No. 22-93

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

REPLY BRIEF FOR PETITIONERS

BRIAN T. QUINN
MICHIGAN STATE UNIVERSITY
426 Auditorium Road
East Lansing, MI 48824

SCOTT R. ELDRIDGE
BRIAN M. SCHWARTZ
ERIKA L. GIROUX
ASHLEY N. HIGGINSON
MILLER, CANFIELD, PADDOCK & STONE, PLC
One Michigan Avenue
Suite 900
Lansing, MI 48933

GREGORY G. GARRE
Counsel of Record
CHARLES S. DAMERON
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2207
gregory.garre@lw.com

Counsel for Petitioners

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

INTRODUCTION

In response to the decision below, respondents' counsel proclaimed that they had secured a "huge win"—with ramifications "all over the country"—when they convinced the Sixth Circuit to hold that Title IX athletics "compliance is measured by the **actual number** of students impacted, not the percentage." Bailey Glasser LLP, *Courtroom Win May Provide Michigan State University Women Student-Athletes A Chance To Compete Again* (Feb. 4, 2022), perma.cc/AG5C-ZPJQ (bolded text in original).

But now that respondents are trying to fend off certiorari, their message has changed. They claim (at 2) that the Sixth Circuit simply joined "every court of appeals to address the issue" in holding that courts are "*permit*[*ted*] … to consider percentage figures in evaluating whether 'substantial proportionality' has been achieved." In other words, as they spin it now, the Sixth Circuit's decision is a ho-hum replication of nationwide precedent, not the game-changer that respondents' counsel trumpeted in the wake of the ruling—and that the dissent below warned about.

Respondents' new take on the decision does not hold up. The Sixth Circuit adopted a clear legal rule: "[S]ubstantial proportionality should be determined by looking at the gap in *numerical* terms, not as a percentage." Pet.App.13a. And as both the majority and the dissent recognized, that rule conflicts with numerous decisions holding that a small percentage gap is a complete defense under Title IX's "substantial proportionality" safe harbor, *see* Pet.App.13a n.3; *id.* at 28a-29a & n.5 (Guy, J., dissenting).

Again seeking to evade review, respondents argue that, because the Sixth Circuit remanded for

application of its radical new rule, this Court's review must wait. Not so. The petition seeks review of a threshold legal question that controls this case. Indeed, the district court has already issued a preliminary injunction under the Sixth Circuit's new rule, flipping its prior decision. But recognizing the touchstone importance of the question presented, the district court stayed its preliminary injunction pending disposition of the petition for certiorari. Nothing will be gained by postponing this Court's review. And this Court has regularly granted certiorari to review preliminary injunction rulings, where, as here, those rulings turn on threshold legal questions that control the case. *Infra* at 7-8.

Moreover, this Court's review is needed now. Respondents just ignore the amicus briefs filed by 15 States and three major universities detailing the havoc that the Sixth Circuit's new "duty of numerical perfection" will inflict on universities as well as student-athletes. States Br.11. By eliminating the "2-3 percent safe harbor" recognized by other courts across the country, *id.*, the decision below sets up a standard that is "profoundly unworkable in practice," and that will prove "extremely disruptive" to university athletic programs in the near term. Universities Br.4, 16. There is no reason to subject schools—and students—to the disruption that will ensue if the decision below is allowed to stand.

ARGUMENT

I. The Sixth Circuit Adopted The Strict Numerical Rule It Announced

Respondents' opposition is based almost entirely on the premise that the Sixth Circuit did not adopt any rule barring the "assessment of the participation

gap in percentage terms." Opp.24. That position is flatly contradicted by how the Sixth Circuit majority, Sixth Circuit dissent, and respondents' own counsel all described the ruling in real time.

- The Sixth Circuit majority held that "substantial proportionality should be determined by looking at the gap in *numerical* terms, not as a percentage." Pet.App.13a. Thus, the court ruled that it was "improper" for the district court to consider "the participation gap as a percentage of the size of the athletic program" and that, instead, "[t]he correct inquiry focuses on the *number* of participation opportunities, not the gap as a percentage of the athletic program." *Id.* at 9a-10a.
- In dissent, Judge Guy likewise explained that "[t]oday's decision now means . . . courts *cannot* consider the participation gap as a percentage," *id.* at 21a, and that "[t]he majority . . . adopts a bright-line rule that courts may *only* consider 'the gap in *numerical* terms, not as a percentage,'" *id.* at 28a (quoting *id.* at 13a).
- And, in the wake of the decision, respondents' own counsel proclaimed that, under the decision below, Title IX "compliance is measured by the **actual number** of students impacted, not the percentage." *Supra* at 1.

In the face of this, respondents point to the fact that the Sixth Circuit said in passing that "the percentage gap may be relevant." Opp.23 n.4 (quotation omitted). But that language is immediately cabined by the Sixth Circuit's *rule* that "substantial proportionality should be determined by looking at the gap in *numerical* terms, not as a

percentage," Pet.App.13a—and admonition that "the ultimate focus should be on the *numerical* gap," *id.* at 12a. The Sixth Circuit's decision establishes that a small percentage gap cannot trigger Title IX's "substantial proportionality" safe harbor; the Sixth Circuit set aside the district court's ruling that MSU fell within the safe harbor because its participation gap was small in percentage terms. *Id.* at 61a-63a. And, ultimately, this point—the critical one here—is undisputed: even respondents admit that the decision below prohibits district courts from according the percentage gap "dispositive weight" in assessing substantial proportionality. Opp.24; *see id.* at 23 n.4.

In short, the Sixth Circuit clearly adopted a strict numerical rule that eliminates universities' ability to rely on percentage figures to establish "substantial proportionality" for purposes of Title IX. Respondents' claim (at 24) that the decision below "does not even implicate the question presented" rests on their blatant mischaracterization of that decision.

II. The Circuit Conflict Is Real

The Sixth Circuit's decision squarely conflicts with the decisions of other courts of appeals. Unlike the Sixth Circuit, both the Fourth and Seventh Circuits recognize that universities may establish compliance with Title IX based solely on small *percentage* differences between men's and women's athletic participation respective to student enrollment. *See Equity in Athletics, Inc. v. Department of Educ.*, 639 F.3d 91, 110 (4th Cir. 2011); *Boulahanis v. Board of Regents*, 198 F.3d 633, 639 (7th Cir. 1999), *abrogated on other grounds by Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246 (2009); *see* Pet.18-24; States Br.7-9; Universities Br.4. What's more, both the

Sixth Circuit majority (Pet.App.13a n.3) and dissent (*id.* at 28a-29a & n.5) acknowledged this split.

Respondents just ignore that the Sixth Circuit itself acknowledged the conflict. Instead, respondents argue that the cases from other circuits do not support MSU's position because they do not prescribe a "magic number at which substantial proportionality is achieved." Opp.20 (quoting *Equity in Athletics*, 639 F.3d at 110). But MSU's position does not depend on any "magic number"; MSU's position is that a small participation gap—in percentage terms—can be a complete defense under Title IX's "substantial proportionality" safe harbor. That position is consistent with the decisions of other courts of appeals recognizing that small percentage gaps—including participation gaps in the 2-3% range—are sufficient to establish "substantial proportionality." Pet.18-22. In those circuits, MSU's small percentage-based participation gap would give MSU a complete defense to Title IX liability.

In *Equity in Athletics*, the Fourth Circuit—relying on the Seventh Circuit's decision in *Boulahanis*—held that the plaintiffs' case failed because "other courts . . . have found educational institutions to be in compliance with Title IX where the sex disparity was similar to that alleged by EIA"—a 2% gap—in "percentage" terms. 639 F.3d at 110. And the Fourth Circuit's decision squarely rejected the raw numerical standard adopted by the Sixth Circuit below. Pet.20-21. Respondents claim (at 20) that the Fourth Circuit "viewed the participation gap in *both* percentage and numerical terms." But the relevant holding was that "a disparity as low as 2%" could not—"as a matter of law"—be "substantially disproportionate." 639 F.3d at 110. The Sixth Circuit's decision below clearly

conflicts with *Equity in Athletics*—just as the Sixth Circuit acknowledged. Pet.App.13a n.3.

As to *Boulahanis*—where the Seventh Circuit concluded that a participation gap of less than "three percentage points" established "substantial proportionality," 198 F.3d at 638-39—respondents claim this ruling is "dicta." Opp.18. But that ruling was central to the Seventh Circuit's holding that the university's elimination of two men's teams "d[id] not constitute a violation of Title IX." 198 F.3d at 639. Accordingly, the Fourth Circuit and district courts in several other circuits have recognized that *Boulahanis* stands for the proposition that a participation gap "within three percentage points" establishes substantial proportionality, *Equity in Athletics*, 639 F.3d at 110. And the Sixth Circuit itself recognized that this is what *Boulahanis* held. Pet.App.13a n.3. MSU also pointed to just some of the numerous district court decisions following this rule. Pet.21-22. Again, respondents offer no answer.

In contrast, the Second Circuit—and now the Sixth Circuit—hold that there is no Title IX "safe harbor at . . . *any* . . . percentage." *Biedeger v. Quinnipiac Univ.*, 691 F.3d 85, 106 (2d Cir. 2012) (emphasis added); Pet.App.13a (quoting *Biedeger*). Under this rule—advocated by respondents—a small percentage gap is never sufficient to invoke Title IX's "substantial proportionality" safe harbor. Opp.22-23 & n.4. Certiorari is needed to resolve this "clear circuit split." Universities Br.4.

III. There Is No Vehicle Problem

Despite the acknowledged circuit conflict on an undeniably important question of federal law, respondents argue (at 26) that the Court should delay

review until a "final decision" is entered. But this is just another flawed attempt to evade review.

This case presents a classic situation where interlocutory review is warranted to address an issue "fundamental to the further conduct of the case." *Land v. Dollar*, 330 U.S. 731, 734 n.2 (1947) (citation omitted). The question presented concerns the threshold standard for determining whether a university falls within Title IX's "substantial proportionality" safe harbor. And here, there is no question about the impact of this ruling: applying the Sixth Circuit's new standard, the district court entered the preliminary injunction it had previously denied under the percentage approach. Dkt. No. 110, PageID.2038 (recognizing the Sixth Circuit's mandate that "[t]his Court must look at the participation gap solely 'in *numerical* terms, not as a percentage'") (quoting Pet.App.13a), PageID.2049 (holding that respondents had shown a "substantial likelihood" of success on the merits under that new rule).[1]

This Court routinely grants certiorari of preliminary-injunction orders that turn on threshold legal questions that will control the outcome of the case. *See* Pet.33-34; *e.g.*, *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876 (2021); *Department of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1904-05 (2020); *National Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2370 (2018). As in those cases, further trial court proceedings—to adjudicate whether respondents prevail *under the Sixth Circuit's new rule*—will shed

---

[1] Respondents claim the case is "certain to be resolved in their favor at summary judgment." Opp.26. But their summary judgment motion depends on the Sixth Circuit's new rule.

no light on the legal question presented. The district court has already issued a preliminary injunction based on the Sixth Circuit's flawed rule.

Both the district court and Sixth Circuit have recognized the touchstone significance of the question presented here. The district court has stayed its preliminary injunction order until this Court acts on this petition—precisely because of the controlling nature of the question presented. Dkt. No. 127.[2] Likewise, the Sixth Circuit—which is now bound by the decision below—is holding MSU's appeal of the district court's preliminary injunction in abeyance pending this Court's decision on certiorari. *Balow v. Michigan State Univ.*, No. 22-1790 (6th Cir.), ECF No. 21. The courts below are waiting for this Court's resolution of the threshold question presented.

Respondents argue (at 24) that review is unwarranted because "facts have changed." On remand from the Sixth Circuit's decision, the district court simply updated its findings on the participation gap to include the 2020-21 and 2021-22 academic years. But this is irrelevant. The threshold question presented does not hinge on any facts; it requires this Court to decide the *legal standard* that will determine what facts are relevant. If this Court agrees with MSU and the dissent below, then it should vacate the

---

[2] Respondents note that the preliminary injunction does not require reinstatement of the team. Opp.27. But the court ordered MSU to submit a compliance plan that forces MSU down a path of remedying a Title IX violation that does not exist under the proper understanding of the safe harbor and that, in itself, could prove highly disruptive given the inevitable controversy flowing from a proposed restructuring of its athletics program.

decision below and remand for further proceedings under the *correct* legal standard.[3]

In any event, the district court's preliminary injunction decision just confirms that MSU qualifies for the safe harbor under the percentage-based approach applied by other courts that have repeatedly held that small participation gaps in the range of 2-3% establish substantial proportionality. Under the district court's decision, MSU's participation gap for the past four academic years is as follows:

Academic Year	**Participation Gap (as percentage)**
2018-19	1.4%
2019-20	0.6%
2020-21	2.2%
2021-22	2.1%

Dkt. No. 110, PageID.2039. The participation gap for the current academic year is projected to be just 0.5%, *see* Dkt. No. 128, PageID.2415, as enrollment fluctuations have stabilized in the wake of the Covid-19 crisis. Those figures would easily satisfy the 2-3% threshold courts have held fall within Title IX's "substantial proportionality" safe harbor, whether viewed separately or as a whole. *Supra* at 4-6 & n.2.

Finally, while nothing will be *gained* by delaying review of the threshold question presented, declining

---

[3] Respondents' suggestion (at 3) that a decision from this Court would be an "advisory opinion" is baseless. The question presented is dispositive as to whether a preliminary injunction or other relief should issue, *see supra* at 7—a matter which is the subject of an ongoing controversy between the parties.

review here would have potentially "staggering" consequences for universities and student-athletes in the Sixth Circuit. Universities Br.16. If the Court grants certiorari, the case can be briefed, argued, and decided this term. But if the Court denies the petition, it would likely delay resolution of this issue until 2024 at the earliest. As *amici* explain, that would have immense practical and financial ramifications for universities and students in the Sixth Circuit, effectively denying those schools a level playing field with schools outside the Sixth Circuit, and even "result[ing] in *fewer* athletics opportunities for student-athletes of both genders and some schools." Universities Br.14; *see* States Br.17, 19.[4]

IV. The Decision Below Is Wrong

Respondents' attempt to defend the decision below only underscores the inflexibility of the Sixth Circuit's strict numerical rule and need for this Court's review.

As the dissent below, MSU, and amici have explained, the Sixth Circuit's strict numerical approach for determining "substantial proportionality" conflicts with the text of the statute as well as longstanding agency guidance. *See* Pet.App.28a-31a; Pet.24-29; States Br.3-11, 20-22; Universities Br.8-12. Respondents have no answer on the text—which explicitly provides that it "shall not be construed to prevent the consideration" of "statistical evidence," including "percentage[s]," in assessing alleged "imbalance[s]," 20 U.S.C. § 1681(b).

---

[4] Because the United States has already presented its views in this case as an amicus (Pet. 16 n.3), there is no reason to call for the views of the Solicitor General.

Instead, respondents cherry-pick floor speeches, the least reliable form of legislative history. Opp.29.

Likewise, respondents have no answer for why a standard framed in terms of whether opportunities are "substantially proportionate" cannot be met by showing that opportunities *are* proportionate based on the conventional method for measuring proportionality—percentages or ratios. Pet.App.29a-30a n.6 (Guy, J., dissenting). Moreover, respondents acknowledge that the Sixth Circuit's numerical standard collapses the three-pronged safe harbor long ago established by the Department of Education following notice and comment into just *one* prong, disrupting settled reliance interests. Opp.31-32; *see* Pet.27-28. Where a plaintiff alleges that a "viable team" could be formed given a numerical discrepancy, prong one now collapses with prong three to establish liability. At schools like MSU that have followed the three-part test for over 40 years, this is a revolutionary development. Universities Br.9-11.

Respondents' opposition proves how disruptive the Sixth Circuit's strict numerical approach will be. Under the Sixth Circuit's rule, percentage figures can never trigger the safe harbor, and all a plaintiff need allege is a numerical participation gap sufficient to form a "viable team," along with student interest and ability to form such a team. Pet.30. Yet—as respondents acknowledge—a "viable" team may be as small as 4-5 students. Universities Br.13; States Br.15; Opp.34. Respondents note (at 34) that a plaintiff still would have to show that there is "interest" and "ability" to form such a team. But especially at schools like MSU—with tens of thousands of undergraduates—it will scarcely be difficult to allege that a handful of such students

exist. Under the Sixth Circuit's rule, such allegations will suffice to make a full-blown Title IX case.[5]

The Sixth Circuit's rule promises endless litigation—and threats of litigation—that will prove "incredibly disruptive to university athletic programs," Universities Br.14, "undermine the very interests Title IX was intended to serve," *id.* at 12, and "'impose serious financial burdens on' universities, 'the taxpayers who support them, and the [students] they serve.'" States Br.22 (alteration in original) (citation omitted). Routine fluctuations in student enrollments and interest in athletic opportunities alone will trigger Title IX, and it will be virtually impossible to make almost any changes to athletic programs given the ripple effects under the Sixth Circuit's strict numerical rule. Universities Br.12-15. That regime poses a direct threat to college athletics, does a profound disservice to Title IX, and ultimately will harm students of both sexes.

---

[5] Respondents' suggestion (at 4) that MSU does not challenge the "viable team" aspect of the Sixth Circuit's rule is wrong; the Sixth Circuit's "viable team" trigger is part-and-parcel of its flawed numerical approach. Pet.28 & n.5.

CONCLUSION

The petition should be granted.

Respectfully submitted,

BRIAN T. QUINN
MICHIGAN STATE UNIVERSITY
426 Auditorium Road
East Lansing, MI 48824

SCOTT R. ELDRIDGE
BRIAN M. SCHWARTZ
ERIKA L. GIROUX
ASHLEY N. HIGGINSON
MILLER, CANFIELD, PADDOCK & STONE, PLC
One Michigan Avenue
Suite 900
Lansing, MI 48933

GREGORY G. GARRE
Counsel of Record
CHARLES S. DAMERON
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2207
gregory.garre@lw.com

Counsel for Petitioners

November 22, 2022