No. 22-93

IN THE

Supreme Court of the United States

MICHIGAN STATE UNIVERSITY, ET AL.,

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

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether a court evaluating if a school is providing intercollegiate level participation opportunities for male and female students "in numbers substantially proportionate to their respective enrollments" should consider only the difference between the undergraduate and intercollegiate athletic participation percentages or should also consider the number of students affected by that difference.

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INTRODUCTION

This case does not warrant this Court's review, particularly not in its current procedural posture. In contending otherwise, Michigan State University ("MSU") misrepresents the decision below and other relevant case law, relies on outdated Title IX data and fails to alert the Court to the changed facts in this case, misleads the Court by suggesting that women are underrepresented in varsity athletics at MSU because of "natural" fluctuations in enrollment instead of MSU's conscious decision to eliminate a thriving women's team, and labels as "unworkable" a standard that has been applied by courts since 1996 and has proven workable ever since.

As relevant here, courts assess whether schools are compliant with Title IX by comparing the representation of female students in varsity athletics with their representation in the undergraduate student population (with shortfalls giving rise to what is known as "female participation gap"). The courts then determine whether the female participation gap is large enough to sustain a viable women's team. In fact, as the parties now know, that assessment in this case shows the female participation gaps at MSU in 2020-21 (*i.e.*, the academic year in which the school announced that it would eliminate the women's swimming and diving team) and in 2021-22 (*i.e.*, the first academic year without the women's swimming and diving team) were large enough to sustain the very women's team MSU decided to eliminate. There are several independent reasons to deny MSU's petition.

First, contrary to MSU's contention, there is no circuit split on the question presented. MSU seeks

review on whether courts "may" consider the participation gap between athletic participation opportunities and undergraduate enrollment as a percentage when determining whether a school has violated Title IX. But every court of appeals to address the issue, including the Sixth Circuit below, *permits* courts to consider percentage figures in evaluating whether "substantial proportionality" has been achieved.

MSU's real question—as its petition makes clear—is whether courts must give a percentage participation gap dispositive weight when the gap is 2% or smaller. *No* court of appeals has adopted this bright-line test, which is inconsistent with agency guidance and long-standing practice. Instead, every court of appeals to consider the test for "substantial proportionality," including the Sixth Circuit below, agrees that it depends on an individualized assessment of each school's circumstances. In particular, the determination hinges on whether the existing participation gap is large enough to sustain a viable team for the underrepresented sex—that is, a team for which there is sufficient interest, ability, and competition. Pet. App. 94a.

Second, even if there were a relevant circuit split on the question presented, this case would be a poor vehicle to resolve it because the factual situation has changed materially since the Sixth Circuit issued the ruling below—and because a final decision on the merits is fast approaching. The only Title IX data MSU presented to the Sixth Circuit was from the 2019-20 academic year, *before* the decision to eliminate the women's team was made, announced, or became effective. MSU's petition to this Court

continues to rely on that data. But in July 2022, the district court held a supplemental hearing on the female student-athletes' motion for preliminary injunction. Opinion, ECF No. 110, PageID.2032, *available at* 2022 WL 3152232. On August 8, 2022, the district court granted the motion for preliminary injunction. *Id.* at PageID.2055. It found that the participation gap in the 2020-21 academic year was forty women, and it was thirty-six women in the 2021-22 academic year. *Id.* at PageID.2039. These figures are much larger than the ones MSU suggests exist based on the 2019-20 data. Because events on the ground have changed since the Sixth Circuit issued the decision below, MSU is asking this Court to issue an advisory opinion as to circumstances that no longer exist. Moreover, despite granting the preliminary injunction based on the newer and more relevant Title IX data, the district court did *not* require MSU to add or reinstate a team, nor did it require MSU to add women's athletic participation opportunities. Instead, it ordered MSU to develop and submit its own Title IX compliance plan. *Id.* at PageID.2055.

In addition, as of today, there is a fully briefed motion for summary judgment ready to be decided. And the district court has the matter scheduled for trial in January 2023, after which a final decision will be made on the merits. There is no reason for this Court to take up the matter on a preliminary record that all parties know has been overtaken by more recent and more relevant evidence, particularly when a final decision on the merits is—at most—mere months away.

Third, the Sixth Circuit's decision is fully consistent with and, indeed, compelled by long-standing agency guidance that assesses Title IX compliance by comparing a school's participation gap to the size of a viable team the school could add. Critically, MSU's petition *does not challenge* this test. The agency in charge of enforcing Title IX—the Office of Civil Rights ("OCR")—has consistently said that assessing Title IX compliance requires a fact-specific inquiry into the school's individual circumstances. Pet. App. 92a–93a. The guidance goes on to provide that, where the participation gap is large enough to sustain a viable team, athletic opportunities are not substantially proportionate. Pet. App. 94a. The federal courts of appeals, including the Sixth Circuit in this case, have uniformly adopted this exact approach.

MSU's preferred approach, which would require courts to apply a bright-line test resulting in automatic Title IX compliance if the percentage participation gap is below 2%, abandons and contradicts the OCR's guidance and the decades of case law interpreting and applying it. Indeed, there is no way for a court to determine whether a 2% participation gap, standing alone, is large enough to sustain a viable women's team. Put simply, MSU's approach cannot be squared with the OCR's guidance and would create a new test that no court of appeals has adopted.

In addition, and contrary to MSU's contention, this case does not concern a mere "natural" fluctuation in enrollment or participation. Instead, this case concerns MSU's intentional decision to eliminate a women's team and reduce participation

opportunities for its female students. How the fact-specific test for determining whether a participation gap violates Title IX's prohibition against sex discrimination in the context of intercollegiate athletics might be applied in a different scenario, involving a mere natural fluctuation in enrollment or participation, has no bearing on how *this case*, involving an intentional decision to eliminate women's opportunities to participate in intercollegiate sports, should be resolved.

As a final point, the test for substantial proportionality clarified by the OCR's guidance has enjoyed universal acceptance and application for nearly three decades. Courts have not struggled to apply it, nor has it resulted in unending Title IX litigation. Schools' intentional decisions to offer women disproportionately fewer participation opportunities have engendered some litigation. But the test itself has not. Moreover, contrary to MSU's suggestions, the test does not inevitably result in adding women's teams. As the district court's decision *granting* Plaintiffs' motion for preliminary injunction demonstrates, schools may choose to come into Title IX compliance without adding women's teams. Nothing about the test or its results is unworkable for courts or for schools.

In short, the Sixth Circuit's standard is consistent with the standard applied by its sister circuits, mirrors agency guidance, and has proven workable over time. MSU's petition, which is predicated on facts that no longer exist and a misreading of the law, should be denied.

STATEMENT OF THE CASE

A. Relevant Statutory and Regulatory Background.

In 1972, Congress enacted Title IX to address the profound gender inequities that existed throughout nearly all areas of educational institutions, including intercollegiate athletics. 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). In passing Title IX, Congress intended to encourage women to participate in sports and "to remedy the discrimination that results from stereotyped notions of women's interests and abilities." *Neal v. Bd. of Trustees*, 198 F.3d 763, 768 (9th Cir. 1999).[1]

In 1975, the United States Department of Education ("DOE") (formerly the Department of Health, Education and Welfare) adopted regulations interpreting Title IX. *See* 34 C.F.R. Part 106 (the "Regulations"). The Regulations require all educational institutions that accept federal funds, including MSU, to provide equal athletic opportunities to male and female students. *See* 34

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[1] Title IX requires gender equity for men and women, but, unfortunately, women still receive approximately 60,000 fewer athletic opportunities than men and this brief will refer to women when discussing expanding opportunities. Women's Sports Foundation, *Chasing Equity: The Triumphs, Challenges, and Opportunities in Sports for Girls and Women* 7, 21 (Jan. 15, 2020), *available at* https://rb.gy/jz42mc (last visited Nov. 4, 2022).

C.F.R. § 106.41(a). To assess whether an institution is providing equal athletic opportunities, the Regulations look at "[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) (emphasis added). Post-secondary schools had three years to fully comply with this requirement. 34 C.F.R. § 106.41(d).

In response to nearly 100 complaints of gender discrimination received by the end of July 1978, the DOE determined that additional guidance would assist post-secondary institutions in complying with Title IX. *See* Title IX of the Education Amendments of 1973; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413 (Dec. 11, 1979) (the "Policy Interpretation). In 1979, DOE's Office of Civil Rights ("OCR") issued a policy interpretation of Title IX and the Regulations. *See id.* Pursuant to the Policy Interpretation, compliance with equal athletic participation opportunities is determined by applying a 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 under-represented 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 under-represented 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.

44 Fed. Reg. at 71,418.

The first prong—the only prong at issue in this case—considers whether a school has provided male and female students with participation opportunities "in *numbers* substantially proportionate to their respective enrollments." *Id.* (emphasis added). Nothing in the forty-year-old Policy Interpretation says to look at *percentages* to determine compliance or establishes an exact percentage or numerical threshold under which an institution is in compliance as a matter of law.

Following issuance of the Policy Interpretation, and in response to questions from universities, OCR issued a clarification regarding the three-part test in 1996. *See* Pet App. 80a, Office of Civil Rights, U.S. DOE, *Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test* (Jan. 15, 1996) ("1996 OCR Guidance"). The 1996 OCR Guidance provides that, after determining that compliance must be reached under prong one, "OCR's analysis next determines whether athletic opportunities are substantially proportionate." Pet App. 92a. The 1996 OCR Guidance notes that "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." Pet. App. 92a.

But DOE ultimately decided not to require absolute parity. Pet. App. 93a. Instead, the 1996 OCR Guidance provides that an institution is in compliance with prong one when "the *number* of opportunities that would be required to achieve proportionality would not be sufficient to sustain a viable team." Pet. App. 94a (emphasis added). 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*." Pet. App. 93a (emphasis added).

Under the OCR guidance, determining whether an institution is providing substantially proportionate athletic participation opportunities is a fact-intensive analysis that looks at the ratio of students versus student-athletes both in terms of percentages and in terms of absolute numbers. The 1996 OCR Guidance provides two illustrative examples for institutions, both of which look at the percentage of undergraduate enrollment as compared to student-athlete participation, and then go on determine the number of student-athletes that would be needed to achieve proportionality to assess compliance with prong one. Pet. App. 94a.

> 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.

Pet. App. 94a.

The 1990 OCR Investigator's Manual similarly provides that "[t]here is no set ratio that constitutes 'substantially proportionate' or that, when not met, results in a disparity or violation." Valerie M. Bonnette & Lamar Daniel, ED, *Title IX Athletics Investigator's Manual*, p. 24 (1990), available at https://files.eric.ed.gov/fulltext/ED400763.pdf. Determining whether each sex's varsity athletic participation opportunities are "substantially proportionate" to their undergraduate enrollment in this way has been the accepted practice for more than forty years and is exactly the approach used by the Sixth Circuit in this case—and in all other federal circuits faced with similar claims.

B. Relevant Factual Background.

Contrary to MSU's framing of the issues here, this case exists because the school made an intentional decision to eliminate an existing women's varsity team, *not* because there were small natural fluctuations resulting in a temporary participation gap. Natural fluctuations occur when an institution's enrollment and/or its athletic participation numbers change for "natural" reasons—things that are generally unexpected and largely out of the institution's control.

That is not what happened here. In this case, MSU decided to eliminate a thriving, existing women's team to save money, despite a preexisting participation gap that favored the school's male student-athletes. This case is about whether that decision violated Title IX. That decision is why members of the now-eliminated women's swimming and diving team (the "Student-Athletes") brought suit and sought a preliminary injunction. The Student-Athletes have never argued, nor did the Sixth Circuit hold, that MSU would be required to add an athletic team if there were simply "natural fluctuations." Rather, the question is whether a school's decision to eliminate an *existing* women's team in the face of a *preexisting* participation gap violates Title IX.

On October 22, 2020, MSU announced that, due to financial concerns, it was eliminating its women's swimming and diving team and men's swimming and diving team (*i.e.*, two separate teams), a decision that

became effective at the end of the 2020-21 academic year. *See* Pet. App. 2a.[2]

Prior to the elimination of these two teams, MSU sponsored 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. Pet. App. 2a. MSU does not sponsor and has not sponsored any co-ed or combined gender teams in its varsity athletic program.

Following the announcement that the women's swimming and diving team would be eliminated at the end of the academic year, eleven members of the team, who had dedicated their lives to becoming Division I swimmers and divers (the "Student-Athletes"), filed this case and a motion for a preliminary injunction on January 15, 2021. Pet. App. 2a. The Student-Athletes sought to prevent

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[2] Eliminating both teams purportedly saved MSU $2.07 million, a figure that represents just 1.5% of the athletic department's $128,703,793 overall expenditures in 2020-21. *See* Pet. 10; Michigan State University 2020-21 Budgets, Michigan State University, available at https://rb.gy/8n0lb8 (last visited Nov. 3, 2022) (showing MSU's athletics expenditures on page vi). Meanwhile, during the pendency of this case—wherein MSU continues to tout its supposed commitment to women's athletic opportunities—MSU is moving forward with renovations to its *men's* football complex to the tune of $67,000,000. *See* MSU Infrastructure Planning and Facilities, Football Complex Renovation and Addition Approved April 2022, *available at* https://rb.gy/5zuoa8 (last visited Nov. 3, 2022) (showing current construction projects).

MSU from eliminating their team while the parties litigated the underlying Title IX claims. Pet. App. 2a. The Student-Athletes alleged that MSU's elimination of the women's team would violate Title IX because it resulted in a participation gap of thirty-five women, which failed to provide female student-athletes with substantially proportionate participation opportunities and was necessarily large enough to accommodate a viable women's team. Pet. App. 1a–2a, 14a.

The district court denied the Student-Athletes' request prohibit MSU from eliminating their team pending a decision on the merits. Pet. App. 38a. The district court determined that any of the three participation gaps anticipated by the parties would satisfy Title IX's substantial proportionality requirement because most of the projected participation gaps were smaller than the average size of women's teams at MSU. Pet. App. 60a. The district court also rejected OCR's long-standing guidance that a school provides substantially proportional opportunities for its female students only when the participation gap is smaller than a viable team. Pet. App. 60a–61a. The district court further held that the athletic participation gap should be examined solely as a percentage, and, because MSU's gap was projected to be smaller than 2%, the Student-Athletes were not likely to succeed on the merits of their Title IX claim. Pet. App. 61a–62a. The Student-Athletes appealed that decision.

The Sixth Circuit vacated the district court's decision, finding, in relevant part, that, to determine if an institution is providing substantially proportionate athletic opportunities to its male and

female students, Title IX looks at whether the participation gap is large enough to sustain a viable team for the underrepresented gender. Pet. App. 10a–11a. As the Sixth Circuit recognized, "[p]ercentages 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." Pet. App. 11a.

The Sixth Circuit did *not* hold that a court should never look at the percentages, but rather that the determination of compliance cannot rest on percentages alone, because participation gaps are the *number* of student-athletes deprived of athletic opportunities. Pet. App. 12a. The Sixth Circuit went on to hold, consistent with Title IX and its regulations, that there is no bright-line percentage or numerical gap that results in automatic compliance with Title IX's "substantial proportionality" prong. Pet. App. 12a. The Sixth Circuit did *not* make a finding as to MSU's compliance with Title IX. Instead, it remanded the case back to the district court to make a determination concerning the size of the participation gap and whether MSU was providing substantially proportionate athletic participation opportunities to its female student-athletes. Pet. App. 18a–20a. MSU sought en banc review of the Sixth Circuit's decision, which was denied. Pet. App. 67a.

MSU then filed a petition for review with this Court, ostensibly presenting the question of whether courts "may" assess the participation gap as a percentage or "must" assess it in numerical terms, even though the Sixth Circuit actually held that

percentages are relevant to determining whether a participation gap violates Title IX. MSU's petition ignores that aspect of the lower court's ruling, and instead seeks the imposition of a strict statistical test that would result in automatic compliance for schools if their participation gaps are below 2%.

C. The District Court Grants the Student-Athletes' Motion for Preliminary Injunction After MSU Petitions for Certiorari.

Since MSU filed its petition for certiorari, circumstances have substantially changed below. When the motion for preliminary injunction was initially briefed and decided, the Student-Athletes used the best publicly available data from 2019-20 to show that eliminating their team would result in a participation gap of approximately thirty-five women, thereby violating Title IX. Pet. App. 2a, 14a. MSU disagreed and argued that its Title IX data for 2019-20 showed a gap of only twelve women. Since that time, however, MSU has provided its more recent Title IX participation data, which paint a very different picture than the one MSU presents in its petition.

For example, as it did in its opposition to the motion for preliminary injunction, MSU argues that the participation gap would only be fifteen women after the elimination of the women's swimming and diving team. Pet. 13, 17, 25; Pet. App. 14a. But this figure was based on data from the 2019-20 academic year, the year *before* MSU announced its decision to eliminate the women's swimming and diving team. As this case has progressed through litigation, MSU's own Title IX participation data has shown that, in

the 2020-21 academic year, MSU had an undergraduate enrollment of 16,639 men and 17,949 women (51.9% women). *See* ECF No. 110, PageID.2039. That same data shows varsity athletic participation of 448 men and 443 women (49.7% women). *Id.* In short, this data reveals a *2.2%* participation gap equal to forty women. *See* ECF No. 10, PageID.2039. Gaps of this size would not qualify even for MSU's misguided statistical test.

In the year following the elimination of the teams (*i.e.*, the 2021-22 academic year), MSU continued to have a participation gap of thirty-six women or 2.1%. *See id.* This new data shows the participation gap is not the twelve women—or fifteen women after the elimination—that MSU continues to tout in its petition for certiorari. *Compare* Pet. App. 14a, *with* Opinion, ECF No. 110, PageID.2039.

While MSU would like the Court to believe the facts are those it mentions, the reality is that this case has continued during the appeal process. Additional facts learned since the district court first considered the motion in February 2021 resulted in the district court granting the Student-Athletes' motion for preliminary injunction after remand by the Sixth Circuit. *See* ECF No. 110.

REASONS FOR DENYING CERTIORARI

I. There Is No Circuit Split on the Question Presented.

MSU frames its question presented in terms of whether courts "may" assess substantial proportionality via the percentage gap between enrollment and participation. Pet. at i. But the petition—including its discussion of the supposed

circuit split—makes clear that MSU seeks a rule requiring courts to give dispositive weight to the percentage gap when that gap is less than 2%. *See, e.g.*, Pet. at 21 (arguing that, in two circuits, "MSU would face no Title IX liability on the basis of a small percentage gap like the one at issue here"). As explained above, even under that test, MSU is not offering substantially proportionate participation opportunities because the 2020-21 and 2021-22 data shows that the participation gaps for those years *exceed* 2%. That fact aside, MSU is also wrong about the law. In particular, MSU argues that two circuits have given the percentage gap dispositive weight in the manner it seeks to have the Court do here. *See* Pet. at 18–22 (identifying the Fourth and Seventh Circuits as "[c]ircuits that gauge substantial proportionality on a percentage basis"). They have not.

MSU's lead case on this point did not focus at all on whether participation opportunities were substantially proportionate, and certainly did not do so in a manner resulting in binding precedent. *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 that case, Illinois State University acknowledged that, while enrollment was 45% male and 55% female, athletics participation was 66% male and only 34% female. *Id.* at 635. To rectify this situation, the school dropped men's wrestling and men's soccer and added women's soccer. *Id.* at 636.

The narrow issue on appeal in *Boulahanis* was whether the elimination of a men's team necessarily violates Title IX when it is based solely on the

participants' sex (*e.g.*, as opposed to financial or other concerns). *See id.* at 636–39. The Seventh Circuit held that it does not. *See id.* at 638. In so ruling, the court did not resolve the question that MSU contends is present in this appeal. Rather, it simply noted that Illinois State University's elimination of men's teams—which remedied the preexisting 21% female participation gap—caused "the athletic participation of men [to] remain[] within three percentage points of enrollment." *Id.* at 639. The Court was careful to explain, however, that "plaintiffs-appellants *do not contend* that this disparity is outside the requirements of substantial proportionality." *Id.* (emphasis added).

Thus, the contention pressed by MSU in this appeal—that the elimination of an athletic team did not violate Title IX because the participation gap was not substantially disproportionate—was never argued in *Boulahanis*. The court's stray observation that Illinois State University "ha[d] achieved substantial proportionality" was not the basis for the Court's holding and cannot be stripped of the relevant context that the issue was uncontested on appeal. *Id.* at 639. At most, it is non-binding dicta. *See, e.g.*, *Wilder v. Apfel*, 153 F.3d 799, 803 (7th Cir. 1998) (explaining that "dicta" refers to "the parts of an opinion that are not binding on a subsequent court" because they were "not integral elements of the analysis underlying the decision—not being grounded in a concrete legal dispute and anchored by the particular facts of that dispute"; because "they may not express the judges' most careful, focused thinking"; and because giving them "the force of law would give judges too much power, and of an

essentially legislative character"); *Thomas & Bettis Corp. v. Panduit Corp.*, 138 F.3d 277, 289 n.4 (7th Cir. 1998) (noting that a particular discussion was "purely dicta" because "the outcome of the case was resolved on another basis" and that dicta "does not constitute . . . binding precedent"). That reality aside, the court's analysis of the less-than-3% male participation gap is necessarily dependent on the broader case-specific circumstances of the school's history of dramatically shortchanging women and its recent efforts to come into Title IX compliance.

MSU's reliance on the Fourth Circuit's decision in *Equity in Athletics, Inc. v. Department of Education*, 639 F.3d 91 (4th Cir. 2011), is similarly misplaced because that court did not measure the participation gap solely in terms of percentage. In that case, James Madison University determined that, "although women represented 61% of the undergraduate student body, they constituted only 50.7% of the varsity intercollegiate athletes." *Id.* at 97. To rectify the imbalance, the school eliminated seven men's and three women's teams, which it expected to "yield a female athletic participation rate of 61%." *Id.*

The male athletes sued, contending that the school's equity plan "overdid" the elimination of male student-athletes. *Id.* at 109–10. In particular, the male plaintiffs argued that, after the plan was implemented, "men became the under-represented gender . . . by 2%, which represents 17 male athletic slots." *Id.* at 110.

In rejecting that argument, the Fourth Circuit pointed out that the plaintiffs' math was wrong and that men were actually underrepresented by only 1.15%—and far fewer than seventeen men. *See id.* It

then held that plaintiffs could provide "no support" for the "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." *Id.*

Thus, *Equity in Athletics* does not support MSU's position because, just as the Sixth Circuit did here, it viewed the participation gap in *both* percentage and numerical terms. And it did so, again, by looking at the fact-specific circumstances of a plan that erased a more than 10% female participation gap and left a 1.15% male participation gap in its place.

Moreover, far from establishing the automatic-compliance "safe harbor" percentage MSU advocates for here, the Fourth Circuit expressly held that "DOE has not specified a magic number at which substantial proportionality is achieved." *Id.* Thus, contrary to MSU's contention, the Fourth Circuit eschewed any bright-line test measuring substantial proportionality, opting instead for a more sensitive case-by-case analysis focused on each school's individual circumstances.[3]

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[3] MSU argues that the Fourth Circuit did not "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." Pet. at 21. Having just explained that the plaintiffs' figures nearly doubled the actual participation gap, it is no wonder the Fourth Circuit did not focus on the seventeen participation opportunities. Nor is it any wonder that the court did not assess whether the actual gap of approximately nine men was large enough to "conceivably support another men's team of some kind." As the Sixth Circuit amply explained in this case, the gap's size should be compared to a viable team (*i.e.*, a team for which there is interest, ability,

(*Footnote continued*)

On this critical point, the courts of appeals speak with one voice: Substantial proportionality hinges on a case-by-case analysis, not the mechanical application of bright-line statistical tests. *See, e.g.*, *Ollier v. Sweetwater Union High Sch. Dist.*, 768 F.3d 843, 856 (9th Cir. 2014) (holding "there is *no magic number* at which substantial proportionality is achieved" and that, when assessing substantial proportionality, courts must "look beyond the raw numbers to the institution's specific circumstances and the size of its athletics program" (emphasis added; internal quotation marks and citations omitted)); *Biediger v. Quinnipiac Univ.*, 691 F.3d 85, 106–07 (2d Cir. 2012) ("But as the 1996 Clarification makes clear, substantial proportionality is *not determined by any bright-line statistical test*. . . . [W]e do not, in any event, understand the 1996 Clarification to create a statistical safe harbor at [2%] or any other percentage. Instead, the Clarification instructs that substantial proportionality is properly determined on a 'case-by-case basis' after a careful assessment of the school's 'specific circumstances,' including the causes of the disparity and the reasonableness of requiring the school to add additional athletic opportunities to eliminate the disparity." (emphasis added; citation omitted)); *Equity In Athletics*, 639 F.3d at 110 (holding that "the DOE has expressly noted that determinations of what constitutes 'substantially proportionate' under the first prong of the Three-Part Test should be *made on a case-by-case basis*," and

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and available competition), not a "conceivabl[e]" team "of some kind."

then confirming that there is no "magic number at which substantial proportionality is achieved" (emphasis added)); *Cohen v. Brown Univ.*, 101 F.3d 155, 171 (1st Cir. 1996) (holding that "the substantial proportionality test of prong one is applied under the Title IX framework, *not mechanically, but case-by-case, in a fact-specific manner*" and that Title IX does not "mandate[] a finding of discrimination based solely upon a gender-based statistical disparity" (emphasis added)); *Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824, 829–30 (10th Cir. 1993) (noting that OCR had long ago instructed "its Title IX compliance investigator that *there is no set ratio* that constitutes 'substantially proportionate' or that, when not met, results in . . . a violation" (emphasis added)). In the decision below, the Sixth Circuit simply joined this chorus. Pet. App. 6a. ("Substantial proportionality is *determined 'on a case-by-case basis, rather than through use of a statistical test*.'" (emphasis added)).

Uniform acceptance of this case-by-case approach matters because isolated consideration of a percentage gap necessarily creates a one-size-fits-all statistical test. There is no way, for example, to assess whether a given percentage gap is substantially proportionate based on the size of individual school's athletics program or on any other school-specific circumstance. Nor is there any way to determine whether a given percentage gap is large enough to sustain a viable team (or an average team, or a team of any size). Courts simply cannot do what OCR instructs using only the percentage gap. The only way to gauge substantial proportionality based solely on a percentage gap is to compare a given

figure to some uniform, all-encompassing target (*e.g.*, 2%), the exact "magic number" methodology Title IX, the OCR, and courts of appeals have roundly rejected.[4]

Moreover, it bears mentioning that both *Boulahanis* and *Equity in Athletics* rejected challenges to schools' efforts to come into Title IX compliance by cutting *men's* sports. Title IX's central purpose was to open avenues for *women*, the historically underrepresented sex, to, among other things, participate in sports. *See, e.g.*, *Neal*, 198 F.3d at 768; *Cohen*, 101 F.3d at 179–80. MSU's persistent female participation gap, which continues after its decision to eliminate women's swimming and diving (as well as the separate men's swimming and diving team), bears no resemblance to the circumstances of those cases.

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[4] As relevant here, the Sixth Circuit, like the court in *Equity in Athletics*, held that the participation gap may be considered in both percentage and numerical terms. *See* Pet. App. 12a (explaining that "percentages are relevant" and "the percentage gap may be relevant," but that the "ultimate focus should be on the *numerical* participation gap"). While the Sixth Circuit declined to give the percentage gap dispositive weight, MSU's argument that the decision "forbids" consideration of the percentage gap, Pet. at 26, simply misstates the court's holding. That the information may be relevant suggests it may be considered; it just must be considered alongside the numerical participation gap and not accorded dispositive weight.

II. This Case Is Not an Appropriate Vehicle to Resolve the Question Presented.

Even if there were a circuit split on the question presented, this case would not be a good vehicle to resolve it, for at least four separate reasons.

First, the decision below does not even implicate the question presented as formulated by MSU. The question presented is premised on the fiction that the decision below "forbids" assessment of the participation gap in percentage terms. *See* Pet. at i (asking only whether, in determining whether a school offers substantially proportionate participation opportunities, the gap "must be assessed in raw numerical terms, or, instead, may be assessed as a percentage figure"). But the decision below does no such thing. The Sixth Circuit plainly held that "percentages are relevant" and that "the percentage gap may be relevant." Pet. App. 12a, 13a. Under that ruling, courts "may" consider those percentages when assessing substantial proportionality; the decision below simply rules out according that single data point dispositive weight. And, on that point—as discussed above—there is no circuit split.

Second, as admitted by MSU and confirmed by the district court below, the facts have changed materially since the initial decision now on review was entered in February 2021. In particular, this case concerns whether MSU's decision to eliminate the women's swimming and diving team violated Title IX because, once it became effective, the school failed to offer female students substantially proportionate participation opportunities. MSU announced its decision to eliminate the women's

swimming and diving team in October 2020, and the decision took effect in May 2021. At the time the motion for preliminary injunction was initially decided (and appealed), however, Title IX participation data was available only for the 2019-20 academic year (*i.e.*, the year *before* the elimination was announced). For that year, MSU argues the participation gap was less than 2%—a largely irrelevant fact MSU has made the centerpiece of its petition.[5]

But when the Sixth Circuit remanded the case in April 2022, the district court allowed supplemental briefing—and, by that time, new data provided by MSU in discovery showed that the participation gap was much larger than it originally appeared. For example, MSU's Title IX participation data for 2020-21 (*i.e.*, the year MSU announced the decision to eliminate the women's swimming and diving team) shows that the school had a female participation gap of forty (equal to *2.2*%). *See* ECF No. 110, PageID.2039. For the 2021-22 academic year (*i.e.*, the first year without a women's swimming and diving team), MSU's data shows there was a female participation gap of thirty-six (equal to *2.1*%). *See id.*

These numbers are fatal to MSU's petition. They show that, even if there were a strict statistical test that resulted in automatic compliance for participation gaps under 2%, *MSU would not have been eligible for it in either of the potentially relevant years*. This material change in the record renders

[5] In reality, MSU arrived at the small participation gap in 2019-20 by counting as Title IX participants two teams that undisputedly did not have seasons that academic year.

this case, in this posture, a poor vehicle to resolve the question presented. Simply put, even if this Court were to grant MSU's petition and adopt the 2% or less test MSU advances, it would not make any difference on the current facts of this case.

Third, and relatedly, the question presented could not possibly have "ended this case," as MSU claims. Pet. at 33. This argument ignores that the motion at issue was a motion for *preliminary injunction*. As this Court knows well, cases do not end merely because preliminary relief is granted or denied. Indeed, MSU's motion to dismiss the participation claim was separately denied, so this case was *always* going to proceed at least to summary judgment. As MSU has not filed a motion for summary judgment, the case is now certain either to be resolved in Plaintiffs' favor at summary judgment or to be resolved after a trial. This same reality would have resulted even if the Sixth Circuit had adopted MSU's preferred approach and affirmed the denial of Plaintiffs' motion for preliminary injunction.

Fourth, and finally, review at this stage is premature because this case is rapidly approaching a final decision on the merits. *See Virginia Military Institute v. U.S.*, 508 U.S. 946, 946 (1993) (opinion of Scalia, J., respecting the denial of certiorari) (noting that "We generally await final judgment in the lower courts before exercising our certiorari jurisdiction." (citations omitted). In the wake of the Sixth Circuit's decision below, Plaintiffs have filed a motion for summary judgment, which is now fully briefed and ripe for resolution. The trial in this matter is also scheduled for January 23, 2023. The added clarity and finality that would accompany a resolution on

the merits—and, thus, bring into focus whether various issues truly are outcome determinative—would aid this Court's decision regarding whether this case merits further review. At this stage, however, this case does not call out for this Court's immediate intervention—particularly because the district court, upon granting Plaintiffs' motion for preliminary injunction, did not order MSU to reinstate or create any team and instead permitted MSU full discretion to create its own compliance plan. ECF No. 110, PageID.2054.

III. The Decision Below Is Consistent with Title IX and Applicable Agency Guidance.

As explained above, the Sixth Circuit's approach to determining whether an institution is providing substantially proportionate athletic opportunities to its female students is consistent with Title IX, its regulations, and long-standing case law. MSU's arguments to the contrary lack merit.

A. The Sixth Circuit's decision comports with Title IX.

First, there is no question that the lower court's ruling comports with Title IX itself. MSU deploys selective quotations in an attempt to create a conflict between the lower court's holding and the statute. *See* Pet. 24–25. In truth, no such conflict exists.

Title IX provides as follows: "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[.]" 20 U.S.C.A. § 1681(a). However, concerned that institutions would interpret Title IX

to require gender quotas to remedy existing gender disparities at the time the statute was passed, Congress included language explaining that preferential or disparate treatment is not required:

> 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.

20 U.S.C.A. § 1681(b) (emphases added). MSU focuses solely on the fact that this passage uses the word "percentage" to support its argument that Title IX conflicts with the Sixth Circuit's statement that, although "[p]ercentages are helpful in comparing the gender ratio of the athletic program to the gender ratio of the undergraduate body[, t]hey are not . . . the correct tool for measuring the participation gap." Pet. App. 11a.

Setting aside the fact that this section of Title IX also uses the phrase "total number *or* percentage,"

this section of the law was never intended to dictate how a court evaluated whether an institution was in compliance with Title IX for failing to provide substantially proportionate participation opportunities. It merely states that nothing prevents the use of statistical evidence to show that a gender imbalance exists. *See* 20 U.S.C.A. § 1681(b).

Further, as the First Circuit aptly analyzed, it is

> important to bear in mind, however, the congressional concerns that inform the proper interpretation of this provision. Section 1681(b) was patterned after § 703(j) of Title VII, 42 U.S.C. § 2000e–2(j), and was specifically designed to prohibit quotas in university admissions and hiring, based upon the percentage of individuals of one gender in a geographical community.

Cohen, 101 F.3d at 174–75 (citing H.R. Rep. No. 554, 92d Cong., 1st Sess. (1971), *reprinted in* 1972 U.S.C.C.A.N. 2462, 2590–92 (Additional Views); 117 Cong. Rec. 39,261–62 (1971) (remarks of Rep. Quie); 117 Cong. Rec. 30,406, 30,409 (remarks of Sen. Bayh); 117 Cong. Rec. 39,251–52 (remarks of Rep. Mink and Rep. Green)). The *Brown* Court went on to recognize that

> the legislative history strongly suggests that the underscored language defines what is proscribed (in the contexts of admissions and hiring) in terms of a geographical area, beyond the institution, and does not refer to an imbalance within the university, with respect to the representation of each gender in intercollegiate athletics, as compared to the gender makeup of the student body.

Id. The strict statistical test for which MSU advocates is exactly what this provision seeks to prevent. In any event, the statutory language MSU relies upon to create its supposed conflict does not apply to imbalances within the university itself.

B. The Sixth Circuit's decision comports with longstanding agency guidance.

MSU wants this Court to adopt a strict statistical test for determining substantial proportionality under Title IX, wherein a percentage gap smaller than 2% automatically results in compliance. But OCR itself has expressly disavowed such statistical tests. Pet. App. 93a. OCR has clarified that the "substantially proportionate" determination "depends on the institution's specific circumstances and the size of its athletics program," which is why "OCR makes this determination on *a case-by-case basis, rather than through use of a statistical test*." Pet. App. 93a (emphasis added). Additionally, every court of appeals that has considered this question has adopted the case-by-case approach and rejected the use of statistical tests. *See supra* 20–22.

MSU's attempts to discount this long-standing approach fail at every turn. In attacking the decision below, MSU points to a portion of the 1996 OCR Guidance wherein the agency demonstrates a situation in which an "institution would clearly satisfy part one." Pet. App. 93a. The letter then provides an example with an institution providing *exact proportionality*: *i.e.*, where "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." Pet. App. 93a. MSU was not providing its male and female students exact

proportionality either before or after the elimination of women's opportunities. Nonetheless, MSU boldly claims that this scenario—providing exact proportionality to its men and women—"effectively describes this case." Pet. 26. That contention is simply false.

Moreover, the very next sentence of the 1996 OCR Guidance goes on to clarify that, if that same institution had a *natural* fluctuation in enrollment following a year of exact proportionality, it would be unreasonable to expect the institution to fine tune its program that year. Pet. App. 93a. Nothing about MSU's change in participation involved a *natural* fluctuation; it was an intentional decision to eliminate women's opportunities. Additionally, as the district court recognized in its subsequent decision on the Student-Athletes' motion for preliminary injunction, for the eight years prior to the elimination of the women's swimming and diving team, "the gap [at MSU] disfavored women. Intuitively, one would expect natural fluctuations at a school complying with Title IX to result in some years where the gap disfavors men. That is not the case here, which suggests that MSU's recent participation gaps are only partially the result of natural fluctuations." ECF No. 110, PageID.2047.

MSU next argues that the Sixth Circuit's decision improperly collapses prong one and prong three of the three-part test. Prong three of the test allows schools that are not providing substantially proportionate participation opportunities to male and female student-athletes to demonstrate Title IX compliance by showing 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. Importantly, this part of the test would never be implicated in a lawsuit, like this one, where a team had been eliminated. Indeed, once opportunities for an established women's team at a university have been cut, there is no argument that the women's athletic interests at that school are "fully and effectively accommodated." *Id*.

MSU's error lies in the fact that prong one is the *only* prong that can be used to determine compliance after women's sports are cut when women are the underrepresented sex. For that reason alone, there is no concern that prong one and prong three collapse under OCR's explanation—which the Sixth Circuit relied upon—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, 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." Pet. App. 94a. Institutions that have not eliminated women's teams still have all three prongs of compliance open to them. Moreover, as contemplated in 1979, an institution that has not eliminated a women's team and cannot show that athletic opportunities are substantially proportionate to undergraduate enrollment can rely upon proof that it's athletic department already sponsors all the sports that women have the "interest and ability" to play. 44 Fed. Reg. at 71,418.

C. The Sixth Circuit's decision is workable.

MSU attempts to scare this Court into believing that the OCR's definition of substantial proportionality—a participation gap that is not large enough to sustain a viable team—would lead to a parade of horribles for college athletics. *See, e.g.*, Pet. 17, 24, 28, 30 (repeatedly asserting that a school would have to add a "4-person tennis team" if participation gaps are measured numerically). MSU's effort is misguided.

Neither the 1996 OCR Guidance nor the Sixth Circuit's decision requires an institution to add a team in response to a participation gap of four individuals. In fact, the 1996 OCR Guidance example clearly states that participation gap of *six* individuals would be substantially proportionate because it would likely not support a viable team. Pet. App. 94a. The situation that MSU relies upon to paint a picture of impossible compliance is not grounded in reality.

Importantly, Title IX does not require the addition of a team just because the participation gap is large enough to fit a team. If there is a participation gap large enough to sustain a team, the next question is whether that team is *viable*. Pet App. 94a. As the Sixth Circuit reiterated from longstanding agency guidance, a viable team is "a team for which there is a sufficient number of interested and able students and enough available competition to sustain an intercollegiate team." Pet. App. 94a. In MSU's case, the women's swimming and diving team is such a viable team. As the 1996 OCR Guidance makes clear, when an institution has recently eliminated a viable team, a presumption

exists that "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." Pet. App. 101a–102a.

Thus, in the hypothetical situation that MSU mentions time and time again in its petition (where a participation gap exists by virtue of a "natural fluctuation"), the students seeking to add a new varsity team would bear the burden of proving the program violated Title IX by demonstrating both that the participation gap is larger than a viable team *and* that there in fact exists a viable team for that institution. There is nothing unworkable about that approach; it has been successfully followed and applied by every federal court to consider it since. *See, e.g.*, *Pederson v. Louisiana State Univ.*, 213 F.3d 858, 879 (5th Cir. 2000) (analyzing sufficiency of evidence women seeking to add varsity teams presented at trial); *Ollier v. Sweetwater Union High Sch. Dist.*, 604 F. Supp. 2d 1264, 1275 (S.D. Cal. 2009), aff'd, 768 F.3d 843 (9th Cir. 2014) (same).

MSU nonetheless insists that, if even a tiny a gap exists, a "4-person tennis team" would necessarily have to be added. *See* Pet. 17, 24, 28, 30. But this argument conveniently leaves out that the women seeking to add a tennis team (assuming one does not already exist) would have to prove that there is sufficient interest, ability, and available competition to sustain a varsity tennis team of that size at the university. Making that determination requires a fact-intensive, case-by-case analysis to determine whether an institution is providing equitable athletic participation opportunities for its female students.

That is neither novel nor unworkable. It is the approach that has withstood the test of time. There is no reason for this Court to reach out and disturb it.

Finally, MSU ignores the fact that, in the unlikely event a court were to find that a gap of four women violated Title IX, the institution would not be *required* to add the four-person team. It could decrease men's opportunities or expand women's opportunities by four in existing sports instead.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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