No. 21-1183

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, and 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., and BILL BEEKMAN,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
No. 1:21-cv-00044
Honorable Hala Y. Jarbou

BRIEF OF NATIONAL WOMEN'S LAW CENTER, LEGAL AID AT WORK, AND TWENTY-FIVE ADDITIONAL ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS' OPENING BRIEF

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8. Human Rights Campaign
9. KWH Law Center for Social Justice and Change
10. Men of Reform Judaism
11. NARAL Pro-Choice America
12. National Association of Social Workers (NASW)
13. National Association of Women Lawyers
14. National Consumers League
15. National Crittenton
16. National Women's Political Caucus
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18. The Women's Law Center of Maryland
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CORPORATE DISCLOSURE STATEMENT

Pursuant to Sixth Circuit Rule 26.1 and Federal Rule of Appellate Procedure 29(a)(4)(A), undersigned counsel certifies that *amici curiae* each have no parent corporation, and that there is no publicly held corporation that owns 10% or more of the stock of any of them.

Dated: May 26, 2021

Palo Alto, California

/s/ Harrison J. Frahn
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AMICI CURIAE'S IDENTITY, INTEREST, AND AUTHORITY TO FILE

The **National Women's Law Center** ("NWLC") is a non-profit legal advocacy organization dedicated to the advancement and protection of women's rights and for all to be free from sex discrimination in all facets of life. Since 1972, NWLC has worked to secure equal opportunities in education for girls and women through the full enforcement of Title IX in all arenas, including interscholastic and collegiate athletics.

Legal Aid At Work ("LAAW") is a non-profit public interest law firm whose mission is to protect, preserve, and advance the employment and education rights of individuals from traditionally under-represented communities. LAAW has represented plaintiffs in cases of special import to communities of color, women, recent immigrants, individuals with disabilities, the LGBTQ community, and the working poor. LAAW has litigated a number of cases under Title IX of the Education Amendments of 1972, including *Ollier v. Sweetwater*, 768 F.3d 843, 854 (9th Cir. 2014). LAAW's interest in preserving the protections afforded to students by this country's antidiscrimination laws is longstanding.

The co-leaders of this brief are joined by twenty-five additional *amici*, who are public interest organizations committed to gender justice. *Amici* have an interest in assisting this Court in understanding the importance of equality based on

sex for women and girls in education under Title IX and the broader harms at issue in this case.[1]

All parties have consented to the filing of this brief.

[1] No counsel for any party authored this brief in whole or in part and no entity or person, aside from *amici curiae* and their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The passage of Title IX nearly 50 years ago guaranteed girls and women equal opportunities in education, including in school athletics programs. Despite this promise, schools across the country still deprive women and girls of access to the well-documented, long-lasting benefits that sports participation offers. This unlawful sex discrimination persists, and the school at the center of this case—Michigan State University ("MSU")—exemplifies the problem.

Faced with clear evidence of longstanding Title IX violations at MSU, including the school's recent plan to eliminate the women's swimming and diving team, the district court improperly rejected Plaintiffs' attempt to maintain the status quo through a preliminary injunction. As Plaintiffs explained in their opening brief ("Op. Br."), the district court committed manifold errors, each of which warrants reversal.

In this brief, *amici* highlight specific errors that not only contributed to the erroneous decision below, but, if approved by this Court, would also undermine women and girls' ability nationwide to obtain relief when their schools violate Title IX.

As background, a school can comply with Title IX's equal opportunities requirement by offering athletic participation opportunities to men and women "in numbers substantially proportionate to their respective enrollments." Title IX and

Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,418 (Dec. 11, 1979) ("1979 Policy Interpretation"). The test for this "substantial proportionality" standard asks whether the difference between the number of opportunities offered to the underrepresented sex and the number that would be required to achieve exact proportionality (the "participation gap") is large enough "to sustain a viable team." *See* Office for Civil Rights ("OCR"), U.S. Department of Education ("DOE"), *Clarification of Intercollegiate Athletics Policy Guidance: The Three Part Test* (1996) ("1996 Clarification"). If the participation gap is sufficient to sustain a viable team, the school does not offer "substantially proportionate" opportunities.

MSU fails this test. By eliminating its women's swimming and diving team, the school would exacerbate an already-unlawful participation gap and create one that is plainly large enough to sustain a viable team for women—namely, the very team seeking to avoid elimination. Failing to recognize this, the district court invented and then relied upon two erroneous legal standards.

First, the district court compared MSU's participation gap with the average size of women's sports teams at MSU, claiming that the comparison was "one of the OCR's stated criteria for proportionality." Opinion, R.16, PageID.749. That is simply incorrect. Title IX does not contemplate a comparison between a school's participation gap and the average size of its women's teams. Rather, the inquiry focuses on whether the participation gap is large enough to support a "viable team"

for a particular sport—something that has nothing to do with the average size of a school's teams across all sports. Under the correct standard, to the extent any "average team size" comparison is necessary to determine viability (in most cases, including this one, it is not), the appropriate metric is the size of women's teams *for the sport in question* at other competitor schools.

Second, the district court erroneously treated a participation gap of 2% or less as proof of substantial proportionality—a *de facto* safe harbor. Opinion, R.16, PageID.752-53. Putting aside the fact that the district court was wrong to conclude that the gap at MSU is less than 2%, its safe harbor rule contravenes OCR's repeated and unequivocal guidance that substantial proportionality is not measured "through use of a statistical test." 1996 Clarification; *see also* Valerie M. Bonnette & Lamar Daniel, DOE, *Title IX Athletics Investigator's Manual* 24 (1990) ("There is no set ratio that constitutes 'substantially proportionate.'").

In addition to applying two incorrect legal standards, the district court also made it nearly impossible for Plaintiffs to prove their case factually. As noted above, a school complies with Title IX when men's and women's athletic participation numbers are substantially proportionate to each gender's enrollment. At most schools, Title IX participation records are not publicly available. Consequently, unless schools disclose their participation data, Title IX plaintiffs seeking preliminary injunctions must use publicly-available information—

something courts routinely allow them to do. In such situations, courts have not given schools a pass for refusing to produce their Title IX records, nor have courts faulted *plaintiffs* for not introducing them.

Here, MSU refused to produce its Title IX data, forcing Plaintiffs to rely on publicly-available data to prove a likelihood of success under the statute. In response, instead of producing the records MSU claimed would exonerate it, the school submitted self-serving affidavits—*without* the data on which they were supposedly based—to assert compliance. The district court, rather than drawing an inference *against* MSU for failing to produce the critical data, simply accepted MSU's figures and rejected Plaintiffs' in-depth analysis to the contrary. This decision contravened the federal rules requiring disclosure of such relevant information, and general principles of fairness.

For these reasons, *amici* urge this Court to reverse and remand with instructions to enjoin MSU from cancelling its women's swimming and diving team.

ARGUMENT

I. ALMOST FIFTY YEARS AFTER TITLE IX'S PASSAGE, SCHOOLS STILL ARE NOT PROVIDING WOMEN AND GIRLS WITH EQUAL OPPORTUNITIES TO REAP THE BENEFITS OF PLAYING SPORTS.

Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 et seq., bars sex discrimination in all aspects of schools that receive federal funding,

including in their athletic programs. Since its enactment, Title IX has played a vital role in breaking down barriers for women and girls to play sports and enjoy the lifelong benefits that flow from sports participation.

But Title IX's promise remains unfulfilled. The disparities that exist today reflect a collective emphasis on men's and boys' sports at the K-12 and college levels. In such an environment, courts play an essential role in ensuring that women and girls receive equal athletic opportunities.

A. Participating in sports provides substantial benefits for women and girls.

Participating in sports offers women and girls substantial lifelong benefits. Playing sports keeps students engaged in school—girls who play sports are more likely to graduate from high school, have higher grades, and score higher on standardized tests than non-athletes. *See* NWLC, *The Battle for Gender Equity in Athletics in Elementary and Secondary Schools* (June 2017), https://nwlc.org/wp-content/uploads/2015/08/Battle-for-GE-in-Elementary-and-Secondary-Schools.pdf. Women college athletes, particularly women of color, reap similar academic benefits. NWLC, *The Battle for Gender Equity in Athletics in Colleges and Universities* 2 (June 2017), https://nwlc.org/wp-content/uploads/2015/08/Battle-for-GE-in-Colleges-and-Universities.pdf ("Battle in Colleges"). And the availability of athletic scholarships can increase young

women's ability to pursue a college education and choose from a wider range of schools. *Id.*

Playing sports also allows women and girls to maintain better physical and mental health. Regular exercise significantly reduces a young woman's chance of developing heart disease, osteoporosis, and breast cancer, and offers psychological benefits in the form of higher self-esteem, a lower incidence of depression, and more positive body image. *Id.*

Sports participation also contributes to increased employment for women. A recent study concluded that 94% of women in the C-suite of Fortune 500 companies played sports growing up, including 52% at the college level, and the vast majority reported that the lessons they learned on the playing field contributed to their success in business. Ernst & Young, *Why Female Athletes Make Winning Entrepreneurs* 2 (Mar. 2020), https://assets.ey.com/content/dam/ey-sites/ey-com/en_gl/topics/entrepreneurship/ey-why-female-athletes-make-winning-entrepreneurs.pdf. Relatedly, women who participated in high school sports earn 7% higher wages than their peers. Betsey Stevenson, *Beyond the Classroom: Using Title IX to Measure the Return to High School Sports* 4-5 (Nat'l Bureau of Econ. Rsch., Working Paper No. 15728, 2010).

B. Despite important advances made under Title IX, colleges still do not provide women with equal sports opportunities.

Title IX plays a vital role in breaking down barriers for women to participate in intercollegiate sports. Since the law's enactment, there has been a 291% increase in women's participation opportunities offered by schools in the National Collegiate Athletic Association ("NCAA"). *See* Women's Sports Foundation, *Chasing Equity: The Triumphs, Challenges, and Opportunities in Sports for Girls and Women* 7, 21 (2020).

But women nationwide still have fewer opportunities to participate in college sports than do men, and they are often not treated equally when they do participate. Nationally, college women receive almost 60,000 fewer athletics opportunities than college men. *Id.* And women at the typical Division I-FBS school receive only about one-third of the total money spent on athletics, recruiting, and scholarships. Battle in Colleges at 2.

MSU exemplifies this disparity. In addition to failing to offer equal participation opportunities for women, MSU provides substantially less funding to its women's teams, as evidenced by data from 2018-2019, the most recent school year available:

- *Total athletic expenses*: Men: $60.7 million; Women: $20.1 million;
- *Recruiting expenses*: Men: $1.36 million; Women: $414,564;

- *Total spent on coaches' salaries*: Men: $15.7 million; Women: $3.7 million;
- *Athletic scholarship dollars*: Men: $9.26 million; Women: $7.49 million.[2]

Clearly, much work remains to achieve gender equality in sports at MSU and beyond.

II. THE DISTRICT COURT APPLIED TWO INCORRECT STANDARDS IN ASSESSING WHETHER MSU OFFERS SUBSTANTIALLY PROPORTIONATE ATHLETIC OPPORTUNITIES TO MEN AND WOMEN.

Title IX's regulations require that federally-funded schools provide "equal athletic opportunity for members of both sexes." 34 C.F.R. § 106.41(c). To determine whether a school meets this requirement, courts employ a test delineated in the DOE's 1979 Policy Interpretation. *See, e.g.*, *Horner v. Ky. High Sch. Athletic Ass'n*, 43 F.3d 265, 274 (6th Cir. 1994). Under that test, a school complies with Title IX if it satisfies any one of three parts (or "prongs").

The first prong—the only one at issue in this case—asks "[w]hether . . . participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments." 1979 Policy Interpretation at 71,418; *see also* Opinion, R.16, PageID.749-53.

[2] Office of Postsecondary Education, DOE, *Equity in Athletics Data Analysis*, ope.ed.gov/athletics/#/institution/search (last visited May 25, 2021).

In 1996, OCR issued the current guidance on how to determine whether a school satisfies this first prong. *See* 1996 Clarification.[3] First, a court determines the "number of participation opportunities afforded to male and female athletes" at the school. 1996 Clarification; *see also Biediger III*, 691 F.3d at 93.[4] Second—and the central issue here—a court considers whether "the number of participation opportunities . . . is substantially proportionate to each sex's enrollment." *Ollier*, 768 F.3d at 856; *see also* 1996 Clarification. Recognizing that in "some circumstances it may be unreasonable to expect an institution to achieve exact proportionality," the 1996 Clarification explains that a school complies with prong

[3] OCR is the primary federal agency responsible for Title IX enforcement. 20 U.S.C. § 3441(a)(3). Courts routinely recognize that its policy interpretations, including the 1996 Clarification, "deserve[] . . . great deference" under *Chevron USA v. NRDC*, 467 U.S. 837 (1984) and other relevant authorities. *See, e.g.*, *Neal v. Bd. of Trustees of Cal. State Univ.*, 198 F.3d 763, 770-71 (9th Cir. 1999); *Biediger v. Quinnipiac Univ.*, 691 F.3d 85, 96-97 (2d Cir. 2012) ("*Biediger III*").

[4] Here, the district court accepted MSU's contention that in the most recent years for which data was available, the school had a participation gap of between 12 and 27 athletes. Opinion, R.16, PageID.749. For the reasons set forth in Plaintiffs' opening brief, *amici* agree that the district court's analysis on this point was deeply flawed, and yielded an artificially small participation gap. *See* Op. Br. at 28-29 (arguing that the participation gap, properly analyzed, is at least 35 and likely much larger). Indeed, Defendant's own expert estimated a participation gap of 30 athletes for 2020-21. *See* O'Brien Report, R.8-8, PageID.446. *Amici* endorse Plaintiffs' arguments and write here to explain why—regardless of the size of MSU's participation gap—the district court applied two incorrect standards to assess substantial proportionality.

one if its athletic offerings are "'substantially' proportionate to enrollment rates." 1996 Clarification.

Because this question "depends on the institution's specific circumstances"—including whether the school's own actions are to blame for any participation gap—the determination does not hinge on any percentage-based "statistical test." *Id.* Instead, participation 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." *Id.* The guidance further provides that "[a]s a frame of reference in assessing [viability], [a court] may consider the average size of teams offered for the underrepresented sex, a number which would vary by institution." *Id.*[5]

[5] The 1996 Clarification provides two examples of this "viability" standard, noting that if a school with 600 athletes had a participation gap of "approximately 62 . . . women, it is likely that a viable sport could be added" and so the school would "not me[et] part one." *Id.* By contrast, if a school with only 60 total athletic participants had a participation gap of 6 women, that school "would meet part one" because "6 participants are unlikely to support a viable team." *Id.*

A. The district court's focus on the average size of MSU's women's teams to measure substantial proportionality is contrary to controlling authority, defies common sense, and creates perverse incentives.

The district court asserted that "one of the OCR's stated criteria for proportionality" involved comparing the participation gap at MSU to the "average size of a women's team at MSU." *See* Opinion, R.16, PageID.737, PageID.749. That was wrong. Nothing in the 1996 Clarification or other relevant authority establishes the average size of a particular school's teams as a criterion for proportionality. Rather, the sole measure is whether the participation gap is "sufficient to sustain a viable team," a question that in most cases (like this one) does not involve any "average team size" comparison at all.

1. *The 1996 Clarification does not contemplate an "intra-school" comparison like the one made by the district court.*

Recall that the 1996 Clarification centers the substantial proportionality inquiry on whether "the number of opportunities . . . required to achieve proportionality would . . . sustain a *viable team* . . . ." 1996 Clarification (emphasis added). The guidance defines "viable team" as "a team for which there is a *sufficient number of . . . students* and *enough available competition to sustain an intercollegiate team*." *Id.* (emphasis added). Plainly the definition focuses on the number of athletes necessary for a team to *compete with other schools*.

As a result, in cases like this one, where the participation gap is sufficient to sustain a thriving team the school just eliminated, there is no need—and it makes no sense—to consider average team sizes at all.[6] The prong one inquiry is over because there is obviously a viable team at hand (here, MSU's women's swimming and diving team, with 28 members, *see* Lopiano Rep., R.2-14, PageID.230) and the gap is sufficient to sustain it (here, at least 35, *supra* n.4). *See Biediger III*, 691 F.3d at 107-08 (finding that school could "afford the additional participation opportunities of an independent sports team" by re-instating its recently eliminated women's volleyball squad that "require[d] a mere 14 players to compete"); *Cohen v. Brown Univ.*, 101 F.3d 155, 180 (1st Cir. 1996) ("[W]hile the question of full and effective accommodation of athletics interests and abilities is potentially a complicated issue where plaintiffs seek to create a new team . . . no such difficulty is presented here, where plaintiffs seek to reinstate what were successful university-funded teams right up until the moment the teams were demoted"); *Ohlensehlen v. Univ. of Iowa*, 2020 WL 7651974, at *5 (S.D. Iowa 2020) ("The 35 members of the University of Iowa women's swimming and diving team easily fits within [the school's participation gap] as a viable team . . . ."). Faced with a

[6] Indeed, in the two illustrative examples the 1996 Clarification discusses, *see supra* n.5, OCR looked only at whether the participation gap was sufficient to sustain a viable team, and did not consider average team size.

perfectly viable team, the district court's substantial proportionality inquiry should have ended.

But even if the district court *had* needed to look beyond the women's swimming and diving team, it still erred. In cases unlike this one, where the question is whether the participation gap could sustain a *new* team, it makes sense to consider *some* average team size to assess viability. OCR's guidance provides for this:

> As a frame of reference in assessing [the number of students needed for a viable team, a court] may consider the *average size of teams offered for the underrepresented sex*, a number which would vary by institution.

1996 Clarification (emphasis added). Here, without any support, the district court inferred that the relevant "teams offered for the underrepresented sex" are all of the women's sports teams at MSU, as opposed to women's teams for a single sport across *different* institutions. Opinion, R.16, PageID.751. This was erroneous because it contravenes the 1996 Clarification and would yield irrational results. *United States v. Fitzgerald*, 906 F.3d 437, 447 (6th Cir. 2018) ("[C]ourts should not construe a statute to produce an absurd result . . . Congress did not intend.").

First, nothing in the text of the 1996 Clarification calls for an intra-school comparison like the one used by the district court. While clear given the context, at most, the guidance is ambiguous as to which "teams offered for the underrepresented sex" it refers. But, to the extent that phrase may be ambiguous,

the district court's intra-school approach is untenable given the 1996 Clarification's definition of "viable team." *See In re Arctic Exp. Inc.*, 636 F.3d 781, 791-92 (6th Cir. 2011) ("If the terms of a regulation are ambiguous, [this Court] next . . . read[s] the regulation in its entirety to glean its meaning.").

Again, the question of what "average team size" is relevant to viability arises when a court must decide if a *new sport* could fill a school's participation gap, and the inquiry turns on the hypothetical new team's ability to compete *with other schools*. *See supra*, at 13; 1996 Clarification. Viewed in this light, the district court's approach makes no sense: the average size of all women's sports teams *within* an institution bears no plausible relation to the number of athletes required to field an intercollegiate team for a *different sport*.

To illustrate, imagine a school that offers three women's sports—soccer, softball, and track—with an average team size of 30 athletes. If a court finds that the school has a participation gap of 20 athletes, the size of the school's currently-sponsored teams is irrelevant to whether another team requiring fewer than 30 athletes—e.g., tennis or volleyball—could be added. Rather, the average team size *in the sport to be added* is what is relevant. To answer that question, it is only logical that a court would consider the average size of teams for that sport at other,

competitor schools (a number that, per the 1996 Clarification, "would vary by institution").[7]

2. *The district court's "intra-school average" approach is unsupported by the weight of the authority.*

Few courts have addressed whether the "teams offered for the underrepresented sex" mentioned in the 1996 Clarification's guidance are, as the district court assumed, all of the teams offered by the defendant school. However, when courts have reached this question, they almost uniformly give the common-sense answer—that the number of athletes required to field a "viable team" depends on the sport at issue and involves a comparison to competitor schools' teams.

For example, in *Mayerova v. Eastern Michigan University*, in analyzing whether the school could field viable women's softball and tennis teams, the court properly considered the "typical[]" size of teams for those specific sports, not intra-school average team size. *See* 346 F. Supp. 3d 983, 987, 992 (E.D. Mich. 2018);

[7] Paying short shrift to this point, the district court rejected the notion that "a school like MSU could field a viable team of eight female tennis players" due to the fact that MSU's participation gap expressed as a percentage is purportedly small. Opinion, R.16, PageID.751-52. As discussed below, *infra* Part II.C, the district court confused the analysis of MSU's specific context—wrongly treating a 2% gap as a safe harbor. In fact, if there were a participation gap of 8 women and the average women's tennis team size at MSU's competitors was 8 or smaller, then, depending upon the cause of the disparity, MSU might not satisfy substantial proportionality.

see also Clemons as Next Friend of T.W. v. Shelby Cty. Bd. of Educ., 2019 WL 2894381 (W.D. Ky. 2019), *aff'd and rev'd in part on other grounds* 818 F. App'x 453 (6th Cir. 2020) (recognizing that viable team inquiry does not hinge on average size of *different* sports teams within school, but rather teams of same sport across schools as "[t]he nature of each sport will necessarily dictate a reasonable number of players on a team."); *Bryant v. Colgate Univ.*, 1996 WL 328446, at *10 (N.D.N.Y. 1996) (noting that question of whether women's team could be sustained hinged on whether "the pool of women interested in ice hockey are of sufficient ability to sustain a viable, competitive *intercollegiate* team *in Colgate's competitive region*" (emphasis added)).

Aside from the district court's decision below, *amici* are aware of no cases holding that substantial proportionality turns on whether the participation gap is smaller than the average team size at the school. In fact, *amici* know of only two cases in which courts have mentioned in dicta the average team size of sports at a school when assessing prong one. In *Biediger v. Quinnipiac University*, 728 F. Supp. 2d 62 (D. Conn. 2010) ("*Biediger II*"), *aff'd*, 691 F. 3d 85 (2d. Cir. 2012), in analyzing a participation gap of 38—larger than all of the women's teams at the school—the district court used team sizes to explain why it was "certain that an independent sports team could be created from the shortfall of participation opportunities." *Biediger III*, 691 F.3d at 107 (citation omitted). And in *Anders v.*

California State University, Fresno, the court repeatedly cited the district court's decision in this case, discussing both the average team size and 2% safe harbor "tests" erroneously created by the lower court here. *See* 2021 WL 1564448, at *5, *14, *16 (E.D. Cal. 2021).[8]

While the *Anders* court ultimately denied plaintiffs' motion for a preliminary injunction on other grounds, the decision in that case underscores the grave and immediate danger posed by the decision below.

3. *The district court's approach creates perverse incentives for schools.*

The district court's intra-school average team size test, if affirmed, would arbitrarily incentivize schools to increase the average size of their women's teams to avoid Title IX liability and allow a school with a sizable participation gap to cut women's teams with impunity. To illustrate, imagine a school with equal enrollment of men and women with the following sports and true team sizes:

[8] On May 10, 2021, the *Anders* plaintiffs filed a Motion for Reconsideration of the court's preliminary injunction ruling, which is currently pending. *See* Case No. 1:21-cv-00179-AWI-BAM, Dkt. 39.

Women's Athletic Participation Opportunities		Men's Athletic Participation Opportunities	
Sport	No. of Participants	Sport	No. of Participants
Softball	22	Baseball	35
Track & Field	58	Track & Field	50
Soccer	35	Soccer	30
Rugby	40	Rugby	65
Lacrosse	45	Lacrosse	40
Rowing	115	Football	115
Tennis	8	Tennis	8
Total Participants	**323**	**Total Participants**	**343**
Average Team Size	46.1	Average Team Size	49.0
Participation Gap = 20			

Even before canceling any team, the school offers 20 fewer participation opportunities to women than men. Nonetheless, applying the district court's test, not only would the school be in compliance with Title IX to begin with (20 being smaller than the average women's team size, 46.1), it could even *cancel its women's tennis and softball teams and remain in compliance*, since the resulting participation gap would remain smaller than the average women's team size. This absurd result occurs because, while canceling both women's teams would clearly increase the participation gap (from 20 to 50), it would also remove the two

smallest teams from the average team size calculation, meaning that the school's average team size would increase substantially (from 46.1 to 58.6).

This Court should reject the district court's approach; otherwise, schools could avoid liability by stacking their athletics programs with fewer but ever-larger women's teams, denying women meaningful participation opportunities.

B. A safe harbor percentage for substantial proportionality contravenes the 1996 Clarification and well-settled precedent.

The district court also erred in adopting a blanket 2% participation gap "safe harbor" in its analysis of substantial proportionality, *see* Opinion, R.16, PageID.752-53, an approach the OCR has unequivocally and repeatedly rejected. *See* 1996 Clarification; *see also* Bonnette & Daniel, *supra*, at 5. Under the correct standard, the district court should have considered MSU's "specific circumstances," including the cause of the school's participation gap, and should have reached the opposite conclusion. *See Biediger III*, 691 F.3d at 106; 1996 Clarification.

Numerous cases—including those cited by the district court—underscore the well-established rule that, when considering a school's participation gap expressed as a percentage, there is no "magic number" at which substantial proportionality is achieved. *See, e.g., Biediger III*, 691 F.3d at 106-07 (finding defendant's emphasis on "relatively small percentage of disparity" unwarranted as "the 1996 Clarification makes clear [that] substantial proportionality is not determined by any

bright-line statistical test") (citations omitted); *Ollier v. Sweetwater Union High Sch. Dist.*, 768 F.3d 843, 856 (9th Cir. 2014) ("[T]here is no magic number at which substantial proportionality is achieved . . . . Rather, substantial proportionality is determined on a case-by-case basis in light of the institution's specific circumstances and the size of its athletic program.") (citations omitted); *Equity In Athletics, Inc. v. Dep't of Educ.*, 639 F.3d 91, 110 (4th Cir. 2011) (same); *Biediger II*, 728 F. Supp. 2d at 110 ("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"). Ignoring this, the district court misconstrued the cases as establishing a 2% *de facto* safe harbor, and then found that Plaintiffs were unlikely to establish a Title IX violation. *See* Opinion, R.16, PageID.752-53.[9]

[9] Even the NCAA has repeatedly stated that a 2% participation gap can establish a Title IX violation. *See, e.g.,* NCAA, *Achieving Gender Equity: A Basic Guide to Title IX and Gender Equity In Athletics For Colleges and Universities* 11 (2002) ("2002 NCAA Gender Equity Manual") (citing as example of non-compliance under prong one a hypothetical institution with 600 athletes and a participation gap of 25, and noting that "despite a difference of only two percentage points" the institution "would not be offering opportunities substantially proportionate to enrollment"; and further noting "[s]maller differences than two percentage points, depending on participation rates at a specific institution, may also be found as not substantially proportionate"); *see also* NCAA, *Gender Equity in Intercollegiate Athletics: A Practical Guide for Colleges and Universities* 25 (2008) (advising that "[a]t least one regional [OCR] office stated informally that anything greater than 1 percent would raise red flags").

Instead, the court should have engaged in the "specific circumstances" analysis mandated by the 1996 Clarification, which requires examining the "causes of the disparity." *See Biediger III,* 691 F.3d at 106; *see also Ollier*, 768 F.3d at 856, n.7 (noting "[a]n institution that sought to explain a disparity . . . should show how its specific circumstances justifiably explain the reasons for the disparity as being *beyond its control*") (emphasis added). Here, the cause of disparity is clear. Despite years of non-compliance with Title IX, MSU voluntarily cut the women's swimming and diving team to meet purported funding needs,[10] even though doing so eliminated more opportunities for women than for men. This decision to *reduce* opportunities for women, who were already underrepresented, stands in stark contrast to the leading case cited by the district court in support of its 2% safe harbor. *See Equity in Athletics, Inc. v. Dep't of Educ.*, 675 F. Supp. 2d 660, 683 (W.D. Va. 2009) (finding "the mere fact that men became the 'underrepresented gender' by 2% *as a result of JMU's initial efforts to comply with the Three Part*

[10] MSU's funding-related arguments strain credulity. The school's football coach is "one of the 15 highest-paid football coaches in NCAA" with an annual salary of $5.5 million (plus six-figure performance bonuses and reimbursement by MSU for a "country club membership at a club of his choosing"). Austin Denean, *Mel Tucker One of 15 Highest-Paid Football Coaches in NCAA*, Fox News (Feb. 13, 2020), https://www.fox17online.com/sports/ncaa/mel-tucker-one-of-15-highest-paid-football-coaches-in-ncaa. Similarly, the men's basketball coach is paid over $4 million a year. *Id.* In 2018-19, the entire annual operating expenses for MSU's women's swimming and diving team was $196,845. *See* Office of Postsecondary Education, *supra* n.2.

Test is insufficient to state a plausible [Title IX] claim") (emphasis added), *aff'd*, 639 F.3d 91 (4th Cir. 2011).

Finally, if anything, the district court's discussion of the "size of [MSU's] athletic program" gets the substantial proportionality analysis backwards. Opinion, R.16, PageID.751-52. At a school with a small athletics program, 2% may only represent a handful of participation opportunities, whereas 2% at a large program (like MSU) represents a significant number, sufficient to sustain a viable team. *See supra* Parts II.A-B & n.4. The NCAA understood this straightforward concept nearly two decades ago. *See* 2002 NCAA Gender Equity Manual at 11 (noting that in large hypothetical program of 600 athletes, two percent gap would render the program out of compliance with prong one because that two percent represents 25 participation opportunities, a "sufficient number to form a viable team").

III. THE DISTRICT COURT IMPROPERLY REJECTED PLAINTIFFS' USE OF MSU'S PUBLICLY-AVAILABLE PARTICIPATION DATA WHILE CREDITING MSU'S CLAIMS ABOUT ITS NON-PUBLIC TITLE IX RECORDS, WHICH THE SCHOOL HAD REFUSED TO PRODUCE.

From the outset of this case, Plaintiffs sought MSU's internal Title IX participation data. At every turn, MSU stonewalled. *See* Pls.' Reply Br., R.13, PageID.601-02. Even when it would have presumably benefitted MSU to demonstrate its purported compliance, the school still did not produce its records to Plaintiffs, the court, or even fully to its own expert. *See id.*; O'Brien Rep., R.8-8,

PageID.433. Consequently, Plaintiffs had to rely on MSU's self-reported, publicly-available athletic participation numbers—including data published by MSU annually under the Equity in Athletics Disclosure Act ("EADA") and the school's online athletic rosters—which indicated that the school is out of compliance. *See* Opinion, R.16, PageID.745. Despite precedent to the contrary, the district court rejected Plaintiffs' in-depth analyses of these data, and instead accepted at face value MSU's *characterization* of the data it refused to produce.

If allowed to stand, this decision would incentivize schools to engage in the same stonewalling tactics and obfuscation that contravene basic discovery rules, preventing women and girls around the country from vindicating their rights under Title IX.

A. The district court improperly failed to credit Plaintiffs' use of MSU's publicly-available athletic participation data.

Understanding the uphill battle that Title IX plaintiffs face in accessing schools' internal data, courts routinely accept parties' use of schools' publicly-available EADA and web roster data in determining the number of participation opportunities for Title IX compliance.[11]

[11] *See, e.g., Ohlensehlen v. Univ. of Iowa*, 2020 WL 7651974, at *9-10 (S.D. Iowa 2020); *Biediger v. Quinnipiac Univ.*, 616 F. Supp. 2d 277, 297 (D. Conn. 2009) ("*Biediger I*") (preliminary injunction), *inj. sustained after trial*, 728 F. Supp. 2d 62, 113-14 (D. Conn. 2010), *aff'd*, 691 F.3d 85, 108 (2d Cir. 2012); *Barrett v. W. Chester Univ. of Pa.*, 2003 WL 22803477, at *7 (E.D. Pa. 2003); *Choike v.*

The EADA was enacted in 1994 to address "increasing concern among citizens, educators, and public officials regarding the athletic opportunities for young men and women at institutions of higher education" by informing the public of "the commitments of an institution to provid[e] equitable athletic opportunities." EADA, H.R. 6, 103rd Cong. § 360B (1994). EADA reports contain, among other things, self-reported "information about the University's undergraduate enrollment, broken down by gender; the number and type of men's and women's varsity teams; [and] the number of participants on each team." *Biediger I*, 616 F. Supp. 2d at 283; 20 U.S.C. § 1092(g)(1)(A)–(B)(i).

While there are slight differences between EADA reports and schools' internal Title IX data, that is not a valid basis for rejecting Plaintiffs' reliance on EADA data altogether, and the district court was incorrect to cite that as a rationale. Specifically, the district court ignored the fact that EADA data are typically *more favorable to defendants* than internal Title IX data because "EADA

Slippery Rock Univ., 2006 WL 2060576, at *2-3 (W.D. Pa. 2006); *cf. Robb v. Lock Haven Univ. of Pa.*, 2019 WL 2005636, at *7 (M.D. Pa. 2019); *Mansourian v. Bd. of Regents of Univ. of Calif. at Davis*, 816 F. Supp. 2d 869, 885, 913 (E.D. Cal. 2011); *Brust v. Regents of Univ. of Cal.*, 2007 WL 4365521 (E.D. Cal. 2007).

reports . . . *overestimat[e]* female participation." *Ohlensehlen*, 2020 WL 7651974, at *9 (emphasis added).[12]

Plaintiffs also relied on MSU's athletic roster information, posted by MSU on the athletic department's website. Pls.' Br., R.2-1, PageID.93-94, PageID.96-100. These web roster numbers often hew closer to a school's non-public Title IX records because EADA counts participants only on the first day of competition, while roster listings are typically updated throughout the year.

For these reasons, the district court should have relied on the school's EADA reports and web roster numbers—the best publicly-available sources for a school's athletic participation data. At the preliminary injunction phase, such data is certainly sufficient to demonstrate likelihood of success under Title IX. *See, e.g., Certified Restoration Dry Cleaning Network, L.L.C. v. Tenke Corp.*, 511 F.3d 535, 542 (6th Cir. 2007) ("[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.").

[12] For example, under the EADA, male practice players who are listed on the women's team roster as of the day of the first scheduled contest are counted as participants on the women's team. Such players would not be counted as participants under Title IX.

B. The district court should have drawn an adverse inference from MSU's failure to produce its Title IX records instead of crediting what MSU claims those records may show.

MSU has repeatedly maintained that its internal Title IX records demonstrate compliance with Title IX. *See*, *e.g.*, Defs. Opp. Br., R.8, PageID.321. When faced with a lawsuit challenging that claim, though, MSU refused to produce the supposedly exculpatory information, and even its own expert did not fully review it. *See* Pls.' Reply Br., R.13, PageID.602; O'Brien Rep., R.8-8, PageID.433. In such a situation—where a school refuses to show its hand but claims it has a straight flush—it is only fair for a court to infer that the unproduced data do not help the school's case. The court in *Ohlensehlen*, faced with strikingly similar facts to those here, recognized as much:

> [Defendants'] position is especially disingenuous considering Defendants' refusal to disclose the official Title IX data they claim exonerates the University—data they admit is discoverable but have nonetheless declined to produce in response to Plaintiffs' request. Defendants offer no authority for the position, and the Court finds it utterly unpersuasive.

2020 WL 7651974, at *10. Here, instead of drawing an adverse inference from MSU's refusal to provide this data, the district court took the opposite approach. The district court both uncritically credited Defendants' self-serving affidavits and rejected Plaintiffs' thorough analysis of publicly-available data. *See* Opinion, R.16, PageID.746-47. Indeed, MSU's "evidence" of compliance, submitted only through the testimony of its expert, should have been excluded, or at least

discounted, because the underlying participation data were never submitted. *See Elam v. Menzies*, 2010 WL 1334557, at *3 (E.D. Ky. 2010) ("An expert report will be excluded when it does not contain sufficient basis or reasons to support the opinions offered."); Fed. R. Civ. P. 26(a)(2)(B)(ii) (expert report "must contain . . . the facts or data considered by the witness in forming" all opinions); *United States v. Reynolds*, 626 F. App'x 610, 614 (6th Cir. 2015) ("Expert testimony is properly excluded if it 'is connected to existing data only by the *ipse dixit* of the expert.'") (citation omitted).

The district court's failure to credit Plaintiffs' use of EADA reports and online roster data, while deferring to MSU's unsubstantiated claims, was reversible error. If this Court affirms, college athletes like Plaintiffs here would be unable to preserve the status quo—even temporarily—through a preliminary injunction should their school choose to cancel their team. Such a result is contrary to Title IX, the EADA, as well as the general principles of fairness and equity in litigation.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court and remand with instructions to preliminarily enjoin MSU from eliminating its women's swimming and diving team.

Dated: May 26, 2021

Palo Alto, California

/s/ Harrison J. Frahn

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7) because it contains 6,439 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

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CERTIFICATE OF SERVICE

I hereby certify that on May 26, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system.

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ADDENDUM