIVERSITY; Michigan State University Board of Trustees; Samuel L. Stanley, Jr.; Bill Beekman, Defendants-Appellees.

No. 21-1183

Argued: October 26, 2021

Decided and Filed: February 1, 2022

[24 F.4th 1051]

Before: GUY, MOORE, and GIBBONS, Circuit Judges.

MOORE, J., Circuit Judge, delivered the opinion of the court in which GIBBONS, Circuit Judge, joined. GUY, Circuit Judge (pp. 1062–69), delivered a separate dissenting opinion.

OPINION

KAREN NELSON MOORE, Circuit Judge.

Michigan State University (MSU) eliminated both its men's and women's swimming-and-diving teams. Members of the women's swimming-and-diving team ("student-athletes") sued, arguing that MSU fails to

provide women athletes with equal participation opportunities as required by Title IX. The district court denied the student-athletes' request for a preliminary injunction. We **VACATE** the district court's order and **REMAND** for further proceedings consistent with this opinion.

I. BACKGROUND

A. MSU's Elimination of Its Swimming-and-Diving Teams

Before the end of the 2019–20 academic year, MSU had the following Division I sports teams: men's baseball, basketball, cross country, football, golf, ice hockey, soccer, swimming and diving, tennis, track and field, and wrestling; and women's basketball, cross country, field hockey, golf, gymnastics, rowing, soccer, softball, swimming and diving, tennis, track and field, and volleyball. R. 8-2 (Breske Decl. at 14) (Page ID #362). On October 22, 2020, MSU announced it would no longer sponsor the men's and women's swimming-and-diving teams after the 2020–21 school year. R. 1 (Compl. ¶ 130) (Page ID #39). During the 2019–20 school year, the teams had 29 men and 33 women. R. 8-2 (Breske Decl. at 14) (Page ID #362).

Eleven women student-athletes sought a preliminary injunction to prevent MSU from eliminating the women's swimming-and-diving team. R. 1 (Compl.) (Page ID #1–55). They argued that MSU failed to provide women with substantially proportionate athletic opportunities, as required by Title IX. The student-athletes and MSU agree on the gender breakdown of the undergraduate student body as a whole: in the 2018–19 school year, 48.8% of undergraduate students were male and 51.2% were

female; and, in the 2019–20 school year, 49.1% were male and 50.9% were female. R. 2-14 (Lopiano Rep. at 20) (Page ID #217); R. 8-2 (Breske Decl. at 10, 14) (Page ID #358, 362). The parties disagree, however, about the number of male and female athletes at MSU.

The district court denied the student-athletes' motion for a preliminary injunction, finding that they were not likely to succeed on the merits of their Title IX claim. The student-athletes timely appealed. R. 18 (Notice of Appeal) (Page ID #757).

B. Statutory and Regulatory Background

Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). Agencies are "authorized and directed to effectuate the provisions of section 1681 . . . by issuing rules, regulations, or orders of general applicability." *Id.* § 1682.

Regulations promulgated pursuant to Title IX extend its protections to athletics, 34 C.F.R. § 106.41(a); *see also* 45 C.F.R. § 86.41(a), and require that recipients "shall provide equal athletic opportunity for members of both sexes," 34 C.F.R. § 106.41(c). The factors that determine whether equal opportunities are available include "[w]hether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes." 34 C.F.R. § 106.41(c)(1).

In 1979, the Secretary of the Department of Health, Education, and Welfare (HEW)[1] issued, after notice and comment, a Policy Interpretation that "clarifie[d] the meaning of 'equal opportunity' in intercollegiate athletics." 44 Fed. Reg. 71,413, 71,414 (Dec. 11, 1979). This document established a three-part test to assess compliance:

> (1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
>
> (2) Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or
>
> (3) Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.

Id. at 71,418.

Only the first prong of this test is at issue. It defines participants as athletes:

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[1] HEW was the Department of Education's predecessor.

> a. Who are receiving the institutionally-sponsored support normally provided to athletes competing at the institution involved, e.g., coaching, equipment, medical and training room services, on a regular basis during a sport's season; and
>
> b. Who are participating in organized practice sessions and other team meetings and activities on a regular basis during a sport's season; and
>
> c. Who are listed on the eligibility or squad lists maintained for each sport, or
>
> d. Who, because of injury, cannot meet a, b, or c above but continue to receive financial aid on the basis of athletic ability.

Id. at 71,415.

In 1996, the Department of Education issued a "Dear College" letter to clarify this three-part test. In addition to "confirm[ing] that institutions need to comply only with any one part of the three-part test in order to provide nondiscriminatory participation opportunities," this letter clarified each of the test's three prongs. Office for Civil Rights, U.S. Dep't of Educ., *Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test* (Jan. 16, 1996), https://www2.ed.gov/about/offices/list/ocr/docs/clarific.html ("1996 Letter"). It explained that substantial, not exact, proportionality is required "because in some circumstances it may be unreasonable to expect an institution to achieve exact proportionality—for instance, because of natural fluctuations in enrollment and participation rates or because it would be unreasonable to expect an institution to add athletic opportunities in light of the small number of students that would have to be accommodated to

achieve exact proportionality." *Id.* Substantial proportionality is determined "on a case-by-case basis, rather than through use of a statistical test." *Id.*

The 1996 Letter further clarified:

> OCR would also consider opportunities to be substantially proportionate when the number of opportunities that would be required to achieve proportionality would not be sufficient to sustain a viable team, i.e., a team for which there is a sufficient number of interested and able students and enough available competition to sustain an intercollegiate team. As a frame of reference in assessing this situation, OCR may consider the average size of teams offered for the underrepresented sex, a number which would vary by institution.
>
> For instance, Institution A is a university with a total of 600 athletes. While women make up 52 percent of the university's enrollment, they only represent 47 percent of its athletes. If the university provided women with 52 percent of athletic opportunities, approximately 62 additional women would be able to participate. Because this is a significant number of unaccommodated women, it is likely that a viable sport could be added. If so, Institution A has not met part one.
>
> As another example, at Institution B women also make up 52 percent of the university's enrollment and represent 47 percent of Institution B's athletes. Institution B's athletic program consists of only 60 participants. If the University provided women with 52 percent of

> athletic opportunities, approximately 6 additional women would be able to participate. Since 6 participants are unlikely to support a viable team, Institution B would meet part one.

Id.

II. DISCUSSION

"In reviewing a district court's decision to deny a preliminary injunction, we evaluate the same four factors that the district court does: '(1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would suffer irreparable injury without the injunction; (3) whether issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of the injunction.'" *Kentucky v. U.S. ex rel. Hagel*, 759 F.3d 588, 600 (6th Cir. 2014) (quoting *City of Pontiac Retired Emps. Ass'n v. Schimmel*, 751 F.3d 427, 430 (6th Cir. 2014) (en banc) (per curiam)). "These factors are to be balanced against one another and should not be considered prerequisites to the grant of a preliminary injunction." *Leary v. Daeschner*, 228 F.3d 729, 736 (6th Cir. 2000).

"This court reviews the district court's decision for an abuse of discretion." *Id.* We review the district court's factual findings for clear error, but "[i]f pure legal conclusions are involved in the district court's determination . . . , those conclusions are subject to de novo review." *Id.* at 736–37.

A. Genuine Participation Opportunities

When determining whether participation opportunities are substantially proportionate to enrollment, "OCR's analysis begins with a determination of the number of participation

opportunities afforded to male and female athletes in the intercollegiate athletic program." 1996 Letter. The student-athletes argue that MSU inflated its number of female athletes by failing to accord certain female athletes genuine participation opportunities, both on the rowing team and on the track-and-field and cross-country teams. The district court rejected this argument. *Balow v. Mich. State Univ.*, No. 1:21-cv-44, 2021 WL 650712, at *6–7 (W.D. Mich. Feb. 19, 2021). We address each sport in turn.

First, the district court did not clearly err in finding that MSU did not inflate its count of women rowers by including "novice" rowers in its count of athletes and having a larger-than-average team. Although the number of novice rowers contributes to the large size of the women's rowing team, novice rowing is "an integral part of the sport," and Big Ten meets include events that are reserved for only novice rowers. R. 8-3 (Chavers Decl. ¶¶ 3–11) (Page ID #367–69). The rowing coach submitted a declaration stating that novice rowers "are full-fledged members of the MSU rowing team" who "receive the same practice gear and competition gear and participate in the same training and conditioning activities as the rest of the team." *Id.* ¶ 5 (Page ID #368). Thus, novice rowers meet the regulatory definition of participant. *See* 44 Fed. Reg. at 71,415.

Second, the district court did not clearly err in finding that MSU did not inflate the number of women's track-and-field and cross-country athletes. Although some athletes did not participate in any races, Title IX does not require that athletes participate in competitions to be counted. *See* 44 Fed. Reg. at 71,415; 1996 Letter ("In determining participation opportunities, OCR includes . . . those

athletes who practice but may not compete."); *see also Biediger v. Quinnipiac Univ.* ("*Biediger III*"), 691 F.3d 85, 93 (2d Cir. 2012) ("It is not necessary for an athlete to meet minimum criteria of playing time . . . to count as a participant."); *Anders v. Cal. State Univ., Fresno*, No. 1:21-cv-179-AWI-BAM, 2021 WL 1564448, at *12 (E.D. Cal. Apr. 21, 2021) ("'[B]ench warming' is a fact of life in most sports.").

Against these conclusions, the student-athletes point to cases in which athletes were not accorded genuine participation opportunities. But those cases are different from the current one. In this case, the university did not pressure teams to have larger or smaller rosters than the coach would prefer, *see Biediger v. Quinnipiac Univ.* ("*Biediger I*"), 616 F. Supp. 2d 277, 283–84 (D. Conn. 2009), nor are women's teams larger than average while men's teams are smaller than average, *see Portz v. St. Cloud State Univ.* ("*Portz II*"), 401 F. Supp. 3d 834, 863 (D. Minn. 2019). At MSU, the coach determines the size of the team based on "interest and the Big Ten's competition requirements." R. 8-3 (Chavers Decl. ¶ 12) (Page ID #369). A coach's preference for a larger team does not mean that team members lack genuine participation opportunities.

Ultimately, the district court did not clearly err in finding that MSU did not inflate its number of women athletes.

B. Calculating the Participation Gap

After determining the number of participants, the district court considered the participation gap as a percentage of the size of the athletic program. 2021 WL 650712, at *11. This was improper. The correct inquiry focuses on the *number* of participation

opportunities, not the gap as a percentage of the athletic program.

The text of the 1979 Policy Interpretation and the 1996 Letter prove this point. The language of the 1979 Policy Interpretation is clear: schools must provide participation opportunities for males and females "in *numbers* substantially proportionate to their respective enrollments." 44 Fed. Reg. at 71,418 (emphasis added). The Dear College Letter likewise focused on the *number*, not percentage, of participation opportunities. *See* 1996 Letter.

The district court, however, justified its consideration of percentages based on language from the 1996 letter that provided that "this determination depends on the institution's specific circumstances and the size of its athletic program." 1996 Letter. The district court reasoned that "[i]f the size of an athletic program is relevant, then the size of the participation gap in relation to the size of the athletic program should also be relevant." 2021 WL 650712, at *11.

This logic ignores the clear text of the 1979 Policy interpretation and misinterprets the reasoning of the 1996 Letter. The 1979 Policy Interpretation never refers to percentages and discusses only the "numbers" of participation opportunities provided. 44 Fed. Reg. 71,413, 71,418 (Dec. 11, 1979). Although the 1996 Letter refers to both numbers and percentages, its central focus is on the numbers. It asks whether a school provides "participation opportunities for male and female students in *numbers* substantially proportionate to their respective full-time undergraduate enrollments," calculates compliance based on "the *number* of participation opportunities," and notes that opportunities are substantially proportionate "when

the *number* of opportunities that would be required to achieve proportionality would not be sufficient to sustain a viable team." 1996 Letter (emphasis added).

Importantly, the 1996 Letter never discussed the *participation gap* as a percentage. Although it refers to percentages in other contexts, it uses only numbers to refer to the participation gap. Percentages are helpful in comparing the gender ratio of the athletic program to the gender ratio of the undergraduate body. They are not, however, the correct tool for measuring the participation gap.

Although a few examples in the Letter speak in terms of percentages, none of these examples contemplates calculating the participation gap as a percentage. The dissent appears to rely on two examples that it claims "illustrat[e] the participation gap as a *percentage*." Dissenting Op. at 1065. The first involves an institution with an enrollment that is 52% male and 48% female, in which 52% of athletes are male and 48% are female. If the enrollment shifts to 51% male and 49% female, the school need not "fine tune its program." 1996 Letter. The second involves an institution that had a consistent enrollment rate of 50% for women, which spiked to 52% in a certain year. Neither example illustrates how to calculate the participation gap. They stand only for the principle that fluctuations in enrollment will not force a school out of compliance. Comparing these examples with the two that immediately follow shows that they do not support the claim that the participation gap is measured as a percentage. The next two examples involve schools of various sizes in which women make up 52% of the university's enrollment but only 47% of the institution's athletes. Unlike the prior examples,

these examples offer instruction on how to calculate a participation gap, and they calculate it as a number. *Id.* They show that, although percentages are relevant, the ultimate focus should be on the *numerical* participation gap.[2]

The district court further implies that participation gaps that are lower than two percent satisfy substantial proportionality. This bright line is inconsistent with the 1996 Letter. Substantial proportionality "depends on the institution's specific circumstances and the size of its athletic program" and is determined "on a case-by-case basis." 1996 Letter; *see, e.g.*, *Lazor v. Univ. of Connecticut*, ––– F. Supp. 3d ––––, ––––, 2021 WL 2138832, at *6 (D. Conn. May 26, 2021) (finding "the defense that a participation gap percentage of less than 2% satisfies the test for substantial proportionality" to be "unpersuasive"); *Robb v. Lock Haven Univ.*, No. 4:17-CV-00964, 2019 WL 2005636, at *8 (M.D. Pa. May 7, 2019) ("While [a 3.35% gap] could be termed a 'borderline case' in terms of raw statistics, a glance at Lock Haven's long history of Prong One nonsatisfaction reveals that gap cannot be attributed to natural fluctuations in the student body, and the

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[2] The dissent argues that the term "substantial proportionality" "inherently requires reference to a ratio or percentage." Dissent at 1066 n.6. As the dissent acknowledges, however, the relevant ratio comes from comparing the athletic opportunities to the gender breakdown of the undergraduate student body. *This* is the relevant ratio, not the percentage of the athletic opportunities relative to the size of the athletic program. This ratio is a variable in the equation that is used to calculate the participation-gap number. The fact that one ratio is used in evaluating substantial proportionality does not mean that every part of the compliance determination requires the use of a ratio

number of lost opportunities that gap represents—36—is not too small to support a new varsity team." (footnotes omitted)); *see also Equity in Athletics, Inc. v. Dep't of Educ.*, 639 F.3d 91, 110 (4th Cir. 2011) ("DOE has not specified a magic number at which substantial proportionality is achieved."). "[W]e do not, in any event, understand the 1996 Clarification to create a statistical safe harbor at [two percent] or any other percentage." *Biediger III*, 691 F.3d at 106.[3]

While the percentage gap may be relevant, substantial proportionality should be determined by looking at the gap in *numerical* terms, not as a percentage. A school may fail to achieve substantial proportionality even if its participation gap is only a small percentage of the size of its athletic program.

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[3] Many cases (none of which are binding on this court) have drawn a bright line around two percent. *See, e.g.*, *Equity in Athletics*, 639 F.3d at 110 ("EIA provides no support for its contention that a disparity as low as 2% (and, according to the record, not much above 1%) is substantially disproportionate as a matter of law."); *Boulahanis v. Bd. of Regents*, 198 F.3d 633, 639 (7th Cir. 1999), *abrogated on other grounds by Trentadue v. Redmon*, 619 F.3d 648 (7th Cir. 2010) (explaining that "the University has achieved substantial proportionality" when "the athletic participation of men remained within three percentage points of enrollment"); *Anders*, 2021 WL 1564448, at *5 ("[C]ourts have held that a disparity of 2% or less between the underrepresented sex's percentage of participation opportunities and the underrepresented sex's percentage of enrollment is proof that an educational institution falls within the substantial proportionality safe harbor." (internal citations and quotation marks omitted)); *Portz v. St. Cloud State Univ.* ("*Portz I*"), 196 F. Supp. 3d 963, 975 (D. Minn. 2016) ("[A] deviation of less than 3.5 percentage points typically keeps the ratios substantially proportionate."). We do not find this reasoning persuasive in light of the clear language of the 1979 Policy Interpretation and the 1996 Letter.

C. The Participation Gap at MSU

The district court did not make any finding as to the size of the participation gap.[4] 2021 WL 650712, at *6, 10–11. MSU used internal Title IX data to calculate a participation gap of 12 before the elimination of the swimming-and-diving teams and 15 after the elimination of these teams. R. 8-8 (O'Brien Rep. at 28–29) (Page ID #443–44). The student-athletes relied on data reported pursuant to the Equity in Athletics Disclosure Act (EADA) and web-roster data to calculate a participation gap of 25 in 2018–19 and 35 in 2019–20. R. 2-14 (Lopiano Report at 20, 35) (Page ID #217, 232).

Title IX counts participants differently than EADA. *Compare* 44 Fed. Reg. at 71,415 *with* U.S. Dep't of Educ., Office of Postsecondary Educ., *User's Guide for the Equity in Athletics Disclosure Act Web-Based Data Collection* (2019), at 31, https://surveys.ope.ed.gov/athletics2k20/wwwroot/documents/2019_EADA_Users_Guide. pdf ("EADA User's Guide"). For Title IX purposes, athletes

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[4] Our dissenting colleague reads the district court's opinion as finding that MSU's numbers are accurate. Dissenting Op. at 1064–65. We do not read the district court's opinion in the same way. The district court found that, regardless of whether the gap was 25, 36, or 12, MSU complied with the substantial-proportionality requirement. 2021 WL 650712, at *10. We do not require the district court "to incant magic words" to make a finding regarding the size of the participation gap. Dissenting Op. at 1064–65. It is not clear to us, however, that the district court made any finding on this issue at all. The language quoted by the dissent is a rejection of the student-athletes' argument that MSU inflated its participation numbers. *Id.* It does not bear on the parties' dispute about the data source, which is wholly separate from whether MSU improperly inflated participation opportunities.

include those who (a) "receiv[e] the institutionally-sponsored support normally provided to athletes competing at the institution involved"; (b) "are participating in organized practice sessions and other team meetings and activities on a regular basis"; and (c) "are listed on the eligibility or squad lists maintained for each sport"; or (d) "because of injury, cannot meet a, b, or c above but continue to receive financial aid on the basis of athletic ability." 44 Fed. Reg. at 71,415. For EADA purposes, participants are students who, as of the day of a varsity team's first scheduled contest "[a]re listed by the institution on the varsity team's roster"; "[r]eceive athletically related student aid"; or "[p]ractice with the varsity team and receive coaching from one or more varsity coaches." EADA User's Guide.

Nevertheless, at the preliminary-injunction stage, it may be appropriate to rely on EADA data to calculate the size of the participation gap. *See Univ. of Texas v. Camenisch*, 451 U.S. 390, 395, 101 S.Ct. 1830, 68 L.Ed.2d 175 (1981) ("[A] preliminary injunction is customarily granted on the basis of procedures that are less formal and evidence that is less complete than in a trial on the merits."). In the types of cases at issue, schools, not plaintiffs, are the only parties who have access to the underlying Title IX data. In *Ohlensehlen v. University of Iowa*, 509 F. Supp. 3d 1085, 1098 (S.D. Iowa 2020), the court credited EADA data in light of the university's refusal to disclose the raw data underlying its Title IX figures. The court explained that when "[d]efendants declined to produce the NCAA squad lists, time and hour limitation records, and competition results that make up the raw data for official Title IX counts that they say supports their figures, despite Plaintiffs'—

and the Court's—requests for them to do so," defendants' position that the court should consider official Title IX, not EADA or web roster, data "is especially disingenuous."[5] *Id*. at 1098, 1101; *see also Biediger I*, 616 F. Supp. 2d at 297 (relying on EADA data to support a preliminary injunction).

Although, at the preliminary-injunction stage, it may be possible to show a strong likelihood of success on the merits based on EADA data, as litigation progresses, the appropriate inquiry turns on Title IX data, which counts participation precisely for this purpose.

D. Substantial Proportionality

The district court found that both the student-athletes' calculation of the participation gap and MSU's calculation of the participation gap meet the substantial-proportionality threshold because they are smaller than the average-size team at MSU. 2021 WL 650712, at *10. The district court erred when it compared the participation gap to the size of the average team at MSU, rather than the size of a viable team.

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[5] Admittedly, this case is different from *Ohlensehlen* in two respects. First, the district court did not ask MSU to disclose its underlying data. Second, although the student-athletes requested the underlying data from MSU, R. 13-7 (FOIA request) (Page ID #708); R. 13-10 (Limited Discovery Request) (Page ID #711–13), they did not pursue either avenue after MSU claimed that neither mechanism gave the student-athletes the right to access this information, R. 13-9 (FOIA Response) (Page ID #710); R. 13-11 (Email from MSU Attorney) (Page ID #714). Nevertheless, *Ohlensehlen* shows that, at the preliminary-injunction stage, there may be a need to rely on data other than official Title IX counts.

The language of the 1996 clarification is clear. Opportunities are substantially proportionate:

> when the number of opportunities that would be required to achieve proportionality would not be sufficient to sustain a viable team, i.e., a team for which there is a sufficient number of interested and able students and enough available competition to sustain an intercollegiate team. As a frame of reference in assessing this situation, OCR may consider the average size of teams offered for the underrepresented sex, a number which would vary by institution.

1996 Letter. The text of the Letter provides a clear answer about how to define a viable team: it uses "i.e.," to define a viable team as "a team for which there is a sufficient number of interested and able students and enough available competition to sustain an intercollegiate team." *Id.*

It is true that the Letter states that the average size of team may be used "[a]s a frame of reference." 1996 Letter. Yet, this language presents a clear contrast with the language in the previous sentence: "i.e." defines viable to mean that there is sufficient interest, ability, and competition for a team, but the "average size of teams" is only "a frame of reference" in making this determination.[6] The Letter provides

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[6] The dissent points to OCR letters that examine the average team size at institutions. Each of these letters involves circumstances in which the parties offered no evidence of whether there is sufficient interest, ability, and competition to field a viable team. In circumstances in which there is no information about interest, ability, and competition, it may be more appropriate to look at the average team as the primary point of reference.

"no indication that, as long as the participation gap is less than the university's average women's team size, the university meets prong one and complies with Title IX." *Lazor*, ––– F. Supp. 3d at ––––, 2021 WL 2138832, at *4.

This interpretation is buoyed by language elsewhere in the Letter. The Letter emphasizes that there are no "strict numerical formulas or 'cookie cutter' answers." 1996 Letter. An interpretation that conflates "viable team" with "average team" creates a strict numerical formula.[7] The language about the lack of strict numerical formulas makes sense only when qualitative factors, such as interest and ability, impact the definition of a "viable team." This also comports with another purpose of the Letter: the Letter consistently focuses on whether a school accommodates the interests and abilities of the underrepresented sex.

Based on the clear language of the guidance, a viable team is not an average one, but is instead one "for which there is a sufficient number of interested and able students and enough available competition to sustain an intercollegiate team." 1996 Letter.

E. Remedy

If, on remand, the district court determines that MSU is not in compliance with Title IX, there is a question of what the appropriate remedy should be. At the preliminary injunction stage, the appropriate

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[7] Unlike the size of a viable team, the size of an average team can be calculated based on only quantitative, not qualitative, factors. Because the participation gap also involves a purely quantitative determination, comparing the participation gap to the average team becomes a purely mathematical calculation, in conflict with the 1996 Letter.

remedy when a school seeks to eliminate a women's team in violation of Title IX is typically an injunction that prevents them from doing so. *See, e.g.*, *Biediger v. Quinnipiac Univ.* ("*Biediger II*"), 728 F. Supp. 2d 62, 113–14 (D. Conn. 2010); *Cohen v Brown Univ.*, 809 F. Supp. 978, 981, 1001 (D.R.I. 1992), *aff'd* 991 F.2d 888 (1st Cir. 1993) (granting preliminary injunction after school demoted two men's and two women's varsity teams, affecting between 34 and 37 men and between 22 and 23 women). This is true even though, as a more permanent matter, a school may be "entitled to determine its own method for achieving statutory compliance." *Biediger II*, 728 F. Supp. 2d at 113–14 (granting preliminary injunction after school announced it would cut two men's teams and one women's team); *see Cohen*, 991 F.2d at 906 ("[R]equiring Brown to maintain the women's volleyball and gymnastics teams in varsity status for the time being is a remedial choice within the district court's discretion" but "[t]hat is not to say . . . that the same remedy will be suitable at trial's end if the Title IX charges prove out against Brown."). In this case, whether a preliminary injunction is appropriate depends on both the district court's finding of the size of the participation gap and its weighing of the preliminary-injunction factors.[8] This issue should be

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[8] The dissent argues that an injunction cannot be appropriate because it does not maintain the status quo. Certainly, the costs of reinstating a team may impact the district court's valuation of the second and third preliminary injunction factors. That does not, however, mean that if a district court denies a preliminary injunction based on a misreading of the law, courts are without the ability subsequently to rectify that error. *See Porter v. Lee*, 328 U.S. 246, 251, 66 S.Ct. 1096, 90 L.Ed. 1199 (1946) ("It has long been established that where a

decided in the first instance by the district court, with the benefit of our clarification on how to determine substantial proportionality.

III. CONCLUSION

We **VACATE** the district court's order and **REMAND** for further proceedings consistent with this opinion.

RALPH B. GUY, JR., Circuit Judge, dissenting.

DISSENT

Due to the athletic department's projected budget deficit of "$35–40 million" and "major upgrades and repairs" needed for the swimming and diving facilities, MSU announced in October 2020 that it would "discontinue the men's *and* women's swimming and diving team[s] after the conclusion of the 2020-21 season" (affecting 29 men and 33 women). (R. 8-6, ¶ 5 (emphasis added); R. 8-7; R. 8-2, PgID 353, 365). Although that is a neutral decision, members of the women's team sued MSU and contemporaneously sought a preliminary injunction to require that MSU continue *only* "*its women's* varsity swimming and diving team." (R. 2, PgID 57-58 (emphasis added); R. 1, PgID 54).

The decision to eliminate the teams resulted in a female participation gap of 15 or 0.87%—as shown in

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defendant with notice in an injunction proceeding completes the acts sought to be enjoined the court may by mandatory injunction restore the *status quo*."); *Di Biase v. SPX Corp.*, 872 F.3d 224, 232 (4th Cir. 2017) ("[A] motion for preliminary injunction filed before the act to be enjoined has occurred, and subsequently intended to restore the status quo once it has been disturbed, is not moot."). To hold otherwise would effectively render the denial of a preliminary injunction in such circumstances unreviewable.

the detailed spreadsheets maintained (and provided to plaintiffs) by MSU's Title IX compliance officer. (R. 8-2, PgID 353, 362; R. 8-8, PgID 443-44). Considering MSU's average team size for females (35) and the participation gap as *both* a number and a percentage, the district court concluded that plaintiffs "have not shown a substantial likelihood of success" on the merits because "[b]ased on MSU's numbers," "MSU's evidence indicates its participation numbers are substantially proportionate." *Balow v. Michigan State Univ.*, No. 1:21-cv-44, 2021 WL 650712, at *9, *11-12 (W.D. Mich. Feb. 19, 2021). After analyzing and balancing all four preliminary injunction factors, the district court denied plaintiffs' requested injunction.

Yet the majority finds fault in the district court's decision and remands. In doing so, the majority announces legal standards that no other federal circuit court has adopted—and for good reason—because the standards blatantly contradict Title IX and agency guidance. Today's decision now means: (1) courts *may rely on* EADA data to grant a preliminary injunction, even though the EADA does not count "participants" in the same way as Title IX; (2) courts *cannot* consider the participation gap as a percentage; (3) courts *cannot* consider a school in compliance when the participation gap is less than the average size of the school's teams for the underrepresented sex; and (4) courts *may grant* an injunction and require a school to reinstate a particular sports team pending a final judgment perhaps years in the future. Any short-lived victory plaintiffs may have won today will hamstring schools and come full circle to harm all athletes in the future. "After all, in the law," there must be evenhandedness,

for "what is sauce for the goose is normally sauce for the gander." *Heffernan v. City of Paterson*, 578 U.S. 266, 136 S. Ct. 1412, 1418, 194 L.Ed.2d 508 (2016). I would affirm the district court's decision to deny plaintiffs' motion for a preliminary injunction.

I.

All involved agree that the general legal framework is outlined in a 1979 Policy Interpretation[1] and a 1996 Letter,[2] interpreting Title IX's implementing regulations. (Maj. Op. 1053–55; Appellant Br. 14-18; Appellee Br. 23-27; *Balow*, 2021 WL 650712, at *2-3). As to plaintiffs' likelihood of success on the merits, the question here is: "Whether intercollegiate level participation opportunities for male and female students are provided in numbers *substantially proportionate* to their respective enrollments." 44 Fed. Reg. at 71,418 (emphasis added). "[E]xact proportionality" is not the test. (1996 Letter, PgID 489). Plaintiffs have the burden to show a sufficient "statistical disparity." *Horner ex rel. Horner v. Kentucky High Sch. Athletic Ass'n*, 206 F.3d 685, 695-96 (6th Cir. 2000) (citation omitted).

Plaintiffs have not met their burden. The parties offer the following female participation gaps at MSU.[3]

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[1] Policy Interpretation: Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413 (Dec. 11, 1979).

[2] Office for Civil Rights (OCR), U.S. Dep't of Educ., *Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test* (Jan. 16, 1996), https://www2.ed.gov/about/offices/list/ocr/docs/clarific.html (R. 8-10, PgID 484-94).

[3] As explained below, the OCR and courts consider the participation gap as a percentage and a number. For example, if student enrollment is 48% females and female athletes

According to MSU (based on Title IX data):

- In 2018–2019, MSU's participation gap was 27 or 1.4%, and the average size of MSU's female teams was 35.
- In 2019–2020, the participation gap was 12 or 0.65%, and the average size of MSU's female teams was again 35. After deducting the 29 men and 33 women displaced by MSU's decision to eliminate the swimming and diving teams—and assuming all else remains the same—the participation gap is 15 or 0.87%.

(R. 8-2, PgID 353, 357, 362; R. 8-8, PgID 443-44; Appellee Br. 28, 35).

According to plaintiffs' expert (Lopiano):

- In 2018–2019, the participation gap was 25 or 1.3% **(based on EADA data)**.
- In 2019–2020, the participation gap was 35 or 2% **(based on website rosters)**. Plaintiffs do not contest that the average size of MSU's female teams was 35. (Appellant Br. 48-52).

(Appellant Br. 28-29; R. 2-14, PgID 217, 232).

The district court identified those figures, as does the majority. *See Balow*, 2021 WL 650712, at *6, *8-9; (Maj. Op. 1059).

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comprise 46% of the athletic department, the participation gap is 2%. To calculate the participation gap for females as a number, the following formula is used: (total male athletes ÷ percentage of males in the student body) – total number of athletes = the female participation gap. (R. 2-14, PgID 211-12). It appears MSU has rounded the participation gap up to a whole number (i.e., 11.31 is rounded up to 12).

The district court concluded—and the majority also acknowledges—that plaintiffs' numbers are based "upon imperfect data, flawed assumptions, contradictory reasoning, and a skewed analysis." *Balow*, 2021 WL 650712, at *9; (Maj. Op. 1056, 1059–60). Indeed, the majority holds that "the district court did not clearly err in finding that MSU did not inflate its number of women athletes." (Maj. Op. 1056–57); *Balow*, 2021 WL 650712, at *6-7. The majority also agrees with the district court that "Title IX counts participants differently than [the] EADA." (Maj. Op. 1059); *Balow*, 2021 WL 650712, at *6; *compare* 44 Fed. Reg. at 71,415 (Title IX), *with* 34 C.F.R. § 668.47(b)(3) (EADA). Even plaintiffs' expert admits that "EADA reports *overcount* female participation compared to Title IX participation counts because they use different metrics." (R. 2-14, PgID 215 (emphasis added)). Yet the majority orders a remand.

There are five fundamental problems with the majority's reasoning.

1.

Despite recognizing that Title IX counts participants differently than the EADA, the majority crafts a new rule by concluding that "at the preliminary-injunction stage, it may be possible to show a strong likelihood of success on the merits based on EADA data." (Maj. Op. 1060). No federal appellate court has adopted such a rule, nor is it permissible to do so. Courts cannot simply say that a legal standard may "change its stripes" in the early stages of litigation. *Comcast Corp. v. Nat'l Ass'n of African American-Owned Media*, ––– U.S. ––––, 140 S. Ct. 1009, 1014, 206 L.Ed.2d 356 (2020). There is nothing in Title IX or its regulations to signal that

Title IX's test for what counts as a participant "might be overlooked or modified in the early stages of a case." *See id.* at 1016. MSU's Title IX compliance officer provided plaintiffs with the detailed Title IX spreadsheets maintained over the relevant years. (R. 8-2, PgID 353, 362; R. 8-8, PgID 443-44). Because this court has no authority to bend the definition of athletic "participant" under Title IX at any stage in a case, plaintiffs cannot substitute EADA data and website rosters for Title IX data. Thus, as the district court concluded, we are left with MSU's calculations—the only calculations that use Title IX participation counts.

The majority cites one district court case that credited EADA data because the defendant school "declined to produce" the underlying "raw data for official Title IX counts" that it offered, "despite Plaintiffs'—and the Court's—requests for [the school] to do so." *Ohlensehlen v. Univ. of Iowa*, 509 F. Supp. 3d 1085, 1098, 1101 (S.D. Iowa 2020); (Maj. Op. 1059–60). But as the majority concedes, "this case is different from *Ohlensehlen* in two respects": (1) the plaintiffs here moved for an injunction and never sought expedited discovery or filed a motion to compel MSU to produce its underlying raw data, *see* Fed. R. Civ. P. 26(d) and 37(a)(1)-(3); and (2) the district court never ordered MSU to disclose its underlying data. (Maj. Op. 1060 n.5).[4] The majority's notion that Title

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[4] The majority cites one other district court decision that relied on EADA data because, due to rosters that were greater than what the court thought was necessary, the court believed that some students were "not receiving genuine opportunities to participate," and the court also found that there was credible evidence of unreported male players. *Biediger v. Quinnipiac Univ.*, 616 F. Supp. 2d 277, 297-98 (D. Conn. 2009); (Maj. Op.

IX plaintiffs may rely on EADA data early in the litigation exceeds judicial authority and, at best, is dicta.

2.

The majority erroneously represents that the district court "did not make any finding as to the size of the participation gap." (Maj. Op. 1059). On the contrary, the district court rejected the logic and substitute data plaintiffs' expert used to calculate a greater participation gap. *Balow*, 2021 WL 650712, at *6-8. As stated, the majority agrees with that much. (Maj. Op. 1056–57, 1059–60). The district court then assessed proportionality "[b]ased on MSU's numbers." 2021 WL 650712 at *9. "[U]sing one of the OCR's stated criteria for proportionality," the court concluded that because MSU's participation gap "numbers are smaller than the average size of a women's team at MSU, which is 35 athletes," "**MSU's evidence indicates its participation numbers are substantially proportionate**." *Id.* (emphasis added); *see also id.* at *11 (finding that "MSU's participation gap appears to be lower than 2%"—the gap calculated by plaintiffs' expert, Lopiano). The court underscored its reasoning when it explained:

> Plaintiffs offer a much higher calculation of the participation gap, but as discussed above, their calculation depends upon imperfect data, flawed assumptions, contradictory reasoning, and a skewed analysis. Thus, Plaintiffs have provided a shaky foundation on which to argue

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1059). But again, the majority notes that this case is different. There is no evidence of unreported male players, and the majority agrees that "Title IX does not require that athletes participate in competitions to be counted." (Maj. Op. 1056).

> that MSU's participation gap is statistically significant. The cracks in that foundation become even more apparent after considering the evidence offered by MSU.
>
> . . . .
>
> In short, on the present record, the Court is not persuaded that MSU has improperly inflated its participation opportunities for women, or that Plaintiffs have shown a likelihood of success on their claim to the extent it requires them to demonstrate such inflation.

Id. at *9-10. It is clear that the district court adopted MSU's calculation of the participation gap. The district court was not required to incant magic words to say so. When the court went on later to say that "[f]urthermore," MSU would likely satisfy substantial proportionality with a gap of 12, 25, or 35, the court was merely offering alternative reasoning. *Id.* at *10. There is no need to remand for the court to spell it out more clearly.

3.

In assessing "substantial proportionality," the majority concludes the district court erred when it "considered the participation gap as a percentage." (Maj. Op. 1057). But courts may consider the participation gap as a percentage *or* a number.

First, under Title IX, Congress authorized courts to consider "statistical evidence of an imbalance" in terms of a "number or percentage." 20 U.S.C. § 1681(b); *see also Horner*, 206 F.3d at 697.

Second, the 1996 Letter also expressly includes both ways of looking at the participation gap: (1) the 1996 Letter considers whether the gap in terms of a *number* could "sustain a viable team," and the letter

gives two examples; and (2) the 1996 Letter also explains that "the [1979] Policy Interpretation examines whether participation opportunities are 'substantially' proportionate to enrollment rates," and the letter gives two examples illustrating the participation gap as a *percentage*. (1996 Letter, PgID 489-90 (participation gap of 1% and 2% "would satisfy" proportionality)). The majority, however, adopts a bright-line rule that courts may *only* consider "the gap in *numerical* terms, not as a percentage." (Maj. Op. 1056–57, 1059). But we cannot "cherry pick" from the 1996 Letter. *See Cyan, Inc. v. Beaver Cty. Emps. Ret. Fund*, ––– U.S. ––––, 138 S. Ct. 1061, 1070, 200 L.Ed.2d 332 (2018). "Our license to interpret [agency guidance] does not include the power to engage in such freewheeling judicial policymaking." *See Pereida v. Wilkinson*, ––– U.S. ––––, 141 S. Ct. 754, 766-67, 209 L.Ed.2d 47 (2021); *Kisor v. Wilkie*, ––– U.S. ––––, 139 S. Ct. 2400, 2413, 204 L.Ed.2d 841 (2019).

Third, all but one federal appellate court to have considered the matter has viewed the participation gap as a percentage. *See, e.g.*, *Equity in Athletics, Inc. v. Dep't of Educ.*, 639 F.3d 91, 97, 110 (4th Cir. 2011) (affirming summary judgment for university because plaintiff "provide[d] no support for its contention that a disparity as low as 2% [*for men*] (and, according to the record, not much above 1%) is substantially disproportionate as a matter of law").[5]

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[5] *See also Boulahanis v. Bd. of Regents*, 198 F.3d 633, 636, 638-39 (7th Cir. 1999) (affirming summary judgment for university because, despite "the elimination of men's soccer and men's wrestling at the University, the athletic participation of men remained within three percentage points of enrollment"); *Biediger v. Quinnipiac Univ.*, 691 F.3d 85, 106-07 (2d Cir. 2012)

Here, the district court evaluated the participation gap in terms of *both* a percentage and a number. *Balow*, 2021 WL 650712, at *9 (concluding that "MSU's evidence indicates its participation numbers are substantially proportionate" because MSU's participation gap "numbers are smaller than the average size of a women's team at MSU, which is 35 athletes"); *id.* at *11 (concluding that "MSU's participation gap appears to be lower than 2%," and plaintiffs "have not cited, and the Court is not aware, of any case where a gap lower than 2% failed to satisfy the test for substantial proportionality"). The district court did not err.[6]

(upholding injunction where there was a "3.62% disparity" or 38 participation opportunities); *Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824, 830 (10th Cir. 1993) ("[A] 10.5% disparity between female athletic participation and female undergraduate enrollment is not substantially proportionate."); *Pederson v. Louisiana State Univ.*, 213 F.3d 858, 878 (5th Cir. 2000). *But see Ollier v. Sweetwater Union High Sch. Dist.*, 768 F.3d 843, 852, 856-57 (9th Cir. 2014) (affirming summary judgment for plaintiffs where the "6.7 percent disparity . . . was equivalent to 47 girls" and "47 girls can sustain at least one viable competitive team"). Notably, the majority cites *Biediger* to reject "a statistical safe harbor at [2%] or any . . . percentage," (Maj. Op. 1058), but *Biediger* still viewed the proportionality gap in terms of a percentage and a number. *Biediger*, 691 F.3d at 106-08 ("3.62% disparity" or 38 roster positions).

[6] It makes sense to view the participation gap as a *number* when assessing the *number* of athletes needed to field a viable, average size team. It also makes sense, however, to view the participation gap as a percentage when comparing the percentage of females in the student body and the percentage of females in the athletic department. The *number* of female students enrolled at MSU (18,192) cannot be compared to the *number* of female athletic participants at MSU (417). (R. 8-8, PgID 444; *see* R. 8-2, PgID 362). Because the two groups have different quantities, a percentage or ratio must be used to

To be sure, the 1996 Letter explains that compliance "depends on the institution's specific circumstances and the size of its athletic program." (1996 Letter, PgID 489); *accord Balow*, 2021 WL 650712, at *11. In that vein, the district court reasoned:

> Schools with larger athletic programs are likely to see larger fluctuations in participation numbers from year to year. Ignoring the size of the participation gap in relation to the size of the athletics program would significantly hinder the ability of schools with larger programs to maintain compliance. They would be more likely to fall outside the safe harbor due to "natural fluctuations in enrollment and participation rates" that may be somewhat large in absolute numbers but are relatively small in relation to the size of their programs.

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perform a "proportionality" comparison. After all, the lodestar is "substantial proportionality" between enrollment for a gender and that respective gender's athletic opportunities. *See* 44 Fed. Reg. at 71,418. The plain meaning of that phrase inherently requires reference to a ratio or percentage. *See Proportionality*, OXFORD ENGLISH DICTIONARY, OED (Oxford Univ. Press 2021) ("A formula or expression stating the proportionality of two or more quantities"), https://www.oed.com/view/Entry/152773?redirectedFrom=proportionality#eid; *see also Proportional*, OXFORD ENGLISH DICTIONARY ("[H]aving a constant ratio *to* another variable quantity."); *Proportional*, MERRIAM-WEBSTER'S UNABRIDGED DICTIONARY (2021) ("[H]aving the same or a constant ratio"), https://unabridgedmerriam-webster.com/unabridged/proportional. Because females make up 50.93% of MSU's enrollment and 50.06% of its athletic participants, (R. 8-8, PgID 443-44; *see* R.8-2, PgID 362), it's fair to say that MSU's "numbers [are] substantially proportionate." 44 Fed. Reg. at 71,418; (*see also* 1996 Letter, PgID 489-90).

Balow, 2021 WL 650712, at *11 (quoting 1996 Letter, PgID 489). That is sound logic grounded in the 1996 Letter and the 1979 Policy Interpretation.

The district court rejected plaintiffs' numbers and accepted MSU's, which showed a participation gap of 0.87% or 15 after the elimination of the men's and women's swimming and diving teams. No court has gone so far as to enjoin a school for such a minimal disparity. Plaintiffs have not shown a slight, much less substantial, likelihood of success on the merits.

4.

The majority concludes that "[t]he district court erred when it compared the participation gap" (as a number) "to the size of the average team" for females at MSU. (Maj. Op. 1060). But that conclusion conflicts with the 1996 Letter and how the OCR has applied it. After explaining proportionality using a percentage, the 1996 Letter explicitly states:

> **OCR would also consider opportunities to be substantially proportionate** when the number of opportunities that would be required to achieve proportionality would not be sufficient to sustain **a viable team**, i.e., a team for which there is a sufficient number of interested and able students and enough available competition to sustain an intercollegiate team. As a frame of reference **in assessing this situation, OCR may consider the average size of teams offered for the underrepresented sex**, a number which would vary by institution.

(1996 Letter, PgID 490 (emphasis added)). Yet the majority reasons that "a viable team is not an average one, but is instead one 'for which there is a sufficient

number of interested and able students and enough available competition to sustain an intercollegiate team.' " (Maj. Op. 1061 (citation omitted)). Again, however, we cannot "cherry pick" from the 1996 Letter. *See Cyan*, 138 S. Ct. at 1070. The majority's rule stands alone among federal circuit courts, and the majority cites one district court case to support its selective interpretation. (Maj. Op. 1060–61) (citing *Lazor v. Univ. of Connecticut*, —— F. Supp. 3d ——, ——, 2021 WL 2138832, at *4 (D. Conn. May 26, 2021)).

Moreover, the majority's interpretation is contrary to how the OCR has applied its 1996 Letter. MSU provided six specific examples where the OCR assessed compliance based upon a school's average team size for the underrepresented sex. The OCR, in fact, has found schools in compliance specifically because the participation gap was *less* than the *average size* of the school's female teams. *See Letter from OCR to Univ. of Minnesota-Twin Cities*, at 6 (Sept. 27, 2018) (approving participation gap of 28 where "the average size of teams offered for the underrepresented sex . . . was 35.85 female athletes"), https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/05152038-a.pdf; *Letter to Innovative Horizons Charter School*, at 5 (Jul. 15, 2016) (finding substantial proportionality achieved because the school had an "average female team size of 15" and "[f]emale under representation [*sic*] of 5 athletes is not enough to sustain a viable team, and is less than the average team size of 15"), https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/09151075-a.pdf; (Appellee Br. 30-31). If the 1996 Letter expressly allows an adjudicator to use "the average size of teams for the

underrepresented sex" at a school as a benchmark and the OCR has applied the rule in that way, we cannot fault the district court for doing so and summarily adopt a conflicting interpretation. *See Kisor*, 139 S. Ct. at 2412, 2418.

Practically speaking, today's decision means that if the participation gap is greater than *any* team for which there is interest, ability, and available competition (i.e., a 4-person tennis team), a school must *always* add that team to comply with Title IX. (Maj. Op. 1056, 1060–61; *see* Appellant Br. 50-51). That is tantamount to requiring perfection, not substantial proportionality. (*See* 1996 Letter, PgID 489). Indeed, under the majority's reasoning, when a school eliminates an athletic program and there is a participation gap, student-athletes (male and female alike) may establish a Title IX violation by simply relying on the prior existence of their team to show that there is enough interest, ability, and competition for their team. That cannot be right.

Because the 1996 Letter and the OCR's decisions recognize that the average size of MSU's female teams is a valid benchmark for the participation gap, a remand is wholly unwarranted.

5.

If all that were not enough, there is a problem with the relief plaintiffs seek. As the parties agree, the district court would need to "order MSU to reinstate the women's swimming and diving team" because it no longer exists. (Appellant Br. 12, 18; Reply Br. 16; Appellee Br. 51-56).[7] But even if plaintiffs were

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[7] *See also* MICHIGAN STATE UNIVERSITY, *2020-21 Swimming and Diving Schedule*, https://msuspartans.com/sports/swimming-and-diving/schedule; Jared Ramsey, *MSU*

entitled to an injunction (and they are not), the most they may obtain is an order "that the university prepare a Title IX-compliant proposal for the . . . school year next fall." *Mayerova v. E. Michigan Univ.*, No. 19-1177, 2019 U.S. App. LEXIS 9373 *4 (6th Cir. Mar. 28, 2019) (order) (Norris, Sutton, and Cook, JJ.) (*staying* a district court injunction that required the school to reinstate the women's tennis and softball teams). For two reasons, that is true regardless of the participation gap.

First, Title IX does not require that MSU reinstate or continue to support a particular team. "Every court, in construing the [1979] Policy Interpretation and the text of Title IX, has held that a university may bring itself into Title IX compliance by increasing athletic opportunities for the underrepresented gender (women in this case) *or* by decreasing athletic opportunities for the overrepresented gender." *Equity in Athletics*, 639 F.3d at 103 (quoting *Neal v. Bd. of Trs.*, 198 F.3d 763, 769-70 (9th Cir. 1999)); *see also Kelley v. Bd. of Trs.*, 35 F.3d 265, 269 (7th Cir. 1994); *Roberts*, 998 F.2d at 830; *Cohen v. Brown Univ.*, 991 F.2d 888, 898 n.15 (1st Cir. 1993). Indeed, that is the rule in this circuit: "An institution need not pour ever-increasing sums into its athletic programs in order to bring itself into compliance, but has the option of reducing opportunities for the overrepresented gender while keeping opportunities for the underrepresented gender stable." *Horner v. Kentucky*

Swimming and Diving members struggle with the shift to student life, The State News (Nov. 3, 2021), https://statenews.com/article/2021/11/the-question-throughout-all-of-this-has-been-why-msu-swimming-and-divingmembers-struggle-with-the-shift-to-student-life?ct=content_open&cv=cbox_featured.

High Sch. Athletic Ass'n, 43 F.3d 265, 275 (6th Cir. 1994); *see also Miami Univ. Wrestling Club v. Miami Univ.*, 302 F.3d 608, 611 (6th Cir. 2002) (upholding decision to eliminate "men's soccer, tennis and wrestling teams" to decrease participation disparity). If reinstating the women's team is not an available remedy at the final judgment, why would a court be permitted to grant such relief while the litigation continues for years? By the end, plaintiffs will have graduated and obtained all they desired: to compete in their sport at MSU.

Second, plaintiffs' requested injunction does not maintain the status quo. The "purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." *Benisek v. Lamone*, ––– U.S. ––––, 138 S. Ct. 1942, 1945, 201 L.Ed.2d 398 (2018) (quoting *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395, 101 S.Ct. 1830, 68 L.Ed.2d 175 (1981)). Where the participation gap was previously 12 or 0.65%, requiring MSU to reinstate *only* the women's swimming and diving team of 33 women would swing the participation gap further the other way—creating a participation gap of 21 for men. That hardly represents the status quo and is yet another reason why a remand is a fruitless exercise.

* * *

"[A] preliminary injunction is 'an extraordinary remedy never awarded as of right.'" *Benisek*, 138 S. Ct. at 1944 (quoting *Winter v. NRDC, Inc.*, 555 U.S. 7, 24, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008)). For that reason, "the proof required for the plaintiff to obtain a preliminary injunction is much more stringent than the proof required to survive a summary judgment

motion." *McNeilly v. Terri Lynn Land*, 684 F.3d 611, 615 (6th Cir. 2012) (citation omitted). Plaintiffs have not carried their heavy burden. That should be enough to give pause before announcing binding principles of law that are contrary to Title IX, agency guidance, and the consensus among the other federal circuit courts. This court should affirm the district court's decision denying plaintiffs a preliminary injunction.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

SOPHIA BALOW, et al.,

Plaintiffs,

v.

MICHIGAN STATE UNIVERSITY, et al.,

Defendants.

______________________/

Case No. 1:21-cv-44

Hon. Hala Y. Jarbou

[2021 WL 650712]

OPINION

Michigan State University (MSU) announced in October 2020 that, due to budget constraints, it would discontinue its men's and women's varsity swimming and diving programs after the end of the 2020-2021 season. Plaintiffs are current members of MSU's varsity women's swimming and diving team. They claim that MSU discriminates against women, in violation of Title IX, 20 U.S.C. §§ 1681 et seq. Specifically, in Count I of their complaint, Plaintiffs claim that MSU provides "fewer and poorer athletic participation opportunities" for women than it does for men. (*See* Compl., ECF No. 1, PageID.45.)[1]

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[1] In Count II, Plaintiffs claim that MSU has not allocated its financial assistance to male and female athletes on an equal basis. In Count III, Plaintiffs claim that MSU has not allocated

Plaintiffs believe that the elimination of their team would exacerbate this problem; accordingly, they have asked the Court for a preliminary injunction requiring MSU to maintain its varsity women's swimming and diving team for the duration of this lawsuit. The Court heard oral argument on Plaintiffs' motion on February 10, 2021. For the reasons herein, the Court will deny the motion.

I. Preliminary Injunction Standard

"'[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion.'" *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (quoting 11A C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure* § 2948 (2d ed. 1995)). The Court considers four factors when deciding whether to grant a preliminary injunction:

> (1) whether the movant has a "strong" likelihood of success on the merits;
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> (2) whether the movant would otherwise suffer irreparable injury;
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> (3) whether issuance of a preliminary injunction would cause substantial harm to others; and
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> (4) whether the public interest would be served by issuance of a preliminary injunction.

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benefits to male and female athletes on an equal basis. The preliminary injunction motion is concerned only with Count I, i.e., MSU's alleged failure to provide equal athletic participation opportunities. (*See* Pls.' Br. in Supp. of Mot., ECF No. 2-1, PageID.85.)

McPherson v. Mich. High Sch. Athletic Ass'n, 119 F.3d 453, 459 (6th Cir. 1997) (en banc).

"These factors are to be balanced against one another and should not be considered prerequisites to the grant of a preliminary injunction." *Leary v. Daeschner*, 228 F.3d 729, 736 (6th Cir. 2000). However, "a finding that there is simply no likelihood of success on the merits is usually fatal." *Gonzales v. Bd. of Med. Examiners*, 225 F.3d 620, 625 (6th Cir. 2000).

II. Title IX

Title IX prohibits sex discrimination in the provision of college sports programs, providing that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity," including intercollegiate athletics. 20 U.S.C. § 1681(a); 34 C.F.R. § 106.41(a).

Title IX's regulations require universities receiving federal funds to "provide equal athletic opportunity for members of both sexes." 34 C.F.R. § 106.41(c). The following factors are relevant for determining "equal opportunity":

> (1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
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> (2) The provision of equipment and supplies;
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> (3) Scheduling of games and practice time;
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> (4) Travel and per diem allowance;
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> (5) Opportunity to receive coaching and academic tutoring;

> (6) Assignment and compensation of coaches and tutors;
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> (7) Provision of locker rooms, practice and competitive facilities;
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> (8) Provision of medical and training facilities and services;
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> (9) Provision of housing and dining facilities and services;
>
> (10) Publicity.

Id. A school's "failure to provide necessary funds for teams for one sex" also may be indicative of sex discrimination. *Id.*

The Department of Education's Office for Civil Rights (OCR) clarified the meaning of "equal opportunity" in a 1979 policy interpretation. *See* Title IX of the Education Amendments of 1972; a Policy Interpretation, 44 Fed. Reg. 71,413 (Dec. 11, 1979). To comply with the requirement to "effectively accommodat[e] the interests and abilities of male and female athletes," institutions must "provide both the opportunity for individuals of each sex to participate in intercollegiate competition, and for athletes of each sex to have competitive team schedules which equally reflect their abilities." *Id.* at 71,417.

Compliance is assessed by the following three-part test:

> (1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
>
> (2) Where the members of one sex have been and are underrepresented among intercollegiate

> athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or
>
> (3) Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.

Id. at 71,418.

In 1996, the OCR clarified that institutions need "comply only with any one part of [this] three-part test in order to provide nondiscriminatory participation opportunities for individuals of both sexes." OCR, Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test (Jan. 16, 1996), https://www2.ed.gov/about/offices/list/ocr/docs/clarific.html.

Plaintiffs have the burden of proving the first part of this test, i.e., that there is a statistically significant disparity between male and female participation opportunities. *See Horner v. Ky. High Sch. Athletic Assoc.*, 43 F.3d 265, 275 (6th Cir. 1994). If Plaintiffs meet their burden, Defendants can escape liability by proving the second part, i.e., a history and continuing practice of program expansion for female athletes. *Id.* If Defendants cannot make this showing, then Plaintiffs must prove the third part, i.e., that the interests and abilities of female students have not been "fully and effectively accommodated." *Id.*

The parties mainly focus their arguments on the first part of the test, substantial proportionality (or lack thereof) in intercollegiate-level participation opportunities at MSU. The parties agree that the number of participation opportunities is determined by counting the number of athletic "participants," which the 1979 Policy Interpretation defines as athletes:

> a. Who are receiving the institutionally-sponsored support normally provided to athletes competing at the institution involved, *e.g.*, coaching, equipment, medical and training room services, on a regular basis during a sport's season; and
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> b. Who are participating in organized practice sessions and other team meetings and activities on a regular basis during a sport's season; and
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> c. Who are listed on the eligibility or squad lists maintained for each sport, or
>
> d. Who, because of injury, cannot meet a, b, or c above but continue to receive financial aid on the basis of athletic ability.

1979 Policy Interpretation, 44 Fed. Reg. at 71,415.

Exact proportionality would be achieved if the ratio of male to female athletic participants is equal to the ratio of male to female students enrolled at the school. When the numbers are not exactly proportional, the number of participation opportunities necessary to achieve exact proportionality is known as the "participation gap." For example, if there are 100 athletic participants in a school where half of the students are men and half are women, then exact proportionality would mean 50 male participants and 50 female participants. But if

there are 55 male participants and only 45 female participants, then the participation gap is 10.[2]

The first part of the three-part test does not require exact proportionality. It requires "substantial" proportionality. The OCR's 1996 clarification letter indicated that it would consider opportunities to be "substantially proportionate" when the participation gap

> . . . would not be sufficient to sustain a viable team, i.e., a team for which there is a sufficient number of interested and able students and enough available competition to sustain an intercollegiate team. As a frame of reference in assessing this situation, OCR may consider the average size of teams offered for the underrepresented sex, a number which would vary by institution.

Clarification of Intercollegiate Athletics Policy Guidance (1996).

III. Standing

MSU argues that Plaintiffs do not have "standing" to assert their claim for two reasons. First, MSU argues that "[t]here is no private right of action under Title IX to challenge a gender-neutral decision such as eliminating a combined men's and women's team[.]" (Defs.' Resp. Br. 22, ECF No. 8.) Second, MSU argues that Plaintiffs "have no standing to otherwise challenge a purported gender opportunity

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[2] The formula for calculating the participation gap is as follows: (number of male athletes / percentage of males in student body) - total number of athletes = participation gap for women. Using the numbers above, that calculation would be: (55 / 0.5) - 100 = 10.

imbalance during a period they were swimming and diving for MSU." (*Id.*)

MSU's first argument is misplaced. First, there is no question that Title IX creates a private right of action and a remedy for discrimination on the basis of sex. *See Cannon v. Univ. of Chicago*, 441 U.S. 677, 708 (1979) ("Not only the words and history of Title IX, but also its subject matter and underlying purposes, counsel implication of a cause of action in favor of private victims of discrimination."); *Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 76 (1992) (finding that a damages remedy is available for an action to enforce Title IX).

MSU relies on *Sandoval v. Alexander*, 532 U.S. 275 (2001), in which the Supreme Court held that there is no private right of action to enforce *disparate impact* regulations under Title VI because the part of Title VI implying a private right of action, 42 U.S.C. § 2000d, prohibited "only intentional discrimination." *Sandoval*, 532 U.S. at 282. Title IX was patterned after Title VI, substituting the word "sex" in Title IX to replace the words "race, color, or national origin" in Title VI. *See Cannon*, 441 U.S. at 695; *cf.* 42 U.S.C. § 2000d (Title VI) *with* 20 U.S.C. § 1681(a) (Title IX). Accordingly, it follows that the Supreme Court's reasoning regarding Title VI applies to Title IX as well. *See Doe v. BlueCross BlueShield of Tenn., Inc.*, 926 F.3d 235, 240-41 (6th Cir. 2019) (finding it "unlikely" that Title IX prohibits disparate-impact discrimination) (citing *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173 (2005) ("Title IX implies a private right of action to enforce its prohibition on intentional sex discrimination.")). In other words, both statutes permit a private right of action for

intentional discrimination, but not for disparate impact.

Nevertheless, as other courts have held in similar situations, Plaintiffs assert a claim of disparate treatment, not disparate impact. Plaintiffs contend that MSU has intentionally treated its female athletes differently than male athletes, and that eliminating the men's and women's swimming and diving team amounts to further discrimination against the female members of that team. This is a disparate treatment claim. *See Biediger v. Quinnipiac Univ.*, 691 F.3d 85, 97-98 (2d Cir. 2012) ("A school's decision to provide students with athletic participation opportunities through separate sports programs for each sex . . . necessarily raises a disparate treatment rather than disparate impact claim in that the school decides which athletic opportunities are available to particular students 'on the basis of sex.'").

In contrast, disparate-impact claims arise when "an entity acts for a nondiscriminatory reason but nevertheless disproportionately harms a protected group." *Foster v. Michigan*, 573 F. App'x 377, 389 (6th Cir. 2014). Plaintiffs do not make such a claim. They do not contend that Defendants acted for nondiscriminatory reasons. Rather, they contend that Defendants specifically chose their team for elimination, and that this choice reflects disparate treatment. Furthermore, the regulations at issue enforce the nondiscrimination requirement of Title IX; they do not purport to regulate facially neutral decisions with disparate impacts. *See Mayerova v. E. Mich. Univ.*, 346 F. Supp. 3d 983, 991 (E.D. Mich. 2018). Thus, *Sandoval* is distinguishable.

MSU's second argument is correct, but irrelevant. As far as the preliminary injunction motion is concerned, Plaintiffs are not challenging a gender imbalance in existence during the period in which they have been members of the swimming and diving team. Instead, they seek to prevent the effects of a decision that will subject them to that imbalance. They have standing to assert this claim.

IV. Preliminary Injunction Analysis

A. Likelihood of Success

Plaintiffs' request for an injunction falters on the first, and most important, factor. Plaintiffs have not shown a strong or substantial likelihood of success on the merits of their claim.

A brief word about the standard for a likelihood of success. Plaintiffs rely heavily on a case with similar facts from the District of Iowa, *Ohlensehlen v. University of Iowa*, No. 3:20-cv-00080-SMR-SBJ, 2020 WL 7651974 (D. Iowa Dec. 24, 2020), in which members of the women's swimming and diving team at the University of Iowa claimed that the university's decision to eliminate their team violated Title IX. *Id.* at *1. The court in that case entered a preliminary injunction to stop the University of Iowa from eliminating the team for the duration of the lawsuit. *Id.* Among other things, the court determined that the plaintiffs had shown a "fair chance" of success on the merits of their Title IX claim. *Id.* at *5. Similarly, Plaintiffs contend that they have demonstrated a "fair chance" of success on the merits of their claim.

Unlike courts in the Eighth Circuit, this Court does not evaluate requests for a preliminary injunction under a "fair chance" standard. The Eighth Circuit has a two-tiered standard for

evaluating preliminary injunctions. The first tier, applicable in *Ohlensehlen*, required the plaintiff to show only a "fair chance of prevailing" on the merits, which permits a showing of less than a fifty percent likelihood of success. *See D.M. by Bao Xiong v. Minn. State High Sch. League*, 917 F.3d 994, 999 (8th Cir. 2019). The second tier, a "heightened, likely-to-prevail standard," applies where the plaintiff challenges a "duly enacted state statute." *Id.* at 1000.

This Court is bound by precedent from the Sixth Circuit, not the Eighth. Nevertheless, "[a] fixed legal standard is not the essence of equity jurisprudence"; "'the precise wording of the standard for the likelihood of success on the merits is not as important as a realistic appraisal of all the traditional factors weighed by a court of equity. A balancing is required, and not the mechanical application of a certain form of words.'" *Roth v. Bank of Commonwealth*, 583 F.2d 527, 537-38 (6th Cir. 1978) (quoting *Metro. Detroit Plumbing & Mech. Contractors Assoc. v. HEW*, 418 F. Supp. 585, 586 (E.D. Mich. 1976)). Thus, the Court applies the Sixth Circuit's standard, but recognizes that its duty is to balance the Plaintiffs' likelihood of success against the other factors.

1. Plaintiffs' Evidence: Lopiano Report

To support their claim of unequal opportunity, Plaintiffs rely on an analysis conducted by their expert, Donna Lopiano, who uses publicly available data—as well as a series of inferences from that data—to offer her opinion that MSU's participation gap is too large for participation opportunities to be substantially proportionate.

(a) Admissibility

As an initial matter, MSU contends that the Court should strike Lopiano's report because it is inadmissible. MSU argues that the report relies upon improper data, makes assumptions from that data that are unwarranted, and offers legal opinions. MSU also argues that an expert's testimony is unnecessary because the relevant calculations are straightforward and simple. Alternatively, MSU asks the Court to consider the report of its own expert.

MSU is invoking the Court's "gatekeeping" role. The Court has a duty to act as a "gatekeeper" for expert testimony by assessing its admissibility. *See Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 147 (1999); *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592 (1993); Fed. R. Evid. 104(a). This inquiry is governed in part by Rule 702, which provides,

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
>
> (b) the testimony is based on sufficient facts or data;
>
> (c) the testimony is the product of reliable principles and methods; and
>
> (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702. Ultimately, an expert's testimony will be admissible if it "both rests on a reliable foundation and is relevant to the task at hand." *Daubert*, 509 U.S. at 597.

The Court will deny MSU's request to strike Lopiano's report and will consider the reports of both experts. Lopiano's resume indicates that she is qualified to render opinions relating to intercollegiate sports programs. In addition, her analysis is helpful and relevant. MSU's objections to her data and her assumptions primarily concern the weight of her conclusions rather than their reliability. To the extent *Daubert* applies at this stage, the Court can weigh MSU's concerns when assessing Lopiano's report in tandem with the report of MSU's expert.

(b) EADA Reports

Lopiano begins her analysis by examining reports filed by MSU under the Equity in Athletics Disclosure Act (EADA), 20 U.S.C. § 1092(g). (*See* Lopiano Rep., ECF No. 2-14, PageID.212.) For the most recent year in which MSU's EADA data is publicly available, the 2018-2019 academic year, the EADA reports show a participation gap of 25 female participation opportunities. (*Id.*, PageID.216.)

As Lopiano acknowledges, however, the participant counts in EADA reports are not equivalent to participation opportunities under Title IX because the EADA reports "do not follow Title IX counting instructions." (*Id.*, PageID.215.) The EADA reports "were designed to make prospective students aware of an institution of higher education's commitment to providing equitable athletic opportunities." (*Id.*, PageID.213.) They were not

designed to report official tallies of participation opportunities for purposes of Title IX.

For instance, the EADA requires universities to report the number of their undergraduate athletes, by team, "as of the day of the first scheduled contest for the team." 20 U.S.C. § 1092(g)(1)(B)(i). However, the number of athletes as of the date of the first scheduled contest may not be the same number of athletes who participate "in organized practice sessions and other team meetings and activities on a regular basis during a sport's season." *See* Policy Interpretation, 44 Fed. Reg. at 71,415. Some athletes who participate in the first competition might leave the team after that event, making the EADA statistics overinclusive.

Lopiano surmises that MSU's participation counts for women are systematically overinflated in the EADA reports because the 2019 instruction manual for EADA reports advises schools to count "male practice players" as participants on women's teams, even though those players would not count as female participants under Title IX. (Lopiano Rep., PageID.216.) However, there is no evidence in the EADA online database that MSU counted male practice players as female participants in its most recent public data. According to Lopiano, the number of male practice players would be displayed in a "caveat" field in the database. (*Id.*, PageID.218.) MSU's EADA data for 2018-2019 contains nothing in that field. Lopiano apparently believes that MSU simply left that field blank, but MSU provides a more straightforward reason: it stopped counting male practice players as female participants in 2019. (*See* Breske Decl. ¶ 23, ECF No. 8-2.)

(c) Web rosters

Next, Lopiano analyzes the player rosters available on MSU's website, which Lopiano believes more closely reflect the number of participants in MSU's athletic programs for purposes of Title IX. She notes that these "web rosters" show participation numbers that are lower than those in the EADA reports. Lopiano implies that this as a sign that MSU is inflating its EADA data, but the difference is also attributable Lopiano's earlier point that EADA reports tend to overcount participants.

By Lopiano's count, the web rosters show participation gaps of 33, 37, and 35 female athletes in the seasons ending in 2018, 2019, and 2020, respectively. (*Id.*, PageID.232.) In percentage terms, these gaps are 1.8%, 2.0%, and 2.0%. (*Id.*)

(d) Inflation

Lopiano believes that the actual participation gaps are much larger than the numbers in the web rosters due to artificial inflation of the player rosters on several of MSU's women's teams, particularly the women's rowing, cross country, and track and field teams.

(i) Women's rowing

Lopiano contends that MSU has inflated its numbers for women's rowing by including 20 to 30 "novices" on its team. (*Id.*, PageID.220.) According to Lopiano, novice rowers are freshmen who have never participated in rowing before college. Lopiano believes that novice female rowers should not be counted as participants because they do not receive "a genuine Division I varsity experience"; in contrast to other rowers, they "participate in fewer regular

season events," "do not receive athletic scholarships, and do not have national championships." (*Id.*, PageID.222, 238.) However, she acknowledges that "participation in a competition is not required in order to count as a participant [under Title IX]" (*id.*, PageID.224 n.6), undermining her point that the ability to participate in season events and national championships has relevance to determining whether an athlete is a participant.

(ii) Women's cross country and track and field teams

Lopiano counts between 35 and 44 members of MSU's women's cross country team during the years 2012 to 2019. (*Id.*, PageID.223.) She believes those numbers are suspicious because the average size of a NCAA Division I women's cross country team is 17 runners. (*Id.*, PageID.224.) At the same time, however, she notes that the men's team is also larger than average, albeit to a lesser extent. And she acknowledges that "she cannot make an accurate participant count." (*Id.*)

Lopiano believes that MSU has improperly inflated the number of participants on its women's cross country and track and field teams because a substantial number of them do not participate in any events. Again, however, Title IX's regulations make clear that participation in an event is not required for an athlete to count as a participant.

(e) Summary

In short, Lopiano believes that MSU's actual participation gap is much larger than approximately 35 female participants due to her belief that MSU has improperly inflated the sizes of several of its women's teams.

Lopiano's analysis contains several shortcomings and flaws that taint her conclusions. First, as she acknowledges, she does not possess the data necessary to accurately count participant numbers. She is forced to guess the number of participants based on EADA reports that are inconsistent with the definition of participant under Title IX, and web rosters that she speculates are more in line with that definition.

Second, to reach a participation gap higher than approximately 35 female athletes, Lopiano makes inferences that are tenuous, at best. For instance, she compares the sizes of MSU's teams to the average size of teams at similar schools. It is difficult to discern the relevance of this comparison. Nothing in Title IX compels a school to make the size of its teams comparable to that of other schools. And in any event, an average necessarily implies that other Division I schools also have teams that are larger than the average, some of which may be comparable to the size of MSU's teams.

Third, Lopiano contends that some of the female athletes on MSU's teams should not count as participants because they do not participate in competitions, but that assertion conflicts with her acknowledgement that such participation is not necessary for an athlete to count as a participant for purposes of Title IX. As summarized by the Second Circuit:

> It is not necessary for an athlete to meet minimum criteria of playing time or athletic ability to count as a participant. As OCR explained, "athletes who practice but may not compete" nevertheless "receive numerous benefits and services, such as

> training and practice time, coaching, tutoring services, locker room facilities, and equipment, as well as important non-tangible benefits derived from being a member of an intercollegiate athletic team." Thus, "it is necessary to count all athletes who receive such benefits when determining the number of athletic opportunities provided to men and women.". . . for an athlete to be counted, he or she must be afforded a participation opportunity that is "real, not illusory," in that it offers the same benefits as would be provided to other *bona fide* athletes. . . . .

Biediger v. Quinnipiac Univ., 691 F.3d 85, 93 (2d Cir. 2012) (citations omitted).

Fourth, Lopiano's logic is skewed in favor of a larger participation gap for female athletes. She does not apply her analysis to men's sports at MSU, such as football.[3] She does not count how many members of the men's teams never or rarely participate in a competition, and then subtract those numbers from the male side of the ledger.

2. MSU's Evidence: O'Brien Report

MSU responds with a report prepared by its own expert, Timothy O'Brien, who provides details that fill in gaps in Lopiano's report. His report suggests that there is no significant participation gap at MSU.

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[3] MSU's Director of Compliance, Alexandra Breske, avers that 29 out of 121 members of the football team did not participate in a competition in 2019. (Breske Decl. ¶ 25, ECF No. 8-2.) In 2018, 40 out of 120 members did not participate in a competition. (*Id.*)

(a) Counting participants

O'Brien reviewed data maintained by MSU's Director of Compliance and compared it to MSU's squad lists. (O'Brien Rep., ECF No. 8-8, PageID.429.) Because the NCAA regulates the number of hours that a student athlete can participate in athletics on a weekly basis, MSU maintains a system to track student athletic activity. (*Id.*, PageID.432.) This data includes "practices, team meetings, strength and conditioning, travel, and competition[.]" (*Id.*) O'Brien also spoke with the coaches of the women's rowing, cross country, and track and field teams to determine whether the spots on their teams represented "legitimate participation opportunities." (*Id.*, PageID.434.)

MSU's data for the 2019-2020 academic year shows a total of 895 athletic participants, 445 of which are male and 450 of which are female. (*Id.*, PageID.431.) The enrollment for that year was 17,530 male students (49.07%) and 18,192 female students (50.93%). These numbers result in a participation gap of 12 female participation opportunities.[4] (*Id.*, PageID.443.) After eliminating the men's and women's swimming and diving teams, if all else remained equal, that gap would increase to 15.[5] (*Id.*, PageID.444.)

(b) Women's rowing

To verify that the novice rowers on MSU's women's rowing team receive legitimate participation

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[4] Using the formula in footnote 2, the calculation is: (445 / 0.4907) - 895 = 12.

[5] The women's swimming and diving team has four more members than the men's team.

opportunities, O'Brien interviewed the coach of that team, Kimberly Chavers. Among other things, Chavers told O'Brien that "women's rowing is not a prominent or highly populated sport at the high school level in the Midwest"; consequently, there is a need for a collegiate program that recruits, trains, and develops skilled multi-sport female athletes to compete in rowing. (O'Brien Rep., PageID.435.)

In addition, the Big Ten Conference requires a minimum team size of 51 student-athletes in order to participate. (*Id.*, PageID.436.) Rowing is a sport with "natural attrition," so to meet the minimum, a larger squad is necessary to offset departures from the program. (*Id.*, PageID.437.)

Most importantly, Chavers confirmed that novice rowers are treated the same as other members of the team. In other words, all the women on the rowing team–novice and otherwise– receive the same "gear, attire, uniforms, iPads, and . . . access to the athletic trainers, academic support, strength and conditioning, nutrition and coaching, among other things." (*Id.*, PageID.437.) And contrary to Lopiano's assertion, some novice rowers receive athletic scholarships. (Chavers Decl. ¶ 21, ECF No. 8-3.)

Furthermore, in the Big Ten Conference, novice rowers can receive points for their team at conference events because some races are reserved for novice rowers. Consequently, novice rowers are necessary for the success of the team. (O'Brien Rep., PageID.436; Chavers Decl. ¶ 10.) And as they develop, novice rowers can compete in the varsity events if their skills allow them to do so. (Chavers Decl. ¶ 9.) Indeed, one novice rower at MSU went on to compete in the Olympics. (*Id.* ¶ 3.)

(c) Women's cross country and track and field

The head coach of the men's and women's cross country and track and field teams, Walter Drenth, told O'Brien that he committed to larger squads in order to be competitive in the Big Ten Conference. (*Id.*, PageID.438-439.) A larger team allows him to recruit quality athletes and focus on their development over the course of four or five years. (*Id.*, PageID.439.) Part of that development involves running athletes as "unattached" at some events, which means that they are not running on behalf of MSU and do not use up a year of their eligibility. (*Id.*, PageID.440.) Drenth also confirmed that all members of the teams are "treated in the same manner and get[] the same level of attention and support." (*Id.*, PageID.441.)

Drenth explained that the women's teams are larger than the men's teams because the NCAA permits MSU to award more scholarships to members of the women's teams than those of the men's teams. The size of the men's teams is approximately 70% of the size of the women's teams, which roughly matches the ratio of scholarship funds available for men versus women (12.6 versus 18). (*Id.*, PageID.442; *accord* Drenth Decl. ¶ 11, ECF No. 8-5.)

3. Assessing Substantial Proportionality

Based on MSU's numbers, there is a gap of 12 participation opportunities for women in the most recent academic year for which the parties can calculate such a gap, the 2019-2020 academic year.[6]

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[6] The parties agree that the Court cannot calculate a participation gap until after a season has ended. Consequently,

In the year before that, the gap was 27. (Breske Decl. ¶ 17.) These numbers are smaller than the average size of a women's team at MSU, which is 35 athletes. (*Id.*) Accordingly, using one of the OCR's stated criteria for proportionality, MSU's evidence indicates its participation numbers are substantially proportionate.

Plaintiffs offer a much higher calculation of the participation gap, but as discussed above, their calculation depends upon imperfect data, flawed assumptions, contradictory reasoning, and a skewed analysis. Thus, Plaintiffs have provided a shaky foundation on which to argue that MSU's participation gap is statistically significant. The cracks in that foundation become even more apparent after considering the evidence offered by MSU.

O'Brien's report, which is supported by affidavits from the coaches for the women's rowing, cross country, and track and field teams, provides facially valid reasons to justify the sizes of those teams and to explain why all the members of those teams are countable as participants under Title IX's criteria. Importantly, the evidence indicates that all members of the foregoing teams are treated equally with respect to the benefits of participation. Although it is true that novice rowers on the women's rowing team generally have less experience and compete in different events than other members of the team, the Court finds no legal support for Lopiano's or Plaintiffs' contention that the spots for these women are not genuine participation opportunities.

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the Court cannot calculate a gap for the 2020-2021 academic year.

Plaintiffs analogize novice rowers to female athletes at a university that downgraded several women's teams from varsity status to club status, aggravating an existing imbalance between athletic opportunities for men and women. *See Cohen v. Brown Univ.*, 991 F.2d 888, 892 (1st Cir. 1993) (*Cohen II*). That comparison is inapt.

In *Cohen*, the downgrade to club status meant that these teams lost "financial subsidies and support services routinely available to varsity teams (*e.g.*, salaried coaches, access to prime facilities, preferred practice time, medical trainers, clerical assistance, office support, admission preferences, and the like)." *Id.* Unlike the club team members in that case, there is no evidence that novice rowers do not receive the same type of subsidies and support as other rowers on the team.

The district court in *Cohen* issued a preliminary injunction requiring the university to reinstate the women's club teams to their former status as varsity teams. *Cohen v. Brown Univ.*, 809 F. Supp. 978, 1001 (D.R.I. 1992) (*Cohen I*). In response to the injunction, the school submitted a plan to add "junior varsity positions" to women's varsity teams. *See Cohen v. Brown Univ.*, 101 F.3d 155, 186 (1st Cir. 1996) (*Cohen IV*). The district court, noting that "junior varsity squads" do not qualify as "intercollegiate competition" under Title IX, concluded that the university's plan to put junior varsity positions on the varsity teams was not a "good faith" effort to comply with the injunction. *Id.*

Plaintiffs argue that a novice rower is like a junior varsity position on a varsity team. Unlike the district court in *Cohen*, however, this Court does not possess the relevant information to determine what facts

distinguished a "junior varsity" position from a varsity one on the same team under the school's plan in that case. If that court was concerned that the junior varsity positions could never participate in intercollegiate competition, it would make sense for the court to conclude that those positions were not countable as genuine participation opportunities under Title IX. However, novice rowers are different. They participate in intercollegiate events specifically designated for them and earn points at those events for the benefit of the team. They can also participate in varsity races as their skills allow. In that respect, they are little different from members of any other varsity team who practice with the team regularly and receive the same institutional support as other teammates but are not yet skilled enough to compete on behalf of the school at intercollegiate events.

In short, on the present record, the Court is not persuaded that MSU has improperly inflated its participation opportunities for women, or that Plaintiffs have shown a likelihood of success on their claim to the extent it requires them to demonstrate such inflation.

Furthermore, the Court is not persuaded that a participation gap of 25 (according to Lopiano's initial estimate based on EADA data), 35 (according to Lopiano's estimate based on the web rosters), or 12 (according to MSU's most recent records) is likely to be too large for a school of MSU's size to satisfy the test for substantial proportionality. Most of these estimates are less than the average size of a women's team at MSU.

The Court rejects Plaintiffs' contention that a participation gap as small as eight athletes would place MSU outside the OCR's proportionality "safe

harbor" for demonstrating "nondiscriminatory participation opportunities." *See* Clarification of Intercollegiate Athletics Policy Guidance (1996). Although it is theoretically possible that a school like MSU could field a viable team of eight female tennis players, the OCR has made clear that it considers substantial proportionality in the context of each institution, including that institution's "specific circumstances and the *size of its athletic program*." *See id.* (emphasis added). Plaintiffs' argument does not account for the size of MSU's athletic program.

If the size of an athletic program is relevant, then the size of the participation gap in relation to the size of the athletic program should also be relevant. Indeed, the substantial proportionality test stems from the OCR's recognition that, because "natural fluctuations in an institution's enrollment and/or participation rates may affect the percentages in a particular year," "it would be unreasonable to expect an institution to achieve exact proportionality[.]" *Id.* Schools with larger athletic programs are likely to see larger fluctuations in participation numbers from year to year. Ignoring the size of the participation gap in relation to the size of the athletics program would significantly hinder the ability of schools with larger programs to maintain compliance. They would be more likely to fall outside the safe harbor due to "natural fluctuations in enrollment and participation rates" that may be somewhat large in absolute numbers but are relatively small in relation to the size of their programs.

Courts seem to recognize this point. They generally examine participation gaps *as a percentage* of the size of the athletic program at the school in question. A case cited by Plaintiffs suggests that a

gap lower than 2% typically satisfies the substantial proportionality requirement:

> OCR has not established a threshold statistical figure for determining whether a school offers participation opportunities substantially proportional to its enrollment, but instead examines each school on a case-by-case basis. 1996 Clarification at 4. Courts, however, have held that a disparity within two percentage points is proof that an educational institution falls within the substantial proportionality safe harbor. *See Equity in Athletics, Inc. v. Dep't of Educ.*, 675 F. Supp. 2d 660, 682-83 (W.D. Va. 2009) (finding no case in which a disparity of two percentage points was held to constitute a lack of substantial proportionality).

Biediger v. Quinnipiac Univ., 728 F. Supp. 2d 62, 110 (D. Conn. 2010); *see also Portz v. St. Cloud State Univ.*, 196 F. Supp. 3d 963, 975 (D. Minn. 2016) (discussing cases and noting that a deviation of "10 or more percentage points . . . [is] very rarely substantially proportionate," whereas "a deviation of less than 3.5 percentage points typically keeps the ratios substantially proportionate").

MSU's participation gap appears to be lower than 2%. Plaintiffs have not cited, and the Court is not aware, of any case where a gap lower than 2% failed to satisfy the test for substantial proportionality. *Cf. Ohlensehlen v. Univ. of Iowa*, No. 3:20-cv-00080-SMR-SBJ, 2020 WL 7651974, at *5 (N.D. Iowa, Dec. 24, 2020) (granting preliminary injunction where participation gap was at least 2.8%); *Portz*, 196 F. Supp. 3d at 976 (granting preliminary injunction where gap was 3.5%); *Ollier v. Sweetwater Union*

High Sch. Dist., 768 F.3d 843, 856 (9th Cir. 2014) (gap of 6.7% was not substantially proportionate); *Biediger*, 728 F. Supp. 2d at 111 (gap of 3.62% was a "borderline case of disproportionate athletic opportunities for women").

Accordingly, for all the foregoing reasons, the Court finds that Plaintiffs have not shown a substantial likelihood of success.

B. Irreparable Injury

Next, the Court considers whether Plaintiffs have shown the possibility of irreparable injury in the absence of an injunction. Plaintiffs have met their burden. Although MSU has promised to maintain Plaintiffs' athletic scholarships throughout their enrollment, the Court recognizes that the discontinuation of their team will likely have significant impacts on Plaintiffs' athletic experience and their ability to compete at an elite level in the future. Transferring to a comparable program at another school could be difficult and costly. And it might require surrendering academic credits that Plaintiffs have earned at MSU.

On the other hand, some of the damage has already been done. MSU made the difficult decision to eliminate Plaintiffs' team and is willing to defend that decision. Plaintiffs now ask the Court to keep their team on temporary life support until the outcome of the case, which is uncertain in both timing and result. MSU will likely have difficulty retaining and recruiting staff and team members in these circumstances, to the detriment of the remaining team members and their ability to compete.

In any event, Plaintiffs have demonstrated a likelihood of irreparable injury in the absence of an injunction.

C. Substantial Harm to Others

MSU apparently contends that maintaining its women's swimming and diving team would cost approximately $1 million per year (around half the $2.07 million cost of maintaining both the men's and women's teams), not including unspecified "capital outlays" that would be necessary to upgrade and repair the swimming and diving facilities. (*See* Defs.' Resp. Br. 8.)

Plaintiffs argue that MSU will suffer no harm because it recently received very large donations for its sports programs, which would be more than enough to cover the cost of maintaining Plaintiffs' team. However, it is not clear how much of those donations would be available to fund Plaintiffs' team. Moreover, those donations do not necessarily mitigate the impact of the Court's injunction. With or without the donations, an injunction would require MSU to allocate significant resources to the women's swimming and diving team that MSU could use elsewhere.

D. Public Interest

The public interest would be served by preventing discrimination in the provision athletic opportunities for women; however, Plaintiffs have not shown that they are likely to succeed on that claim. Absent such a showing, an injunction would not serve the public's interests. MSU is best positioned to steward its financial resources for the benefit of the institution and its students.

On balance, the factors weigh against the grant of a preliminary injunction. Accordingly, the Court will deny Plaintiffs' motion.

V. Conclusion

For the reasons stated herein, the Court will deny Defendants' motion to strike Plaintiffs' expert report. The Court will also deny Plaintiffs' motion for a preliminary injunction.

An order will enter consistent with this Opinion.

Dated: February 19, 2021 /s/ Hala Y. Jarbour

HALA Y. JARBOU
UNITED STATES
DISTRICT JUDGE

No. 21-1183

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Mar 31, 2022
DEBORAH S. HUNT, Clerk

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<tr><td>SOPHIA BALOW; AVA BOUTROUS; JULIA COFFMAN; KYLIE GOIT; EMMA INCH; SHERIDAN PHALEN; MADELINE REILLY; OLIVIA STARZOMSKI; SARAH ZOFCHAK; TAYLOR ARNOLD; ELISE TURKE, INDIVIDUALLY AND ON BEHALF OF ALL THOSE SIMILARLY SITUATED,

Plaintiffs-Appellants,

v.

MICHIGAN STATE UNIVERSITY; MICHIGAN STATE UNIVERSITY BOARD OF TRUSTEES; SAMUEL L. STANLEY, JR.; BILL BEEKMAN,

Defendants-Appellees.</td><td>)
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[2022 WL 1072866]

BEFORE: GUY, MOORE, and GIBBONS, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied. Judge Guy would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

s/ Deborah S. Hunt
Deborah S. Hunt, Clerk

20 U.S.C. § 1681

§ 1681. Sex

(a) Prohibition against discrimination; exceptions

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:

(1) Classes of educational institutions subject to prohibition

in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education;

(2) Educational institutions commencing planned change in admissions

in regard to admissions to educational institutions, this section shall not apply (A) for one year from June 23, 1972, nor for six years after June 23, 1972, in the case of an educational institution which has begun the process of changing from being an institution which admits only students of one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Secretary of Education or (B) for seven years from the date an educational institution begins the process of changing from being an institution which admits only students of only one sex to being an institution which admits

students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Secretary of Education, whichever is the later;

(3) Educational institutions of religious organizations with contrary religious tenets

this section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization;

(4) Educational institutions training individuals for military services or merchant marine

this section shall not apply to an educational institution whose primary purpose is the training of individuals for the military services of the United States, or the merchant marine;

(5) Public educational institutions with traditional and continuing admissions policy

in regard to admissions this section shall not apply to any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex;

(6) Social fraternities or sororities; voluntary youth service organizations

this section shall not apply to membership practices—

(A) of a social fraternity or social sorority which is exempt from taxation under section 501(a) of title 26, the active membership of which consists primarily of students in attendance at an institution of higher education, or

(B) of the Young Men's Christian Association, Young Women's Christian Association, Girl Scouts, Boy Scouts, Camp Fire Girls, and voluntary youth service organizations which are so exempt, the membership of which has traditionally been limited to persons of one sex and principally to persons of less than nineteen years of age;

(7) Boy or Girl conferences

this section shall not apply to—

(A) any program or activity of the American Legion undertaken in connection with the organization or operation of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(B) any program or activity of any secondary school or educational institution specifically for—

(i) the promotion of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(ii) the selection of students to attend any such conference;

(8) Father-son or mother-daughter activities at educational institutions

this section shall not preclude father-son or mother-daughter activities at an educational institution, but if such activities are provided for students of one sex, opportunities for reasonably comparable activities shall be provided for students of the other sex; and

(9) Institution of higher education scholarship awards in "beauty" pageants

this section shall not apply with respect to any scholarship or other financial assistance awarded by an institution of higher education to any individual because such individual has received such award in any pageant in which the attainment of such award is based upon a combination of factors related to the personal appearance, poise, and talent of such individual and in which participation is limited to individuals of one sex only, so long as such pageant is in compliance with other nondiscrimination provisions of Federal law.

(b) Preferential or disparate treatment because of imbalance in participation or receipt of Federal benefits; statistical evidence of imbalance

Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of

persons of that sex in any community, State, section, or other area: *Provided*, That this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this chapter of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex.

(c) "Educational institution" defined

For purposes of this chapter an educational institution means any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education, except that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units, such term means each such school, college, or department.

34 C.F.R. § 106.41

§ 106.41 Athletics

(a) *General*. No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.

(b) *Separate teams*. Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.

(c) *Equal opportunity*. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, among other factors:

(1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;

(2) The provision of equipment and supplies;

(3) Scheduling of games and practice time;

(4) Travel and per diem allowance;

(5) Opportunity to receive coaching and academic tutoring;

(6) Assignment and compensation of coaches and tutors;

(7) Provision of locker rooms, practice and competitive facilities;

(8) Provision of medical and training facilities and services;

(9) Provision of housing and dining facilities and services;

(10) Publicity.

Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute noncompliance with this section, but the Assistant Secretary may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.

(d) *Adjustment period*. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics at the elementary school level shall comply fully with this section as expeditiously as possible but in no event later than one year from the effective date of this regulation. A recipient which operates or sponsors interscholastic, intercollegiate,

club or intramural athletics at the secondary or post-secondary school level shall comply fully with this section as expeditiously as possible but in no event later than three years from the effective date of this regulation.

Federal Register / Vol. 44, No. 239 / Tuesday, December 11, 1979 / Rules and Regulations **71413**

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Office for Civil Rights

Office of the Secretary

45 CFR Part 08

Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics

AGENCY: Office for Civil Rights, Office of the Secretary, HEW.

ACTION: Policy interpretation.

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* * *

VII. The Policy Interpretation

This Policy Interpretation clarifies the obligations which recipients of Federal aid have under Title IX to provide equal opportunities in athletic programs. In particular, this Policy Interpretation provides a means to assess an institution's compliance with the equal opportunity requirements of the regulation which are set forth at 45 CFR 86.37(c) and 86.41(c).

* * *

[71417]

* * *

C. Effective Accommodation of Student Interests and Abilities

* * *

[71418]

* * *

5. *Application of the Policy—Levels of Competition.*

In effectively accommodating the interests and abilities of male and female athletes, institutions must provide both the opportunity for individuals of each sex to participate in intercollegiate competition, and for athletes of each sex to have competitive team schedules which equally reflect their abilities.

a. Compliance will be assessed in any one of the following ways:

(1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or

(2) Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or

(3) Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.

b. Compliance with this provision of the regulation will also be assessed by examining the following:

(1) Whether the competitive schedules for men's and women's teams, on a program-wide basis,

afford proportionally similar numbers of male and female athletes equivalently advanced competitive opportunities; or

(2) Whether the institution can demonstrate a history and continuing practice of upgrading the competitive opportunities available to the historically disadvantaged sex as warranted by developing abilities among the athletes of that sex.

c. Institutions are not required to upgrade teams to intercollegiate status or otherwise develop intercollegiate sports absent a reasonable expectation that intercollegiate competition in that sport will be available within the institution's normal competitive regions. Institutions may be required by the Title IX regulation to actively encourage the development of such competition, however, when overall athletic opportunities within that region have been historically limited for the members of one sex.

* * *

U.S. Department of Education

[https://www2.ed.gov/about/offices/list/ocr/docs/clarific.html]

OCR

Office of Civil Rights

* * *

Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test

[OCR-00016]

[OCR-00016-A]

Jan 16, 1996

Dear Colleague:

It is my pleasure to send you the enclosed Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test (the Clarification).

As you know, the Office for Civil Rights (OCR) enforces Title IX of the Education Amendments of 1972, which prohibits discrimination on the basis of sex in education programs and activities. The regulation implementing Title IX and the Department's Intercollegiate Athletics Policy Interpretation published in 1979—both of which followed publication for notice and the receipt, review and consideration of extensive comments—specifically address intercollegiate athletics. Since becoming Assistant Secretary, I have recognized the need to provide additional clarification regarding what is commonly referred to as the "three-part test," a test used to determine whether students of both sexes are provided nondiscriminatory opportunities

to participate in athletics. The three-part test is described in the Department's 1979 Policy Interpretation.

Accordingly, on September 20, 1995, OCR circulated to over 4500 interested parties a draft of the proposed Clarification, soliciting comments about whether the document provided sufficient clarity to assist institutions in their efforts to comply with Title IX. As indicated when circulating the draft of the Clarification, the objective of the Clarification is to respond to requests for specific guidance about the existing standards that have guided the enforcement of Title IX in the area of intercollegiate athletics. Further, the Clarification is limited to an elaboration of the "three-part test." This test, which has generated the majority of the questions that have been raised about Title IX compliance, is a portion of a larger analytical framework reflected in the 1979 Policy Interpretation.

OCR appreciates the efforts of the more than 200 individuals who commented on the draft of the Clarification. In addition to providing specific comments regarding clarity, some parties suggested that the Clarification did not go far enough in protecting women's sports. Others, by contrast, suggested that the Clarification, or the Policy Interpretation itself, provided more protection for women's sports than intended by Title IX. However, it would not be appropriate to revise the 1979 Policy Interpretation, and adherence to its provisions shaped OCR's consideration of these comments. The Policy Interpretation has guided OCR's enforcement in the area of athletics for over fifteen years, enjoying the bipartisan support of Congress. The Policy

Interpretation has also enjoyed the support of every court that has addressed issues of Title IX athletics. As one recent court decision recognized, the "three-part test" draws its "essence" from the Title IX statute.

The draft has been revised to incorporate suggestions that OCR received regarding how to make the document more useful and clearer. For instance, the Clarification now has additional examples to illustrate how to meet part one of the three-part test and makes clear that the term "developing interests" under part two of the test includes interests that already exist at the institution. The document also clarifies that an institution can choose which part of the test it plans to meet. In addition, it further clarifies how Title IX requires OCR to count participation opportunities and why Title IX does not require an institution, under part three of the test, to accommodate the interests and abilities of potential students.

OCR also received requests for clarification that relate primarily to fact- or institution-specific situations that only apply to a small number of athletes or institutions. These comments are more appropriately handled on an individual basis and, accordingly, OCR will follow-up on these comments and questions in the context of OCR's ongoing technical assistance efforts.

It is important to outline several points about the final document.

The Clarification confirms that institutions need to comply only with any one part of the three-part test in order to provide nondiscriminatory participation

opportunities for individuals of both sexes. The first part of the test--substantial proportionality–focuses on the participation rates of men and women at an institution and affords an institution a "safe harbor" for establishing that it provides nondiscriminatory participation opportunities. An institution that does not provide substantially proportional participation opportunities for men and women may comply with Title IX by satisfying either part two or part three of the test. The second part—history and continuing practice—is an examination of an institution's good faith expansion of athletic opportunities through its response to developing interests of the underrepresented sex at that institution. The third part—fully and effectively accommodating interests and abilities of the underrepresented sex—centers on the inquiry of whether there are concrete and viable interests among the underrepresented sex that should be accommodated by an institution.

In addition, the Clarification does not provide strict numerical formulas or "cookie cutter" answers to the issues that are inherently case- and fact-specific. Such an effort not only would belie the meaning of Title IX, but would at the same time deprive institutions of the flexibility to which they are entitled when deciding how best to comply with the law.

Several parties who provided comments expressed opposition to the three-part test. The crux of the arguments made on behalf of those opposed to the three-part test is that the test does not really provide three different ways to comply. Opponents of the test assert, therefore, that the test improperly establishes arbitrary quotas. Similarly, they also argue that the three-part test runs counter to the intent of Title

IX because it measures gender discrimination by underrepresentation and requires the full accommodation of only one sex. However, this understanding of Title IX and the three-part test is wrong.

First, it is clear from the Clarification that there are three different avenues of compliance. Institutions have flexibility in providing nondiscriminatory participation opportunities to their students, and OCR does not require quotas. For example, if an institution chooses to and does comply with part three of the test, OCR will not require it to provide substantially proportionate participation opportunities to, or demonstrate a history and continuing practice of program expansion that is responsive to the developing interests of, the underrepresented sex. In fact, if an institution believes that its female students are less interested and able to play intercollegiate sports, that institution may continue to provide more athletic opportunities to men than to women, or even to add opportunities for men, as long as the recipient can show that its female students are not being denied opportunities, i.e., that women's interests and abilities are fully and effectively accommodated. The fact that each part of the three-part test considers participation rates does not mean, as some opponents of the test have suggested, that the three parts do not provide different ways to comply with Title IX.

Second, it is appropriate for parts two and three of the test to focus only on the underrepresented sex. Indeed, such a focus is required because Title IX, by definition, addresses discrimination. Notably, Title IX's athletic provisions are unique in permitting

institutions—notwithstanding the long history of discrimination based on sex in athletics programs—to establish separate athletic programs on the basis of sex, thus allowing institutions to determine the number of athletic opportunities that are available to students of each sex. (By contrast, Title VI of the Civil Rights Act of 1964 forbids institutions from providing separate athletic programs on the basis of race or national origin.)

OCR focuses on the interests and abilities of the underrepresented sex only if the institution provides proportionately fewer athletic opportunities to members of one sex and has failed to make a good faith effort to expand its program for the underrepresented sex. Thus, the Policy Interpretation requires the full accommodation of the underrepresented sex only to the extent necessary to provide equal athletic opportunity, i.e., only where an institution has failed to respond to the interests and abilities of the underrepresented sex when it allocated a disproportionately large number of opportunities for athletes of the other sex.

What is clear then—because, for example, part three of the three-part test permits evidence that underrepresentation is caused not by discrimination but by lack of interest—is that underrepresentation alone is not the measure of discrimination. Substantial proportionality merely provides institutions with a safe harbor. Even if this were not the case and proportional opportunities were the only test, the "quota" criticism would be misplaced. Quotas are impermissible where opportunities are required to be created without regard to sex. However, schools are permitted to create athletic

participation opportunities based on sex. Where they do so unequally, that is a legitimate measure of unequal opportunity under Title IX. OCR has chosen to make substantial proportionality only one of three alternative measures.

Several parties also suggested that, in determining the number of participation opportunities offered by an institution, OCR count unfilled slots, i.e., those positions on a team that an institution claims the team can support but which are not filled by actual athletes. OCR must, however, count actual athletes because participation opportunities must be real, not illusory. Moreover, this makes sense because, under other parts of the Policy Interpretation, OCR considers the quality and kind of other benefits and opportunities offered to male and female athletes in determining overall whether an institution provides equal athletic opportunity. In this context, OCR must consider actual benefits provided to real students.

OCR also received comments that indicate that there is still confusion about the elimination and capping of men's teams in the context of Title IX compliance. The rules here are straightforward. An institution can choose to eliminate or cap teams as a way of complying with part one of the three-part test. However, nothing in the Clarification requires that an institution cap or eliminate participation opportunities for men. In fact, cutting or capping men's teams will not help an institution comply with part two or part three of the test because these tests measure an institution's positive, ongoing response to the interests and abilities of the underrepresented sex. Ultimately, Title IX provides institutions with

flexibility and choice regarding how they will provide nondiscriminatory participation opportunities.

Finally, several parties suggested that OCR provide more information regarding the specific elements of an appropriate assessment of student interest and ability. The Policy Interpretation is intended to give institutions flexibility to determine interests and abilities consistent with the unique circumstances and needs of an institution. We recognize, however, that it might be useful to share ideas on good assessment strategies. Accordingly, OCR will work to identify, and encourage institutions to share, good strategies that institutions have developed, as well as to facilitate discussions among institutions regarding potential assessment techniques.

OCR recognizes that the question of how to comply with Title IX and to provide equal athletic opportunities for all students is a significant challenge that many institutions face today, especially in the face of increasing budget constraints. It has been OCR's experience, however, that institutions committed to maintaining their men's program have been able to do so—and comply with Title IX—notwithstanding limited athletic budgets. In many cases, OCR and these institutions have worked together to find creative solutions that ensured equal opportunities in intercollegiate athletics. OCR is similarly prepared to join with other institutions in assisting them to address their own situations.

OCR is committed to continuing to work in partnership with colleges and universities to ensure that the promise of Title IX becomes a reality for all

students. Thank you for your continuing interest in this subject.

Sincerely,

/signed/
Norma V. Cantú
Assistant Secretary
for Civil Rights

Enclosure

……………………………………..

[OCR-00016-B]

Jan 16, 1996

CLARIFICATION OF INTERCOLLEGIATE ATHLETICS POLICY GUIDANCE: THE THREE-PART TEST

The Office for Civil Rights (OCR) enforces Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 et seq. (Title IX), which prohibits discrimination on the basis of sex in education programs and activities by recipients of federal funds. The regulation implementing Title IX, at 34 C.F.R. Part 106, effective July 21, 1975, contains specific provisions governing athletic programs, at 34 C.F.R. § 106.41, and the awarding of athletic scholarships, at 34 C.F.R. § 106.37(c). Further clarification of the Title IX regulatory requirements is provided by the Intercollegiate Athletics Policy Interpretation, issued

December 11, 1979 (44 *Fed. Reg.* 71413 et seq. (1979)).[1]

The Title IX regulation provides that if an institution sponsors an athletic program it must provide equal athletic opportunities for members of both sexes. Among other factors, the regulation requires that an institution must effectively accommodate the athletic interests and abilities of students of both sexes to the extent necessary to provide equal athletic opportunity.

The 1979 Policy Interpretation provides that as part of this determination OCR will apply the following three-part test to assess whether an institution is providing nondiscriminatory participation opportunities for individuals of both sexes:

1. Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
2. Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of the members of that sex; or

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[1] The Policy Interpretation is designed for intercollegiate athletics. However, its general principles, and those of this Clarification, often will apply to elementary and secondary interscholastic athletic programs, which are also covered by the regulation. See 44 *Fed. Reg*. 71413.

3. Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a history and continuing practice of program expansion, as described above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.

44 *Fed. Reg*. at 71418.

Thus, the three-part test furnishes an institution with three individual avenues to choose from when determining how it will provide individuals of each sex with nondiscriminatory opportunities to participate in intercollegiate athletics. If an institution has met any part of the three-part test, OCR will determine that the institution is meeting this requirement.

It is important to note that under the Policy Interpretation the requirement to provide nondiscriminatory participation opportunities is only one of many factors that OCR examines to determine if an institution is in compliance with the athletics provision of Title IX. OCR also considers the quality of competition offered to members of both sexes in order to determine whether an institution effectively accommodates the interests and abilities of its students.

In addition, when an "overall determination of compliance" is made by OCR, 44 *Fed. Reg*. 71417, 71418, OCR examines the institution's program as a whole. Thus OCR considers the effective accommodation of interests and abilities in conjunction with equivalence in the availability,

quality and kinds of other athletic benefits and opportunities provided male and female athletes to determine whether an institution provides equal athletic opportunity as required by Title IX. These other benefits include coaching, equipment, practice and competitive facilities, recruitment, scheduling of games, and publicity, among others. An institution's failure to provide nondiscriminatory participation opportunities usually amounts to a denial of equal athletic opportunity because these opportunities provide access to all other athletic benefits, treatment, and services.

This Clarification provides specific factors that guide an analysis of each part of the three-part test. In addition, it provides examples to demonstrate, in concrete terms, how these factors will be considered. These examples are intended to be illustrative, and the conclusions drawn in each example are based solely on the facts included in the example.

THREE-PART TEST -- Part One: Are Participation Opportunities Substantially Proportionate to Enrollment?

Under part one of the three-part test (part one), where an institution provides intercollegiate level athletic participation opportunities for male and female students in numbers substantially proportionate to their respective full-time undergraduate enrollments, OCR will find that the institution is providing nondiscriminatory participation opportunities for individuals of both sexes.

OCR's analysis begins with a determination of the number of participation opportunities afforded to male and female athletes in the intercollegiate

athletic program. The Policy Interpretation defines participants as those athletes:

a. Who are receiving the institutionally-sponsored support normally provided to athletes competing at the institution involved, e.g., coaching, equipment, medical and training room services, on a regular basis during a sport's season; and

b. Who are participating in organized practice sessions and other team meetings and activities on a regular basis during a sport's season; and

c. Who are listed on the eligibility or squad lists maintained for each sport, or

d. Who, because of injury, cannot meet a, b, or c above but continue to receive financial aid on the basis of athletic ability.

44 *Fed. Reg*. at 71415.

OCR uses this definition of participant to determine the number of participation opportunities provided by an institution for purposes of the three-part test.

Under this definition, OCR considers a sport's season to commence on the date of a team's first intercollegiate competitive event and to conclude on the date of the team's final intercollegiate competitive event. As a general rule, all athletes who are listed on a team's squad or eligibility list and are on the team as of the team's first competitive event are counted as participants by OCR. In determining the number of participation opportunities for the purposes of the interests and abilities analysis, an athlete who participates in more than one sport will

be counted as a participant in each sport in which he or she participates.

In determining participation opportunities, OCR includes, among others, those athletes who do not receive scholarships (e.g., walk-ons), those athletes who compete on teams sponsored by the institution even though the team may be required to raise some or all of its operating funds, and those athletes who practice but may not compete. OCR's investigations reveal that these athletes receive numerous benefits and services, such as training and practice time, coaching, tutoring services, locker room facilities, and equipment, as well as important non-tangible benefits derived from being a member of an intercollegiate athletic team. Because these are significant benefits, and because receipt of these benefits does not depend on their cost to the institution or whether the athlete competes, it is necessary to count all athletes who receive such benefits when determining the number of athletic opportunities provided to men and women.

OCR's analysis next determines whether athletic opportunities are substantially proportionate. The Title IX regulation allows institutions to operate separate athletic programs for men and women. Accordingly, the regulation allows an institution to control the respective number of participation opportunities offered to men and women. Thus, it could be argued that to satisfy part one there should be no difference between the participation rate in an institution's intercollegiate athletic program and its full-time undergraduate student enrollment.

However, because in some circumstances it may be unreasonable to expect an institution to achieve exact proportionality--for instance, because of natural

fluctuations in enrollment and participation rates or because it would be unreasonable to expect an institution to add athletic opportunities in light of the small number of students that would have to be accommodated to achieve exact proportionality--the Policy Interpretation examines whether participation opportunities are "substantially" proportionate to enrollment rates. Because this determination depends on the institution's specific circumstances and the size of its athletic program, OCR makes this determination on a case-by-case basis, rather than through use of a statistical test.

As an example of a determination under part one: If an institution's enrollment is 52 percent male and 48 percent female and 52 percent of the participants in the athletic program are male and 48 percent female, then the institution would clearly satisfy part one. However, OCR recognizes that natural fluctuations in an institution's enrollment and/or participation rates may affect the percentages in a subsequent year. For instance, if the institution's admissions the following year resulted in an enrollment rate of 51 percent males and 49 percent females, while the participation rates of males and females in the athletic program remained constant, the institution would continue to satisfy part one because it would be unreasonable to expect the institution to fine tune its program in response to this change in enrollment.

As another example, over the past five years an institution has had a consistent enrollment rate for women of 50 percent. During this time period, it has been expanding its program for women in order to reach proportionality. In the year that the institution reaches its goal--i.e., 50 percent of the participants in

its athletic program are female--its enrollment rate for women increases to 52 percent. Under these circumstances, the institution would satisfy part one.

OCR would also consider opportunities to be substantially proportionate when the number of opportunities that would be required to achieve proportionality would not be sufficient to sustain a viable team, i.e., a team for which there is a sufficient number of interested and able students and enough available competition to sustain an intercollegiate team. As a frame of reference in assessing this situation, OCR may consider the average size of teams offered for the underrepresented sex, a number which would vary by institution.

For instance, Institution A is a university with a total of 600 athletes. While women make up 52 percent of the university's enrollment, they only represent 47 percent of its athletes. If the university provided women with 52 percent of athletic opportunities, approximately 62 additional women would be able to participate. Because this is a significant number of unaccommodated women, it is likely that a viable sport could be added. If so, Institution A has not met part one.

As another example, at Institution B women also make up 52 percent of the university's enrollment and represent 47 percent of Institution B's athletes. Institution B's athletic program consists of only 60 participants. If the University provided women with 52 percent of athletic opportunities, approximately 6 additional women would be able to participate. Since 6 participants are unlikely to support a viable team, Institution B would meet part one.

THREE-PART TEST -- Part Two: Is there a History and Continuing Practice of Program Expansion for the Underrepresented Sex?

Under part two of the three-part test (part two), an institution can show that it has a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of the underrepresented sex. In effect, part two looks at an institution's past and continuing remedial efforts to provide nondiscriminatory participation opportunities through program expansion.[2]

OCR will review the entire history of the athletic program, focusing on the participation opportunities provided for the underrepresented sex. First, OCR will assess whether past actions of the institution have expanded participation opportunities for the underrepresented sex in a manner that was demonstrably responsive to their developing interests and abilities. Developing interests include interests that already exist at the institution.[3] There are no

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[2] Part two focuses on whether an institution has expanded the number of intercollegiate participation opportunities provided to the underrepresented sex. Improvements in the quality of competition, and of other athletic benefits, provided to women athletes, while not considered under the three-part test, can be considered by OCR in making an overall determination of compliance with the athletics provision of Title IX.

[3] However, under this part of the test an institution is not required, as it is under part three, to accommodate all interests and abilities of the underrepresented sex. Moreover, under part two an institution has flexibility in choosing which teams it adds for the underrepresented sex, as long as it can show overall a history and continuing practice of program expansion for members of that sex.

fixed intervals of time within which an institution must have added participation opportunities. Neither is a particular number of sports dispositive. Rather, the focus is on whether the program expansion was responsive to developing interests and abilities of the underrepresented sex. In addition, the institution must demonstrate a continuing (i.e., present) practice of program expansion as warranted by developing interests and abilities.

OCR will consider the following factors, among others, as evidence that may indicate a history of program expansion that is demonstrably responsive to the developing interests and abilities of the underrepresented sex:

- an institution's record of adding intercollegiate teams, or upgrading teams to intercollegiate status, for the underrepresented sex;
- an institution's record of increasing the numbers of participants in intercollegiate athletics who are members of the underrepresented sex; and
- an institution's affirmative responses to requests by students or others for addition or elevation of sports.

OCR will consider the following factors, among others, as evidence that may indicate a continuing practice of program expansion that is demonstrably responsive to the developing interests and abilities of the underrepresented sex:

- an institution's current implementation of a nondiscriminatory policy or procedure for requesting the addition of sports (including the elevation of club or intramural teams) and the

effective communication of the policy or procedure to students; and

- an institution's current implementation of a plan of program expansion that is responsive to developing interests and abilities.

OCR would also find persuasive an institution's efforts to monitor developing interests and abilities of the underrepresented sex, for example, by conducting periodic nondiscriminatory assessments of developing interests and abilities and taking timely actions in response to the results.

In the event that an institution eliminated any team for the underrepresented sex, OCR would evaluate the circumstances surrounding this action in assessing whether the institution could satisfy part two of the test. However, OCR will not find a history and continuing practice of program expansion where an institution increases the proportional participation opportunities for the underrepresented sex by reducing opportunities for the overrepresented sex alone or by reducing participation opportunities for the overrepresented sex to a proportionately greater degree than for the underrepresented sex. This is because part two considers an institution's good faith remedial efforts through actual program expansion. It is only necessary to examine part two if one sex is overrepresented in the athletic program. Cuts in the program for the underrepresented sex, even when coupled with cuts in the program for the overrepresented sex, cannot be considered remedial because they burden members of the sex already disadvantaged by the present program. However, an institution that has eliminated some participation opportunities for the underrepresented sex can still

meet part two if, overall, it can show a history and continuing practice of program expansion for that sex.

In addition, OCR will not find that an institution satisfies part two where it established teams for the underrepresented sex only at the initiation of its program for the underrepresented sex or where it merely promises to expand its program for the underrepresented sex at some time in the future.

The following examples are intended to illustrate the principles discussed above.

At the inception of its women's program in the mid-1970s, Institution C established seven teams for women. In 1984 it added a women's varsity team at the request of students and coaches. In 1990 it upgraded a women's club sport to varsity team status based on a request by the club members and an NCAA survey that showed a significant increase in girls high school participation in that sport. Institution C is currently implementing a plan to add a varsity women's team in the spring of 1996 that has been identified by a regional study as an emerging women's sport in the region. The addition of these teams resulted in an increased percentage of women participating in varsity athletics at the institution. Based on these facts, OCR would find Institution C in compliance with part two because it has a history of program expansion and is continuing to expand its program for women to meet their developing interests and abilities.

By 1980, Institution D established seven teams for women. Institution D added a women's varsity team in 1983 based on the requests of students and coaches. In 1991 it added a women's varsity team after an

NCAA survey showed a significant increase in girls' high school participation in that sport. In 1993 Institution D eliminated a viable women's team and a viable men's team in an effort to reduce its athletic budget. It has taken no action relating to the underrepresented sex since 1993. Based on these facts, OCR would not find Institution D in compliance with part two. Institution D cannot show a continuing practice of program expansion that is responsive to the developing interests and abilities of the underrepresented sex where its only action since 1991 with regard to the underrepresented sex was to eliminate a team for which there was interest, ability and available competition.

In the mid-1970s, Institution E established five teams for women. In 1979 it added a women's varsity team. In 1984 it upgraded a women's club sport with twenty-five participants to varsity team status. At that time it eliminated a women's varsity team that had eight members. In 1987 and 1989 Institution E added women's varsity teams that were identified by a significant number of its enrolled and incoming female students when surveyed regarding their athletic interests and abilities. During this time it also increased the size of an existing women's team to provide opportunities for women who expressed interest in playing that sport. Within the past year, it added a women's varsity team based on a nationwide survey of the most popular girls high school teams. Based on the addition of these teams, the percentage of women participating in varsity athletics at the institution has increased. Based on these facts, OCR would find Institution E in compliance with part two because it has a history of program expansion and the elimination of the team in

1984 took place within the context of continuing program expansion for the underrepresented sex that is responsive to their developing interests.

Institution F started its women's program in the early 1970s with four teams. It did not add to its women's program until 1987 when, based on requests of students and coaches, it upgraded a women's club sport to varsity team status and expanded the size of several existing women's teams to accommodate significant expressed interest by students. In 1990 it surveyed its enrolled and incoming female students; based on that survey and a survey of the most popular sports played by women in the region, Institution F agreed to add three new women's teams by 1997. It added a women's team in 1991 and 1994. Institution F is implementing a plan to add a women's team by the spring of 1997. Based on these facts, OCR would find Institution F in compliance with part two. Institution F's program history since 1987 shows that it is committed to program expansion for the underrepresented sex and it is continuing to expand its women's program in light of women's developing interests and abilities.

THREE-PART TEST -- Part Three: Is the Institution Fully and Effectively Accommodating the Interests and Abilities of the Underrepresented Sex?

Under part three of the three-part test (part three) OCR determines whether an institution is fully and effectively accommodating the interests and abilities of its students who are members of the underrepresented sex--including students who are admitted to the institution though not yet enrolled. Title IX provides that at recipient must provide equal

athletic opportunity to its students. Accordingly, the Policy Interpretation does not require an institution to accommodate the interests and abilities of potential students.[4]

While disproportionately high athletic participation rates by an institution's students of the overrepresented sex (as compared to their enrollment rates) may indicate that an institution is not providing equal athletic opportunities to its students of the underrepresented sex, an institution can satisfy part three where there is evidence that the imbalance does not reflect discrimination, i.e., where it can be demonstrated that, notwithstanding disproportionately low participation rates by the institution's students of the underrepresented sex, the interests and abilities of these students are, in fact, being fully and effectively accommodated.

In making this determination, OCR will consider whether there is (a) unmet interest in a particular sport; (b) sufficient ability to sustain a team in the sport; and (c) a reasonable expectation of competition for the team. If all three conditions are present OCR will find that an institution has not fully and effectively accommodated the interests and abilities of the underrepresented sex.

If an institution has recently eliminated a viable team from the intercollegiate program, OCR will find that

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[4] However, OCR does examine an institution's recruitment practices under another part of the Policy Interpretation. See 44 *Fed. Reg*. 71417. Accordingly, where an institution recruits potential student athletes for its men's teams, it must ensure that women's teams are provided with substantially equal opportunities to recruit potential student athletes.

there is sufficient interest, ability, and available competition to sustain an intercollegiate team in that sport unless an institution can provide strong evidence that interest, ability, or available competition no longer exists.

a) Is there sufficient unmet interest to support an intercollegiate team?

OCR will determine whether there is sufficient unmet interest among the institution's students who are members of the underrepresented sex to sustain an intercollegiate team. OCR will look for interest by the underrepresented sex as expressed through the following indicators, among others:

- requests by students and admitted students that a particular sport be added;
- requests that an existing club sport be elevated to intercollegiate team status;
- participation in particular club or intramural sports;
- interviews with students, admitted students, coaches, administrators and others regarding interest in particular sports;
- results of questionnaires of students and admitted students regarding interests in particular sports; and
- participation in particular in interscholastic sports by admitted students.

In addition, OCR will look at participation rates in sports in high schools, amateur athletic associations, and community sports leagues that operate in areas from which the institution draws its students in order to ascertain likely interest and ability of its students

and admitted students in particular sport(s).[5] For example, where OCR's investigation finds that a substantial number of high schools from the relevant region offer a particular sport which the institution does not offer for the underrepresented sex, OCR will ask the institution to provide a basis for any assertion that its students and admitted students are not interested in playing that sport. OCR may also interview students, admitted students, coaches, and others regarding interest in that sport.

An institution may evaluate its athletic program to assess the athletic interest of its students of the underrepresented sex using nondiscriminatory methods of its choosing. Accordingly, institutions have flexibility in choosing a nondiscriminatory method of determining athletic interests and abilities provided they meet certain requirements. See 44 *Fed. Reg*. at 71417. These assessments may use straightforward and inexpensive techniques, such as a student questionnaire or an open forum, to identify students' interests and abilities. Thus, while OCR expects that an institution's assessment should reach a wide audience of students and should be open-ended regarding the sports students can express interest in, OCR does not require elaborate scientific validation of assessments.

An institution's evaluation of interest should be done periodically so that the institution can identify in a timely and responsive manner any developing

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[5] While these indications of interest may be helpful to OCR in ascertaining likely interest on campus, particularly in the absence of more direct indicia, an institution is expected to meet the actual interests and abilities of its students and admitted students.

interests and abilities of the underrepresented sex. The evaluation should also take into account sports played in the high schools and communities from which the institution draws its students both as an indication of possible interest on campus and to permit the institution to plan to meet the interests of admitted students of the underrepresented sex.

b) Is there sufficient ability to sustain an intercollegiate team?

Second, OCR will determine whether there is sufficient ability among interested students of the underrepresented sex to sustain an intercollegiate team. OCR will examine indications of ability such as:

- the athletic experience and accomplishments--in interscholastic, club or intramural competition--of students and admitted students interested in playing the sport;
- opinions of coaches, administrators, and athletes at the institution regarding whether interested students and admitted students have the potential to sustain a varsity team; and
- if the team has previously competed at the club or intramural level, whether the competitive experience of the team indicates that it has the potential to sustain an intercollegiate team.

Neither a poor competitive record nor the inability of interested students or admitted students to play at the same level of competition engaged in by the institution's other athletes is conclusive evidence of lack of ability. It is sufficient that interested students and admitted students have the potential to sustain an intercollegiate team.

c) Is there a reasonable expectation of competition for the team?

Finally, OCR determines whether there is a reasonable expectation of intercollegiate competition for a particular sport in the institution's normal competitive region. In evaluating available competition, OCR will look at available competitive opportunities in the geographic area in which the institution's athletes primarily compete, including:

- competitive opportunities offered by other schools against which the institution competes; and
- competitive opportunities offered by other schools in the institution's geographic area, including those offered by schools against which the institution does not now compete.

Under the Policy Interpretation, the institution may also be required to actively encourage the development of intercollegiate competition for a sport for members of the underrepresented sex when overall athletic opportunities within its competitive region have been historically limited for members of that sex.

CONCLUSION

This discussion clarifies that institutions have three distinct ways to provide individuals of each sex with nondiscriminatory participation opportunities. The three-part test gives institutions flexibility and control over their athletics programs. For instance, the test allows institutions to respond to different levels of interest by its male and female students. Moreover, nothing in the three-part test requires an institution to eliminate participation opportunities for men.

At the same time, this flexibility must be used by institutions consistent with Title IX's requirement that they not discriminate on the basis of sex. OCR recognizes that institutions face challenges in providing nondiscriminatory participation opportunities for their students and will continue to assist institutions in finding ways to meet these challenges.