No. 21-1183

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SOPHIA BALOW, *et al.*,

Plaintiffs-Appellants

v.

MICHIGAN STATE UNIVERSITY, *et al.*,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS AND URGING REVERSAL ON THE ISSUE ADDRESSED HEREIN

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TABLE OF CONTENTS

PAGE

INTEREST OF THE UNITED STATES 1

STATEMENT OF THE ISSUE.....3

STATEMENT OF THE CASE.....3

1. Title IX, Its Regulations, And ED's Three-Part Test 3

2. Proceedings Below.....6

SUMMARY OF ARGUMENT 11

ARGUMENT

THE DISTRICT COURT ERRED IN ITS APPLICATION OF PRONG ONE OF THE THREE-PART TEST 12

CONCLUSION.....22

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

ADDENDUM

TABLE OF AUTHORITIES

CASES: **PAGE**

Beasley v. *Alabama State Univ.*, 3 F. Supp. 2d 1325 (M.D. Ala. 1998) 18

Biediger v. *Quinnipiac Univ.*, 691 F.3d 85 (2d Cir. 2012)..... 2, 13-14, 17

Brust v. *Regents of the Univ. of Cal.*, No. 2:07cv1488,
2007 WL 4365521 (E.D. Cal. Dec. 12, 2007)..... 18

Cannon v. *University of Chi.*, 441 U.S. 677 (1979) 3

Chalenor v. *University of N.D.*, 291 F.3d 1042 (8th Cir. 2002)..... 13

Cohen v. *Brown Univ.*, 101 F.3d 155 (1st Cir. 1996),
cert. denied, 520 U.S. 1186 (1997)..... 2

Communities for Equity v. *Michigan High Sch. Athletic Ass'n*,
459 F.3d 676 (6th Cir. 2006), cert. denied, 549 U.S. 1322 (2007) 2

Cook v. *Florida High Sch. Athletic Ass'n*, No. 3:09cv547 (M.D. Fla. 2009) 2

Equity In Athletics, Inc. v. *Department of Educ.*,
639 F.3d 91 (4th Cir. 2011), cert. denied, 565 U.S. 1111 (2012) 17-18

Mansourian v. *Regents of the Univ. of Cal.*, 602 F.3d 957 (9th Cir. 2010) 13

Miami Univ. Wrestling Club v. *Miami Univ.*, 302 F.3d 608 (6th Cir. 2002) 13

National Wrestling Coaches Ass'n v. *Department of Educ.*,
366 F.3d 930 (D.C. Cir. 2004)..... 6

Ollier v. *Sweetwater Union High Sch. Dist.*, 768 F.3d 843 (9th Cir. 2014)..... 2, 20

Pedersen v. *South Dakota High Sch. Activities Ass'n*,
No. 4:00cv4113 (D.S.D. 2000)..... 2

Portz v. *St. Cloud State Univ.*, 196 F. Supp. 3d 963 (D. Minn. 2016) 7, 14

CASES (continued): **PAGE**

Roberts v. *Colorado State Bd. of Agric.*, 998 F.2d 824 (10th Cir.), cert. denied, 510 U.S. 1004 (1993) 7

STATUTES:

Education Amendments of 1972 (Title IX),
20 U.S.C. 1681 *et seq.* 1
20 U.S.C. 1681(a) 1, 3
20 U.S.C. 1682 4

Equity in Athletics Disclosure Act, 20 U.S.C. 1092(g) 8

20 U.S.C. 3411 5

20 U.S.C. 3505(a) 6

Pub. L. No. 96-88, § 201, 93 Stat. 671 (1979) 6

REGULATIONS:

34 C.F.R. Pt. 106 1

34 C.F.R. 106.41 2

34 C.F.R. 106.41(a) 4

34 C.F.R. 106.41(c) 4

45 C.F.R. 86.41(c) 4

44 Fed. Reg. 71,413 (Dec. 11, 1979) 4

45 Fed. Reg. 29,557 (Exec. Order No. 12212) (May 5, 1980) 6

45 Fed. Reg. 72,995 (Exec. Order No. 12250) (Nov. 4, 1980) 2

RULE: **PAGE**

Fed. R. App. P. 29(a) 2

MISCELLANEOUS:

NCAA, NCAA Women's Sports Inventory (2019-2020), https://www.ncaa.org/sites/default/files/NCAA-WSI.pdf) 17, 20

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INTEREST OF THE UNITED STATES

The United States has a direct and substantial interest in this case, which involves an interpretation of Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. 1681 *et seq.*, and its implementing regulations, see 34 C.F.R. Pt. 106. Title IX prohibits any institution that receives federal financial assistance from discriminating on the basis of sex in its educational programs and activities. 20 U.S.C. 1681(a). The United States Department of Education (ED) has issued

implementing regulations under Title IX that provide that no individual may be discriminated against on the basis of sex in any interscholastic, intercollegiate, club, or intramural athletic program offered by a funding recipient. See 34 C.F.R. 106.41.

The Department of Justice coordinates the implementation and enforcement of Title IX's nondiscrimination provisions across federal executive agencies. See Exec. Order No. 12250, 45 Fed. Reg. 72,995 (Nov. 4, 1980). Consistent with that responsibility, the Department has participated as *amicus curiae* in numerous Title IX athletics cases. See, *e.g.*, *Ollier* v. *Sweetwater Union High Sch. Dist.*, 768 F.3d 843 (9th Cir. 2014); *Biediger* v. *Quinnipiac Univ.*, 691 F.3d 85 (2d Cir. 2012); *Communities for Equity* v. *Michigan High Sch. Athletic Ass'n*, 459 F.3d 676 (6th Cir. 2006), cert. denied, 549 U.S. 1322 (2007); *Cohen* v. *Brown Univ.*, 101 F.3d 155 (1st Cir. 1996), cert. denied, 520 U.S. 1186 (1997); see also *Cook* v. *Florida High Sch. Athletic Ass'n*, No. 3:09cv547 (M.D. Fla. 2009) (participating as *amicus curiae* in the district court). The Department also has participated in such cases as a plaintiff-intervenor. See, *e.g.*, *Pedersen* v. *South Dakota High Sch. Activities Ass'n*, No. 4:00cv4113 (D.S.D. 2000).

The United States files this brief under Federal Rule of Appellate Procedure 29(a).

STATEMENT OF THE ISSUE

The United States addresses the following question:

Whether the district court erred in its application of part one of the Department of Education's Three-Part Test for examining whether an educational institution provides nondiscriminatory athletic participation opportunities for students of both sexes under Title IX of the Education Amendments of 1972.[1]

STATEMENT OF THE CASE

1. Title IX, Its Regulations, And ED's Three-Part Test

a. 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). Title IX was passed with two purposes in mind: "to avoid the use of federal resources to support discriminatory practices," and "to provide individual citizens effective protection against those practices." *Cannon* v. *University of Chi.*, 441 U.S. 677, 704 (1979).

Title IX "authorize[s] and direct[s]" each agency empowered to extend federal financial assistance to any educational program or activity "to effectuate the provisions of [S]ection 1681 * * * with respect to such program or activity

[1] The United States takes no position on any other issues presented in this appeal.

by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken." 20 U.S.C. 1682. To that end, the Secretary of the Department of Health, Education, and Welfare (HEW), ED's predecessor agency, issued regulations in 1975 that prohibit discrimination in athletic programs offered by a recipient of federal funds. 45 C.F.R. 86.41(c) (subsequently codified at 34 C.F.R. 106.41(a)). The regulations require recipients to provide equal athletic opportunity for members of both sexes, and specify ten factors that are to be considered in determining whether a recipient offers equal athletic opportunities. 34 C.F.R. 106.41(c).

b. This case concerns the first of those ten factors—"[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). In 1979, after a notice and comment period, the Secretary of HEW published a Title IX Policy Interpretation in the Federal Register, which "clarif[ed] the meaning of 'equal opportunity' in intercollegiate athletics." 44 Fed. Reg. 71,413 (Dec. 11, 1979); (see also Ex. 8 to Opp. to Mot. for Preliminary Injunction, R. 8-9, PageID # 460-

482) (1979 Policy Interpretation).[2] The 1979 Policy Interpretation states that "[c]ompliance will be assessed in any one of the following ways":

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

See 44 Fed. Reg. at 71,418; (1979 Policy Interpretation, R. 8-9, PageID # 471-472). These three methods or "prongs" of compliance are known as the "Three-Part Test." (See Jan. 16, 1996, Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test, attached as Ex. 14 to Mot. for Preliminary Injunction, R. 2-15, PageID # 278-288) (1996 Clarification).

In response to questions regarding which athletic opportunities can be counted for purposes of Title IX compliance, and how the Three-Part Test works, ED's Office for Civil Rights (OCR) has issued several "Dear Colleague" letters to

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[2] "R. __" refers to the document number on the district court docket sheet. "PageID # __" refers to the page numbers in the paginated electronic record.

augment the 1979 Policy Interpretation.[3] As relevant here, the January 1996 "Dear Colleague" letter and clarification memorandum provides specific factors to guide OCR's analysis of each prong of the Three-Part Test and provides examples to demonstrate, in concrete terms, how OCR will consider these factors. (See generally 1996 Clarification, R. 2-15); see also *National Wrestling Coaches Ass'n* v. *Department of Educ.*, 366 F.3d 930, 935 (D.C. Cir. 2004) (stating that the 1996 Clarification "confirmed that institutions may comply with the Three-Part Test by meeting any one of the three prongs" and made clear that "the Three-Part Test is only one of many factors [ED] examines to assess an institution's overall compliance with Title IX and the 1975 Regulations").

2. Proceedings Below

a. In October 2020, Michigan State University (MSU) announced that it would discontinue its men's and women's varsity swimming and diving programs after the end of the 2020-2021 season. (Opinion, R. 16, PageID # 733). Plaintiffs, a number of current members of MSU's varsity women's swimming and diving team, sued MSU, alleging unlawful discrimination under Title IX. (Opinion, R. 16, PageID # 733). In particular, plaintiffs alleged that MSU provides "fewer and

[3] In 1980, Congress created ED. Pub. L. No. 96-88, § 201, 93 Stat. 671 (1979) (20 U.S.C. 3411); Exec. Order No. 12212, 45 Fed. Reg. 29,557 (May 5, 1980). By law, all of HEW's determinations, rules, and regulations continued in effect after ED assumed the responsibilities transferred to it. See 20 U.S.C. 3505(a).

poorer athletic participation opportunities" for women than it does for men and that "elimination of their team would exacerbate this problem." (Opinion, R. 16, PageID # 733) (citation omitted). They sought a preliminary injunction requiring MSU to maintain its varsity women's swimming and diving team for the duration of the lawsuit. (Opinion, R. 16, PageID # 733).

b. The district court denied plaintiffs' motion for a preliminary injunction, finding defendants in compliance with Title IX because the athletic participation opportunities for men and women at MSU are substantially proportionate. (See Opinion, R. 16, PageID # 749-755). To determine plaintiffs' likelihood of success on the merits, the district court examined MSU's athletics program under the Three-Part Test. (Opinion, R. 16, PageID # 735-737); see also 44 Fed. Reg. at 71,418. Because MSU planned to eliminate a women's team, the parties and the district court focused on the first prong of the test—*i.e.*, substantial proportionality. (Opinion, R. 16, PageID # 736-737).[4]

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[4] Where, as here, a university plans to eliminate a team for the underrepresented sex, it cannot satisfy either prong two or three of the Three-Part Test. See, *e.g.*, *Roberts* v. *Colorado State Bd. of Agric.*, 998 F.2d 824, 830 (10th Cir.) ("[T]he ordinary meaning of the word 'expansion' [in prong 2] may not be twisted to find compliance under this prong when schools have increased the relative percentages of women participating in athletics by making cuts in both men's and women's sports programs."), cert denied, 510 U.S. 1004 (1993); *id.* at 832 ("Questions of fact under this third prong will be less vexing when plaintiffs seek the reinstatement of an established team rather than the creation of a new one."); *Portz* v. *St. Cloud State Univ.*, 196 F. Supp. 3d 963, 975 (D. Minn. 2016)

(continued...)

In support of their motion for a preliminary injunction, plaintiffs submitted an expert report based on publicly available data, including reports MSU had filed under the Equity in Athletics Disclosure Act (EADA), 20 U.S.C. 1092(g), to establish a participation gap in the athletic opportunities available to male and female students. (See Opinion, R. 16, PageID # 741-743 (discussing plaintiffs' evidence)). MSU's most recent EADA reports showed a participation gap of 25 female participation opportunities, *i.e.*, MSU would have had to add 25 opportunities for women to make their participation rate proportionate to their respective full-time enrollment at MSU.[5] (Opinion, R. 16, PageID # 742). Analyzing publicly available player rosters, however, plaintiffs' expert opined that the participation gap could be as large as 33, 37, and 35 female athletes in the

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(...continued)
(recognizing that a university that sought to eliminate a women's team could not satisfy prongs two or three).

[5] The participation gap is not the difference between the number of male and female athletes. Rather, the participation gap refers to how many more opportunities a school would have to add for the underrepresented sex to make participation proportionate to student enrollment. As the district court explained, "[t]he formula for calculating the participation gap is as follows: (number of male athletes / percentage of males in student body) - total number of athletes = participation gap for women." (Opinion, R. 16, PageID # 737 n.2). For example, according to MSU's data for the 2019-2020 academic year, there were 895 athletic participants, including 445 male athletes and 450 female athletes, and the percentage of males in the student body was 49.07. (Opinion, R. 16, PageID # 747). The calculation of the participation gap, therefore, would be (445 / 0.4907) – 895 = 12. (Opinion, R. 16, PageID # 747 n.4).

seasons ending in 2018, 2019, and 2020, respectively. (Opinion, R. 16, PageID # 743). Moreover, plaintiffs' expert believed that MSU had improperly inflated the sizes of several of its women's teams, resulting in an actual participation gap much larger than 35 female participants. (Opinion, R. 16, PageID # 744-745).

Conversely, MSU submitted a report in which its expert posited that the participation gap was 27 female participation opportunities for the 2018-2019 academic year and 12 female participation opportunities for the 2019-2020 academic year. (See Opinion, R. 16, PageID # 746-747, 749 (discussing MSU's evidence)). MSU's expert further posited that, assuming all else remained equal, the participation gap would increase from 12 to 15 after eliminating the men's and women's swimming and diving teams. (Opinion, R. 16, PageID # 747).

The district court found MSU's expert report to be more credible, but it made no finding as to the actual size of the participation gap that would result from the elimination of the men's and women's swimming and diving teams. (Opinion, R. 16, PageID # 749). Rather, the court found that the average size of a women's team at MSU was 35 athletes. (Opinion, R. 16, PageID # 749). The court thus concluded that, regardless of whether the participation gap was 25 (based on EADA data), 35 (based on web rosters), or 12 (according to MSU's most recent records), MSU would satisfy the test for substantial proportionality because

"[m]ost of these estimates are less than the average size of a women's team at MSU." (Opinion, R. 16, PageID # 751).

In so finding, the court specifically rejected plaintiffs' argument that MSU would not satisfy the substantial proportionality test with even a participation gap as small as eight athletes. (Opinion, R. 16, PageID # 751). "Although it is theoretically possible that a school like MSU could field a viable team of eight female tennis players," the court stated, "the OCR has made clear that it considers substantial proportionality in the context of each institution, including that institution's 'specific circumstances and the *size of its athletic program*.'" (Opinion, R. 16, PageID # 751 (quoting 1996 Clarification)). To account for the size of the athletic program, the court observed that most courts "generally examine participation gaps *as a percentage* of the size of the athletic program at the school in question" and that a gap lower than 2% typically satisfies the substantial proportionality requirement. (Opinion, R. 16, PageID # 752). Here, the court found that "MSU's participation gap appear[ed] to be lower than 2%." (Opinion, R. 16, PageID # 753). The court thus held that plaintiffs had not shown a substantial likelihood of success on the merits. (Opinion, R. 16, PageID # 753).

Turning to the remaining preliminary injunction factors, the court first found that plaintiffs had met their burden to show a likelihood of irreparable injury in the absence of an injunction. (Opinion, R. 16, PageID # 753-754). However, the court

found that "an injunction would require MSU to allocate significant resources to the women's swimming and diving team that MSU could use elsewhere." (Opinion, R. 16, PageID # 754). Finally, the court found that plaintiffs had failed to show that an injunction would serve the public's interest because, in the absence of a showing of discrimination, MSU was "best positioned to steward its financial resources." (Opinion, R. 16, PageID # 754). Based on its assessment of all four factors, the court concluded that a preliminary injunction was not warranted and denied plaintiffs' motion. (Opinion, R. 16, PageID # 754).

c. Plaintiffs timely filed an interlocutory appeal. (Notice of Appeal, R. 18, PageID # 757).

SUMMARY OF ARGUMENT

In holding that MSU had offered nondiscriminatory athletic participation opportunities to its female students, the district court misapplied the first prong of ED's Three-Part Test in three ways. First, rather than using absolute numbers to determine whether participation opportunities were substantially proportionate, the court incorrectly relied on the percentage size of the disparity relative to MSU's overall athletic program. Second, and relatedly, the court incorrectly suggested that a school will generally satisfy prong one and avoid Title IX liability where its percentage disparity is 2% or less. Third, in analyzing whether the participation gap in female athletic opportunities was large enough to sustain a viable women's

team, the court incorrectly relied on the *average* women's team size. But, contrary to the district court's opinion, the 1996 Clarification explains that participation opportunities are not substantially proportionate when the participation gap is sufficient to sustain a viable team, even if that team is smaller than the average team's size and regardless of the percentage disparity.

Here, the participation gap after the elimination of the men's and women's swimming and diving teams is between 15 and 35 athletes (if not more), and the court recognized that it was "theoretically possible that a school like MSU could field a viable team of eight female tennis players." (Opinion, R. 16, PageID # 751). Despite recognizing this possibility, the court did not analyze whether MSU could in fact field another viable women's team. (Opinion, R. 16, PageID # 751) Accordingly, this Court should hold that the district court erred in its application of prong one of the Three-Part Test.

ARGUMENT

THE DISTRICT COURT ERRED IN ITS APPLICATION OF PRONG ONE OF THE THREE-PART TEST

In analyzing plaintiffs' likelihood of success on their claim that MSU's elimination of the women's swimming and diving teams violates Title IX, the district court incorrectly applied prong one of ED's Three-Part Test for evaluating whether athletic participation opportunities for male and female students are provided in numbers substantially proportionate to their respective full-time

enrollments. Indeed, the district court's application of prong one was flatly inconsistent with guidance ED has provided universities and other schools to promote Title IX compliance in their athletic programs.

In particular, the 1996 Clarification explains that, "where an institution provides * * * athletic participation opportunities for male and female students in numbers substantially proportionate to their respective full-time * * * enrollments, OCR will find that the institution is providing nondiscriminatory participation opportunities for individuals of both sexes."[6] (1996 Clarification, R. 2-15, PageID # 282). Exact proportionality is not required. (1996 Clarification, R. 2-15, PageID # 283). Rather, OCR conducts an individualized, fact-specific analysis to determine whether it would be unreasonable to expect a school to achieve substantial proportionality (1) "because of natural fluctuations in enrollment and participation rates"; or (2) "because it would be unreasonable to expect an institution to add athletic opportunities in light of the small number of

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[6] The Sixth Circuit has ruled that the 1979 Policy Interpretation is entitled to deference. See *Miami Univ. Wrestling Club* v. *Miami Univ.*, 302 F.3d 608, 615 (6th Cir. 2002). Although the Sixth Circuit has not explicitly ruled on the deference owed to the 1996 Clarification, it has cited to the 1996 Clarification in discussing the Three-Part Test, *id.* at 613 n.4, and other circuits have held that the 1996 Clarification is entitled to substantial deference, see *Biediger* v. *Quinnipiac Univ.*, 691 F.3d 85, 96 (2d Cir. 2012); *Mansourian* v. *Regents of the Univ. of Cal.*, 602 F.3d 957, 965 n.9 (9th Cir. 2010); *Chalenor* v. *University of N.D.*, 291 F.3d 1042, 1046-1047 (8th Cir. 2002).

students that would have to be accommodated to achieve exact proportionality." (1996 Clarification, R. 2-15, PageID # 283). But where the participation gap is large enough 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"—athletic opportunities are not substantially proportionate and Title IX liability may attach. (1996 Clarification, R. 2-15, PageID # 283).

1. Contrary to the clear guidelines contained in the 1996 Clarification, the district court held that, to determine whether a school satisfies the substantial proportionality requirement, courts generally should "examine participation gaps *as a percentage* of the size of the athletic program at the school in question." (See Opinion, R. 16, PageID # 752). That is not correct. What matters is the size of the school's participation gap and how many opportunities the school would have to add for the underrepresented sex to eliminate the participation gap. (See 1996 Clarification, R. 2-15, PageID # 283). An analysis of substantial proportionality requires courts to examine the size of the participation gap in absolute numbers, not simply as a percentage disparity. See *Biediger* v. *Quinnipiac Univ.*, 691 F.3d 85, 106 (2d Cir. 2012) ("[S]ubstantial proportionality is not determined by any bright-line statistical test."). If courts analyzed participation gaps only in terms of percentage disparities, then schools with large numbers of student athletes—such

as MSU—might well be able to eliminate viable women's teams without creating large percentage disparities.

To explain this point, the 1996 Clarification sets forth two examples, Institution A and Institution B, each with a 5% disparity.[7] (1996 Clarification, R. 2-15, PageID # 283). Although the percentage disparity is the same at each institution, because of the schools' different enrollment numbers, Institution A has a participation gap of 62 female athletes while Institution B has a participation gap of only 6. (1996 Clarification, R. 2-15, PageID # 283). The 1996 Clarification explains that Institution A could likely add a viable sport and, therefore, would not satisfy the first prong. (1996 Clarification, R. 2-15, PageID # 283). On the other hand, because six participants are unlikely to support a viable team, Institution B *would* satisfy the first prong. (1996 Clarification, R. 2-15, PageID # 283). Thus, the 1996 Clarification plainly demonstrates that a court must look at the participation gap in terms of absolute numbers to apply the Three-Part Test.[8]

2. Second, and relatedly, the district court suggested that there is a bright-line rule that a school will always satisfy the substantial proportionality

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[7] At each university, the 1996 Clarification states that women make up 52% of the university's enrollment and 47% of its athletes, (see 1996 Clarification, R. 2-15, PageID # 283), which equals a 5% disparity (52-47=5).

[8] While the participation gap is expressed as an absolute number, it is calculated using a ratio of the number of athletic participation opportunities for the underrepresented sex relative to their enrollment. See note 4, *supra*.

requirement so long as its participation gap is less than or equal to 2%. (See Opinion, R. 16, PageID # 752-753). That also is not correct.

As with relying on the percentage disparity generally, discussed above, creating a percentage-based safe harbor would improperly allow schools with large athletic programs to refuse to add viable teams for the underrepresented sex despite having large participation gaps in absolute numbers. For example, using MSU's numbers and holding everything else equal, if MSU had a 2% disparity in participation opportunities for men and women during the 2019-2020 academic year, it would have a participation gap of 36 female athletes.[9] The average women's team size in this scenario would be only 34 female athletes.[10] Because 36 women would of course be sufficient to constitute a viable team in many sports—for example, the average varsity women's ice hockey team consists of 23

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[9] According to MSU's numbers, during the 2019-2020 academic year, MSU's student body was 49.1% male and 50.9% female. (See Decl. of Alexandra Breske, Ex. B, R.8-2, PageID # 362). The total number of student athletes at MSU during the 2019-2020 academic year was 895. (See Decl. of Alexandra Breske, Ex. B, R.8-2, PageID # 362). A 2% disparity would mean that 48.9% of student athletes would be female (50.9 - 2 = 48.9), which would in turn result in 438 female athletes (895 * 0.489 = 438) and 457 male athletes (895 - 438 = 457). Using the formula in footnote four, the calculation of the participation gap would then be as follows: (457 / 0.491) - 895 = 36.

[10] During the 2019-2020 academic year, MSU had 13 women's teams. (See Decl. of Alexandra Breske, Ex. B, R.8-2, PageID # 362). The calculation of the average women's team size in this scenario is 438 female athletes / 13 women's teams = 34.

or 24 participants (see NCAA, *NCAA Women's Sports Inventory* 28, https://www.ncaa.org/sites/default/files/NCAA-WSI.pdf)—MSU would not satisfy the first prong of the Three-Part Test with a 2% disparity.[11] Yet, the district court reached the opposite conclusion because of its misplaced reliance on percentage disparities, as opposed to examining absolute numbers.

For this reason, and because ED's guidelines call for an individualized analysis, OCR "has not specified a magic number at which substantial proportionality is achieved." *Equity In Athletics, Inc.* v. *Department of Educ.*, 639 F.3d 91, 110 (4th Cir. 2011), cert. denied 565 U.S. 1111 (2012); see also *Biediger*, 691 F.3d at 106 (explaining that the Second Circuit did not "understand the 1996 Clarification to create a statistical safe harbor at [2%] or any other percentage"). Rather, as courts repeatedly have recognized, the 1996 Clarification states that the determination whether athletic opportunities are substantially proportionate must be made on a "case-by-case basis, rather than through use of a statistical test." (1996 Clarification, R. 2-15, PageID # 283); see also *Biediger*, 691 F.3d at 94 ("[S]ubstantial proportionality is determined on a case-by-case basis in light of 'the institution's specific circumstances and the size of its athletic program.'") (citation

[11] In this example, MSU would also not satisfy the first prong even under the district court's flawed analysis because, with a 2% disparity, its participation gap (36) would exceed the average women's team size (34). See pp. 18-21, *infra* (explaining why it is improper to rely solely on the average team size for the underrepresented sex).

omitted); *Equity in Athletics*, 639 F.3d at 110 ("[T]he [Department of Education] 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 the Department relies on such an individual analysis "rather than * * * a statistical test.") (citation omitted).[12]

3. Finally, in determining that athletic participation opportunities at MSU were substantially proportionate for men and women, the district court improperly relied solely on the average women's team size rather than analyzing if MSU's participation gap could sustain a viable women's team.

As a "frame of reference" for determining substantial proportionality, OCR may *consider* "the average size of teams offered for the underrepresented sex, a number which would vary by institution." (1996 Clarification, R. 2-15, PageID # 283). What matters, however, is whether the participation gap is large enough to sustain a *viable* team, not an average-size team. As the 1996 Clarification

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[12] See also *Beasley* v. *Alabama State Univ.*, 3 F. Supp. 2d 1325, 1335 (M.D. Ala. 1998) (noting that OCR's 1990 Title IX Investigators Manual states that "[t]here is no set ratio that constitutes 'substantially proportionate' or that, when not met, results in a disparity or a violation," and also noting that "it is appropriate to accord deference to the OCR's interpretation of its own regulations") (citation omitted); *Brust* v. *Regents of the Univ. of Cal.*, No. 2:07cv1488, 2007 WL 4365521, at *3 (E.D. Cal. Dec. 12, 2007) ("Courts have followed the Office for Civil Rights instructions to its Title IX investigators that '[t]here is no set ratio that constitutes "substantially proportionate" or that, when not met, results in a disparity or a violation.'") (citation omitted; brackets in original).

explains, where "it is likely that a viable sport could be added," an institution will not satisfy the first prong. (1996 Clarification, R. 2-15, PageID # 283). To hold otherwise would create an incentive for schools to increase their average team size by eliminating or refusing to add small-roster women's sports, producing larger participation gaps and more limited Title IX protection.

Here, the district court failed to conduct the necessary fact-intensive inquiry to determine whether a participation gap of at least 15 athletes (if not more) could sustain a *viable* women's team. Rather, the court incorrectly stated that while it was "theoretically possible that a school like MSU could field a viable team of eight female tennis players," in its view, "OCR has made clear that it considers substantial proportionality in the context of each institution." (Opinion, R. 16, PageID # 751). Thus, because the court found that the average size of a women's team at MSU was 35 athletes, it concluded that, regardless of whether the participation gap was 12 female athletes (using MSU's numbers, after eliminating the men's and women's swimming and diving teams), 25 female athletes (using plaintiffs' estimate based on EADA data), or 35 female athletes (using plaintiffs' estimate based on web rosters), MSU would satisfy the test for substantial

proportionality because "[m]ost of these estimates are less than the average size of a women's team at MSU."[13] (Opinion, R. 16, PageID # 751).

This analysis is flatly incorrect. The instructions in the 1996 Clarification make clear that the inquiry is whether the participation gap is large enough to sustain a viable team, not solely the average size of teams. If MSU can field a viable team of eight female tennis players, for example, it will not have satisfied prong one.[14] See *Ollier* v. *Sweetwater Union High Sch. Dist.*, 768 F.3d 843, 857 (9th Cir. 2014) (holding that a school had not satisfied prong one "[a]s a matter of law" where the disparity between female participation opportunities and female enrollment could sustain at least one viable competitive team). This determination

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[13] To the extent the district court relied on a participation gap of 12 female athletic opportunities, that was improper because that number was calculated prior to the elimination of the men's and women's swimming and diving teams. As MSU recognized, eliminating those teams would increase the participation gap from 12 to 15 female participation opportunities. To determine whether doing so would result in a Title IX violation, the district court should have calculated the participation gap that would result from the elimination of the men's and women's swimming and diving teams.

[14] Although the district court used tennis as an example (see Opinion, R. 16, PageID # 751), the United States notes that MSU already has a women's tennis team (see Decl. of Alexandra Breske, Ex. B, R.8-2, PageID # 362). However, it is possible that the participation gap is large enough to sustain another viable team that MSU does not currently offer, such as women's ice hockey, which has an average team size of 23 to 24 participants and, thus, would require fewer participants than an average-size team to field a viable team. See NCAA, *NCAA Women's Sports Inventory* 28, https://www.ncaa.org/sites/default/files/NCAA-WSI.pdf.

will require a fact-intensive analysis of whether the participation gap is large enough to sustain an intercollegiate women's team for which there is sufficient interest, ability, and available competition. (See 1996 Clarification, R. 2-15, PageID # 283).

In this case, MSU's own expert stated that eliminating the women's swimming and diving team would result in a gap of at least 15 female participation opportunities. The question, then, is whether that participation gap would support a viable women's team. (1996 Clarification, R. 2-15, PageID # 283). The district court failed to undertake the correct analysis to determine whether there is sufficient interest, ability, and available competition to add such a team, and misinterpreted prong one of the Three-Part Test in several significant respects.

CONCLUSION

Because the district court failed to undertake the correct analysis to determine whether MSU's participation gap could sustain a viable team, and misinterpreted prong one of the Three-Part Test in several significant respects, this Court should correct the district court's error and remand for further proceedings consistent with this Court's opinion.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(g):

(1) This brief complies with Federal Rule of Appellate Procedure 29 and with Federal Rule of Appellate Procedure 32(a)(7)(B) because, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), it contains 5040 words according to the word processing program used to prepare the brief.

(2) This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2019, in 14-point Times New Roman font.

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Date: May 26, 2021

CERTIFICATE OF SERVICE

I hereby certify that on May 26, 2021, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS AND URGING REVERSAL ON THE ISSUE ADDRESSED HEREIN with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Yael Bortnick
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ADDENDUM

ADDENDUM

Record Entry Number	Description	PageID # Range
2-15	Jan. 16, 1996, Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test, attached as Ex. 14 to Mot. for Preliminary Injunction	278-288
8-2	Decl. of Alexandra Breske, Ex. B	361-365
8-9	1979 Policy Interpretation, attached as Ex. 8 to Opp. to Mot. for Preliminary Injunction	460-482
16	Opinion	733-755
18	Notice of Appeal	757