No. 22-93

In the Supreme Court of the United States

MICHIGAN STATE UNIVERSITY, ET AL.,
Petitioners,

v.

SOPHIA BALOW, ET AL.,
Respondents.

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

BRIEF OF *AMICI CURIAE* STATES OF OHIO, ALABAMA, ALASKA, ARKANSAS, GEORGIA, INDIANA, LOUISIANA, MISSISSIPPI, MISSOURI, MONTANA, SOUTH CAROLINA, TENNESSEE, TEXAS, UTAH, AND WEST VIRGINIA IN SUPPORT OF THE PETITIONERS

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STATEMENT OF AMICI INTEREST*

Students at Ohio's flagship university have long been fond of singing that they "don't give a damn for the whole state of Michigan." *See, e.g.*, Bob Harley, *Ohio State-Michigan Contest Holds Interests of Grid World*, Akron Beacon Journal, at 30 (Oct. 17, 1933). Be that as it may, the State of Ohio cares a great deal for the proper interpretation of Title IX. That is why Ohio—joined by 14 other States—is filing this brief in support of a school from that State up north.

In its decision below, the Sixth Circuit interpreted Title IX to require exact, per-capita, sex-based parity between the student population and athletic opportunities. Thus, if 52 percent of a school's students are women, then 52 percent of the positions on the school's athletic teams must go to women. Schools may deviate from this strict formula only if they can show that it would be impossible to field a "viable" team that would achieve strict per-capita equality. This decision, by keying compliance with Title IX to a fluid percentage (namely, female enrollment) and to a malleable "viability" standard, leaves schools with little guidance regarding how to ensure their compliance with Title IX. In some circumstances, it may be *impossible* for schools to tell whether they are complying until it is too late.

That is a serious problem. Title IX is among the most highly regarded laws in the country. Understandably so. Title IX gives "young women an equal opportunity to participate in sports." *Bostock v.*

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* The *amici* States provided all parties with the notice required by Rule 37.2(a).

Clayton County, 140 S. Ct. 1731, 1779 (2020) (Alito, J., dissenting). For years, girls and women were shut out of athletic competitions, or offered only impoverished substitutes. No longer. Because of Title IX, girls and women may seize athletic opportunities that would have been unimaginable not long ago. Some will compete on major stages, like the Women's Final Four. Many millions more will develop the habits and skills that sports instill—habits and skills that remain important long after the athlete hangs up her cleats.

The Sixth Circuit's ruling threatens all this. It transforms Title IX's equal-opportunity guarantee into something approximating an almost-impossible-to-satisfy guarantee of equal outcomes. Laws that cannot command compliance will not command respect. And laws that command no respect are not likely to retain their vigor. By "inflating" Title IX's "great and beneficent" protections "beyond a sound basis," the Sixth Circuit's ruling risks "bringing about" the law's "eventual depreciation." *Price v. Johnston*, 334 U.S. 266, 301 (1948) (Jackson, J., dissenting).

SUMMARY OF ARGUMENT

This case concerns the scope of an important safe harbor for schools seeking to comply with Title IX and its rules for athletic programs. The Sixth Circuit's decision below erroneously shrinks that safe harbor, subjecting schools in the Circuit to an unworkable standard and exposing them to conflicting liabilities. Its novel decision conflicts with the decisions of other circuits and comes at the worst possible time, when schools are still reeling from the financial devastation caused by the pandemic. Given

these practical concerns, given the circuit split, and given the egregiousness of the Sixth Circuit's error, the Court should grant review and reverse.

ARGUMENT

I. The Sixth Circuit badly erred in holding that Michigan State violated Title IX.

In its decision below, the Sixth Circuit enforced a version of Title IX that the States do not recognize. The Court should grant review to correct the Circuit's mistake.

A. Title IX commands equal opportunity.

1. The Education Amendments Act, which Congress passed pursuant to its Spending Clause power, *see* U.S. Const. art. I, §8, cl.1, imposes requirements on schools that accept federal funds. 20 U.S.C. §§1681–88; *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 281 (1998). One such requirement appears in Title IX of the Act. 20 U.S.C. §1681(a). It says: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." *Id.*

Title IX prohibits only "intentional" discrimination. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173 (2005); *see also Cohen v. Brown Univ.*, 991 F.2d 888, 895 (1st Cir. 1993) ("*Cohen I*"). Thus, the Act does not "require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported pro-

gram or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area." 20 U.S.C. §1681(b).

Although gender disparities do not constitute Title IX violations in and of themselves, gender disparities can sometimes constitute *evidence* of intentional discrimination that violates Title IX. *Cohen v. Brown Univ.*, 101 F.3d 155, 164 (1st Cir. 1996) ("*Cohen II*"); *accord* §1681(b). Thus, although the statute prohibits only intentional discrimination, it allows courts and administrators enforcing Title IX to consider gender imbalances in a recipient's program when deciding whether the recipient intentionally discriminated on the basis of sex.

2. Congress instructed the Department of Health, Education, and Welfare to write "with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports." Education Amendments of 1974, PL 93–380, 88 Stat 484, §844. The agency (and its successor, the Department of Education) have done so by issuing three documents relevant here.

First, the agency promulgated a regulation that requires schools to "provide equal athletic opportunity for members of both sexes." 34 C.F.R. §106.41(b).

Second—and especially important here—the Department issued its "Policy Interpretation." The Policy Interpretation, which the agency promulgated through notice-and-comment rulemaking, creates a safe harbor for schools subject to Title IX. It says that schools will be presumed to have complied with Title IX's equal-opportunity guarantee when they provide "intercollegiate level participation opportuni-

ties for male and female students … in numbers substantially proportionate to their respective enrollments." 44 Fed. Reg. 71,413, 71,418 (Dec. 11, 1979). Even if a school cannot satisfy the Policy Interpretation's "substantially proportionate" safe harbor, it can negate an inference of intentional discrimination in two other ways. It can show a "history and continuing practice of program expansion" for the underrepresented sex. 44 Fed. Reg. at 71,418. Or it can show that it has "fully and effectively accommodated" the "interests and abilities" of the members of the affected sex at the school in question. (The Department of Education calls this the "Three-Part Test," with part one looking for substantial proportionality, part two looking for a history and continuing practice of expansion, and part three looking for full and effective accommodation of actual interest and ability. U.S. Dep't of Educ., Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test (Jan. 16, 1996) ("Guidance Letter"), https://perma.cc/2EAP-7CCV.)

Third, a Guidance Letter provides examples of compliance with the substantially-proportionate requirement. *Id.*

All told, and speaking in statutory terms, the Department has concluded that a gender "imbalance" in athletics is too small to create an inference of intentional "discrimination" if participation opportunities for men and women are "substantially proportionate."

In addition to empowering the Department to refine Title IX's application to college athletics, Congress charged the agency with enforcing Title IX's requirements. Title IX authorized the agency to

withhold federal funds from non-compliant schools. §1682. But it established certain procedural requirements that the agency must abide by before taking funds. *Id.* As part of the congressionally required process, the Department receives and investigates claims of discrimination within school athletic programs. *See, e.g.*, 44 Fed. Reg. at 71,413. Those investigations frequently end in agreements between the Department and the school about steps the school will take to improve opportunities for women. *Recent Resolutions*, U.S. Dep't of Educ., Office of Civil Rights, https://perma.cc/Q46F-2SFN.

At first, the Department alone had the power to enforce Title IX. That is because Congress never expressly empowered students to sue covered institutions for Title IX violations. This Court, however, interpreted Title IX to *implicitly* create a cause of action. The "history of Title IX," the Court held, "plainly indicate[d] that Congress intended to create such a remedy." *Cannon v. Univ. of Chicago*, 441 U.S. 677, 694 (1979). And Congress, this Court later held, ratified that interpretation by expressly abrogating the States' sovereign immunity for Title IX claims. *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 72 (1992); *id.* at 76–78 (Scalia, J., concurring in the judgment). In so doing, Congress confirmed that Title IX's private cause of action includes the right to recover money damages. *Id.* at 72 (majority op.); *id.* at 76–78 (Scalia, J., concurring in the judgment).

3. When plaintiffs bring Title IX suits, they often argue that schools violate the Policy Interpretation by failing to offer substantially proportionate athletic opportunities to men and women. *See, e.g.*, *Biediger v. Quinnipiac Univ.*, 691 F.3d 85, 97 (2d Cir. 2012); *Cohen I*, 991 F.2d 888. The plaintiffs in this case are

making precisely such an argument. Understanding their argument requires understanding what courts have said about proportionality.

Proportionality compares the ratio of student-athletes of a given sex with the ratio of students of that sex. For example, if women make up 53 percent of a school's student body, and 53 percent of the school's student-athletes, then the school's participation opportunities are exactly proportionate. Neither the statute nor the regulation requires exact proportionality. Pet.App.5a (majority op.). Instead, both require substantial proportionality. So the question becomes: How far can a school drift from exact proportionality while maintaining substantial proportionality? Courts have thought about this question in two ways. Pet.App.27a (Guy, J., dissenting) (citing 20 U.S.C. §1681(b)). First, as a percentage. Second, as an absolute number.

Consider first the percentage method. Courts embracing this approach look at the difference between the percentage of the student body made up of one sex and the percentage of student-athletes made up of the same. Pet.App.28a & n.5 (Guy, J., dissenting) (collecting cases). For example, if women make up 53 percent of a school's student body, and 51 percent of the school's student-athletes, then there exists a "participation gap" (a disparity in what the agency calls "participation opportunities") of 2 percent. If women make up 53 percent of a school's student body, and 33 percent of the school's student-athletes, then there exists a "participation gap" of 20 percent.

When courts think about the participation gap this way, they have recognized that schools satisfy

the safe harbor by keeping the percentage gap low—about 2 to 3 percent. Pet.App.62a–63a (collecting cases). That makes sense, as the Guidance Letter says that a school with a student-body population that is 52 percent female and a student-athlete population that is 50 percent female would satisfy the substantially-proportionate test. https://perma.cc/2EAP-7CCV. Schools with a participation gap of 10 percent or greater, on the other hand, have likely not met the safe harbor and must show compliance through another route. *Portz v. St. Cloud State Univ.*, 196 F. Supp. 3d 963, 975 (D. Minn. 2016) (collecting cases). Cases involving gaps of between 3 percent and 10 percent represent "borderline" cases that demand a closer look at the facts on the ground. *Biediger v. Quinnipiac Univ.*, 728 F. Supp. 2d 62, 111 (D. Conn. 2010), *aff'd*, 691 F.3d 85.

The second approach to thinking about the participation gap requires looking strictly at the number of participation opportunities for the underrepresented sex that a school would have to add in order to achieve exact proportionality. Pet.App.10a–11a (majority op.). This requires considering both the percent of the student body made up of the underrepresented sex and the absolute number of student-athletes. For example, if women make up 53 percent of a school's student body, and 51 out of 100 student-athletes, then there exists a participation gap of 5. The school would have to create 5 new participation opportunities for women in order to have women compose 53 percent of its student-athletes. If women make up 53 percent of a school's student body and 66 of 200 student-athletes, then there exists a participation gap of 85. The school would have to create 85 new participation opportunities for women in order

to have women compose 53 percent of its student-athletes. (Put in mathematical terms, this second approach measures the participation gap as follows: "(total male athletes ÷ percentage of males in the student body) – total number of athletes = the female participation gap." Pet.App.22a n.3 (Guy, J., dissenting).)

When courts think about the participation gap this way, they have held that schools satisfy the Policy Interpretation's safe harbor by keeping the participation gap lower than the average team size at that school. Pet.App.31a–33a (Guy, J., dissenting); Pet. App.58a; *see Biediger*, 691 F.3d at 107. Thus, if a school has an average team size of 30 and a participation gap of 20, the school is likely abiding by Title IX. If a school has an average team size of 36 and a participation gap of 80, it will likely have to prove compliance without the benefit of the safe harbor.

Courts have treated these two approaches as alternative options for establishing compliance. A school lands within the safe harbor when *either* its participation gap falls within the 2–3 percent safe harbor *or* its numerical participation gap falls below its average team size. Pet.App.22a n.3, 27a–28a (Guy, J., dissenting).

B. Michigan State complied with Title IX.

Applying the percentage approach, the District Court thought this case was easy. At worst, Michigan State has a participation gap of around 2 percent. Pet.App.62a; Pet.12; *see* Pet.App.20a (Guy, J., dissenting); Pet.13. That fits within the quantitative safe harbor recognized by many courts. Indeed, the *amici* States have not found any case holding that a

participation gap of 2–3 percent or less failed the substantially-proportionate standard. Pet.App.62a. This explains why the District Court determined that the plaintiffs were not likely to succeed on the merits of their Title IX claim and thus denied their request for a preliminary injunction. Pet.App.46a.

In vacating the District Court's decision, the Sixth Circuit adopted an inflexible rule that breaks with other courts. It concluded that the District Court could not evaluate substantial proportionality by looking at percentages. Pet.App.9a–13a (majority op.); *see* Pet.App.27a (Guy, J., dissenting). As a result, it also rejected the 2–3 percent safe harbor accepted by many courts. Pet.App.13a n.3. Courts and schools, under the Sixth Circuit's decision, must determine substantial proportionality by looking at the number of opportunities a school would need to create in order to achieve exact proportionality. Pet. App.13a (majority op.). And courts may ask only whether that numerical participation gap exceeds the size of "a viable team," without relying on a school's average team size. Pet.App.16a.

As the petition for a writ of certiorari explains, the Sixth Circuit's erroneous decision deepens a clear and acknowledged circuit split. Pet.18–24. To make matters worse, the Sixth Circuit erred. Pet.24–29. Courts may view the participation gap either as a percentage or as a number, and a quantitative safe harbor applies either way. Pet.App.27a, 29a (Guy, J., dissenting).

This brief will not belabor those points. Instead, it will explore some practical effects of the Sixth Circuit's error that may not be apparent from looking at

this case alone. Those practical effects further support granting the petition for a writ of certiorari.

II. The Sixth Circuit's decision will create serious on-the-ground problems.

If allowed to stand, the decision below will create substantial hardship for schools within the Sixth Circuit.

A. The Sixth Circuit's rule is inflexible and unworkable.

The Sixth Circuit's approach requires something close to "perfection." Pet.App.33a (Guy, J., dissenting). To be more precise, it has the consequence of exposing schools to Title IX liability based on very small numerical participation gaps. Thus, schools will likely face lawsuits whenever they cut athletic programs—even if the percentage of women participating in athletics nearly equals the percentage of women enrolled at the school.

This duty of numerical perfection extends beyond women. Title IX protects men too, and they have not been shy about suing schools when the balance of sporting opportunities tips in favor of women. *See, e.g.*, *Ng v. Bd. of Regents of Univ. of Minnesota*, No. 21-CV-2404, 2022 WL 602224 (D. Minn. Mar. 1, 2022); *Kelley v. Bd. of Trustees of Univ. of Illinois*, 832 F. Supp. 237 (C.D. Ill. 1993), *aff'd sub nom. Kelley v. Bd. of Trustees*, 35 F.3d 265 (7th Cir. 1994); *Gonyo v. Drake Univ.*, 837 F. Supp. 989 (S.D. Iowa 1993). The traditional safe harbor—anything less than a 2–3 percent participation gap—gives schools the flexibility required to comply with Title IX without fear of being sued by every adversely affected student.

By jettisoning any quantitative safe harbor, the Sixth Circuit's decision forces universities to walk a tightrope. Its approach poses numerous practical problems for schools seeking to comply with the statute.

First, it exposes schools to liability for short-term changes outside their control. Enrollment numbers for men and women fluctuate year to year. *See* Pet. App.2a–3a (majority op.); Guidance Letter, https://perma.cc/2EAP-7CCV. So does participation in sports. *See, e.g.*, *Mayerova v. E. Michigan Univ.*, 346 F. Supp. 3d 983, 994–95 (E.D. Mich. 2018). Likewise, Title IX compliance is not something that a school can simply solve once and for all. It must be monitored on an annual basis—schools may fall out of compliance despite having complied only a few years earlier. *See, e.g.*, *Ng*, 2022 WL 602224, at *2–3; *Compare Cohen v. Brown Univ.*, 16 F.4th 935, 940 (1st Cir. 2021) ("*Cohen III*"), *with Cohen I*, 991 F.2d 888.

Under the Sixth Circuit's decision—which exposes schools to liability for small numerical participation gaps—schools hoping to comply with Title IX will have to respond to those small, year-to-year fluctuations with small, year-to-year changes to their athletics programs. Following an uptick in female enrollment, schools may have to add a small women's team or cut a small men's team. *See* Pet.App.33a (Guy, J., dissenting). And if the population shift reverses the next year, then the school will have to cut the women's team or revive the men's team. A team that pops in and out of existence as needed is not likely to attract recruits or coaches, and not likely to provide a quality athletic opportunity to students who participate. No one plans to play in only his sophomore and

senior years. To make matters worse, because it is cheaper and easier to cut teams than to create them, the Sixth Circuit's test will lead to reduced athletic opportunities for everyone. That is not what Title IX is supposed to accomplish.

The percentage-based safe harbor recognized by many courts protects against this absurdity. It provides the "cushion" schools need to feasibly comply with Title IX year after year. *Ng*, 2022 WL 602224, at *10. This cushion is consistent with Title IX, which by its terms *does not require* strict proportionality. *See* 20 U.S.C. §1681(b).

Second, and relatedly, abandoning the percentage view of the participation gap punishes large schools with successful athletics programs—many of which call the Sixth Circuit home. Because these schools operate larger athletics programs with many teams, they face more potential for significant fluctuation in the absolute number of athletes participating in a given year. *Cf. Mayerova*, 346 F. Supp. 3d at 994–95. The percentage approach to the participation gap accounts for the different circumstances faced by institutions of different sizes. The Sixth Circuit's absolute, numerical approach does not. Thus, the Sixth Circuit's approach paradoxically makes schools that provide *more* athletic opportunities *more* likely to face Title IX liability.

Third, the Sixth Circuit's rule makes it more difficult for schools to address lingering disparities in their programs. Because schools operate on a budget, complying with Title IX originally required significant cuts in men's athletics programs. *See* Brenda L. Ambrosius, *Title IX: Creating Unequal Equality Through Application of the Proportionality Standard*

in Collegiate Athletics, 46 Val. U. L. Rev. 557, 558 (2012). Although schools have come a long way—and some, like Michigan State, have all but eliminated any gaps—nationwide, "college women receive almost 60,000 fewer athletics opportunities than college men." National Women's Law Center Br.10. Addressing the remaining disparities often requires cutting remaining men's programs, rather than adding women's programs. Ross A. Jurewitz, *Playing at Even Strength: Reforming Title IX Enforcement in Intercollegiate Athletics*, 8 Am. U. J. Gender Soc. Pol'y & L. 283, 322 (2000). And when schools cut men's programs, they are likely to face lawsuits from men who, like the women in this case, made decisions about where to matriculate based on their schools' athletic offerings. *Ng*, 2022 WL 602224. The Sixth Circuit's inflexible standard makes it more likely that these cuts will swing the balance too far in the other direction and expose schools to lawsuits from men. Schools will be hard pressed to find the perfectly sized men's team, the elimination of which will comply with the Sixth Circuit's holding.

Fourth, the Sixth Circuit's inflexible standard raises a concern familiar to other areas of Title IX: schools could "lose[] coming and going over the same incident." *Foster v. Bd. of Regents of Univ. of Michigan*, 982 F.3d 960, 969 (6th Cir. 2020) (*en banc*). Look no further than this case. If Michigan State's numbers, which the District Court credited, prove accurate, then eliminating its men's and women's swimming and diving program will turn a 12-person (numerical) participation gap favoring men into a 15-person participation gap favoring men. Pet.13. But the Sixth Circuit's decision opens the door for the plaintiffs to secure a preliminary injunction that

would restore only the women's swimming and diving program, potentially adding 33 female student-athletes and creating a small participation gap favoring women. Pet.App.20a (Guy, J., dissenting). Under the Sixth Circuit's inflexible rule, that could expose Michigan State to a lawsuit from former male athletes.

Fifth, the Sixth Circuit's viability standard ensures that schools will never know whether they are complying with Title IX. That is because women's teams in many sports (including bowling, golf, rifle, tennis, and triathlon) operate with fewer than ten members. NCAA Sports Sponsorship and Participation Rates Report, at p.221 (Jan. 6, 2022), https://perma.cc/T3NY-5L59. Thus, it will often be conceptually possible to create a "viable" team—a team capable of competing—by creating a small team with just a handful of spots. This means, for example, that a school may be liable for failing to add a "4-person tennis team" whenever its participation gap exceeds 4 opportunities. Pet.App.33a (Guy, J., dissenting). And it means that a school cannot gauge its own compliance by looking at its internal data; no matter how small the participation gap, the school will still have to convince a court that the gap is so small that no "viable" team could close it. That malleable metric defeats the purpose of providing a safe harbor.

B. The Sixth Circuit's decision will cause particular hardship in light of the COVID-19 pandemic.

Things only get worse when one considers the current financial state of college athletics. The pandemic wreaked havoc on athletic departments and

their budgets. Matthew J. Williams & Devin M. Mathis, *The COVID-19 Pandemic and the stress it put on College Athletics,* The Sport Journal (August 13, 2021), https://perma.cc/7BQN-PVBJ. This proves especially true for state-run, flagship universities with large and successful athletics programs. Those schools often have large, ongoing costs attributable to facilities and contracts. *Id.* Before the pandemic, these schools could rely on revenue from football and basketball to subsidize teams that do not make money. This allowed them to increase the number and quality of athletic opportunities for men and women alike. J. Brad Reich, *All the (Athletes) Are Equal, but Some Are More Equal Than Others: An Objective Evaluation of Title IX's Past, Present, and Recommendations for Its Future*, 108 Penn St. L. Rev. 525, 553 (2003). During the pandemic, however, schools missed out on revenue from football and basketball, as games were cancelled and attendance was limited. Williams & Mathis, *The COVID-19 Pandemic and the stress it put on College Athletics,* https://perma.cc/7BQN-PVBJ. That left them with large deficits.

Take The Ohio State University. In Fiscal Year 2020, its athletics program produced a surplus of about $18 million. NCAA Membership Financial Reporting System, FY2020, at p.93, https://perma.cc/R8S9-N6JV. In Fiscal Year 2021, that same athletics program incurred a deficit of *$63 million*. NCAA Membership Financial Reporting System, FY2021, at p.96, https://perma.cc/A2KH-BC94. The pandemic had a clear effect. Revenue from football ticket sales shrank from $66 million to $7,000 because the "team played only five regular season games, and all athletic events were closed to fans." Ohio State Athletics reports financial impact of COVID-19 disruptions,

Ohio State News (Feb. 1, 2022), https://perma.cc/7LJE-VWDN.

Ohio State does not stand alone. Major programs across the country faced similar deficits because of the pandemic. Williams & Mathis, *The COVID-19 Pandemic and the stress it put on College Athletics,* https://perma.cc/7BQN-PVBJ. And it will likely take "years" for their budgets to recover, if they ever do. *Id.*

One of the main solutions for cash-strapped athletics departments has been to cut programs. From March 2020 to August 2021, NCAA schools cut a "staggering" 352 athletic programs, with the pandemic serving as the main culprit. *Id.* These decisions can save a college millions of dollars.

Returning to the legal points at issue here, when a school must cut a team for financial reasons, the substantially-proportionate test becomes even more critical for establishing Title IX compliance. In times of financial ease, schools have three options for complying with this part of Title IX: the safe harbor that applies when a school demonstrates substantial proportionality; the second option of establishing a continuing practice of expanding women's sports; and the third option of showing that the school has met the actual interests of the women at its institution. 44 Fed. Reg. 71,413, 71,418. But when a school has to cut programs, the second and third options essentially disappear. Ambrosius, *Title IX: Creating Unequal Equality Through Application of the Proportionality Standard*, 46 Val. U. L. Rev. at 595. After all, a school will have a hard time showing a continuing history of expansion of women's opportunities when it just cut a women's program. And a school

will have a hard time showing that it has met the actual interests of women at the school when current female students sue the school to reinstate a team. *Id.* When money is tight, as it is now, a school will typically have to satisfy substantial proportionality in order to comply with Title IX. Armand B. Alacbay, *Are Intercollegiate Sports Programs A Buck Short? Examining the Latest Attack on Title IX*, 14 Geo. Mason U. Civ. Rts. L.J. 255, 270 (2004). The safe harbor becomes the only harbor.

A recent case illustrates the point. In *Ohlensehlen v. University of Iowa*, 509 F. Supp. 3d 1085, 1092 (S.D. Iowa 2020), the University of Iowa faced $100 million in lost revenue and a $75 million deficit thanks to the pandemic. To address these shortfalls, it decided to cut several programs: men's gymnastics and tennis, along with men's and women's swimming and diving. *Id.* at 1092. Female student-athletes won a preliminary injunction preventing the university from eliminating the women's swimming and diving team or any other women's team. *Id.* at 1088. The merits of the case turned entirely on whether Iowa offered substantially proportionate participation opportunities. *Id.* at 1094. The district court determined that cutting a women's team foreclosed the possibility of succeeding under the other prongs. *Id.* at 1101 n.13.

Thus, to comply with Title IX in times of financial hardship, a university will have to show substantial proportionality. As this case shows, the Sixth Circuit's inflexible standard will serve only to subject schools who must cut programs for financial reasons to additional lawsuits when money is already tight. And even if the school can eventually show that it is complying with the substantially-proportionate

standard, it may have to face an intrusive and expensive preliminary injunction based on preliminary data.

This will help no one. If schools cannot cut programs in times of financial hardship without risking expensive lawsuits, their only option will be to refrain from expanding their programs in times of financial ease. This will mean that students who compete in non-revenue-generating sports will miss out on athletic opportunities. That runs counter to the design of Title IX.

What is more, the novelty of the Sixth Circuit's decision means that schools in the Sixth Circuit have to play by a stricter set of rules than other schools across the country. Schools in the Sixth Circuit must compete with those other schools when recruiting students, coaches, and administrators. But because "no other federal circuit court has adopted" the Sixth Circuit's view of Title IX, Pet.App.21a (Guy, J., dissenting), Sixth Circuit schools must now compete on unequal footing. They alone will miss out on the flexibility Title IX permits. They alone will labor under the looming doubt that comes from making annual adjustments to their athletic programs based on small enrollment fluctuations. They alone will face the bad press that comes from losing lawsuits that students in other circuits would not even think to file. They alone will be hamstrung in their response to financial crises.

This Court should take this case to restore fair competition. It should establish a uniform rule that all schools may avail themselves of the percentage-based safe harbor that courts in most of the country recognize already.

III. Two additional reasons support granting certiorari in this case.

There are at least two additional reasons to grant Michigan State's petition for a writ of certiorari.

A. First, if the Sixth Circuit's decision is right, then the regulation it interpreted—the Policy Interpretation—is likely invalid.

Recall that Title IX is Spending Clause legislation. When Congress legislates under the Spending Clause, it "has broad power to set the terms" by which those who accept the money must abide. *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006). Critically, however, conditions "must be set out 'unambiguously.'" *Id.* (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)). This clear-notice requirement follows from the fact that legislation "enacted pursuant to the spending power is much in the nature of a contract." *Id.* (quotation omitted). Therefore, "to be bound by 'federally imposed conditions,' recipients of federal funds must accept them 'voluntarily and knowingly.'" *Id.* (quotation omitted); *accord Cummings v. Premier Rehab Keller, P.L.L.C.*, 142 S. Ct. 1562, 1570 (2022). They can do so only when the terms of the offer are clear.

Does a statute that bars only intentional discrimination, and that expressly does not impose liability based on gender imbalances alone, 20 U.S.C. §1681(b), *clearly* impose liability based on small participation gaps like the one the Sixth Circuit disapproved of? No. And because the statute does not *clearly* apply to such situations, Title IX must be interpreted not to apply in such situations at all. *Arlington*, 548 U.S. at 296, 300; *Cummings*, 142 S. Ct.

at 1570. If the regulations say otherwise, they go beyond Title IX and are therefore invalid. This Court should grant review to ensure that schools across the country are not laboring under an invalid regulation.

B. In addition, the Court has a special obligation to define the contours of Title IX's private cause of action.

Lurking behind much of what has already been said is this reality: Title IX was not designed to be enforced by private lawsuits. When Congress instructed what is now the Department of Education to decide how the statute should apply to athletics, it did not write a private right of action into the statute. It instead created an administrative process in which the withholding of funds serves as the primary remedy for noncompliance. §1681(b). For their part, the regulations speak in terms of what the agency will consider, not in terms of how a court should approach the problem. 34 C.F.R. §106.41. Nevertheless, this Court inferred a private right of action, which parties use to seek relief for violations of regulations implementing Title IX's commands. All this has exposed athletic departments to federal judicial oversight in the form of private damages awards, preliminary and permanent injunctions, class-action lawsuits, and more.

In another area of Title IX compliance prone to litigation, this Court recognized that, having birthed the statute's private right of action, the Court retains "a measure of latitude to shape a sensible remedial scheme that best comports with the statute." *Gebser*, 524 U.S. at 284. That entails examining the "statute to ensure that [this Court] does not fashion the scope of an implied right in a manner at odds with the

statutory structure and purpose." *Id.* And it means ensuring that the private right of action does not permit federal courts to intrude too far into the "vital relations" among States, schools, and students. *Davis Next Friend LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 685 (1999) (Kennedy, J., dissenting). Having "embarked on" the "endeavor" of allowing a private right of action "under a Spending Clause statute," this "Court is duty bound to exercise that discretion with due regard for federalism and the unique role of the States in our system." *Id.*

This Court has yet to exercise that discretion when it comes to Title IX and athletics. Its inaction has left lower courts to navigate this "rugged legal terrain" largely on their own. *Berndsen v. N. Dakota Univ. Sys.*, 7 F.4th 782, 790 (8th Cir. 2021) (Stras, J., concurring) (quotation omitted). And although many courts have recognized limits (like a percentage-based safe harbor) that accord with "the Spending Clause clear-statement rule" and the "protections of state and local autonomy that our constitutional system requires," *Davis*, 526 U.S. at 685 (Kennedy, J., dissenting), the Sixth Circuit here did not. This Court "can be assured that like suits will follow—suits, which in cost and number, will impose serious financial burdens on" universities, "the taxpayers who support them, and the [students] they serve." *Id.* Because these costs ultimately flow from this Court's decision to infer a private right of action, the Court is "duty bound" to act. *Id.*

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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