No. 22-93

IN THE

Supreme Court of the United States

MICHIGAN STATE UNIVERSITY, ET AL.,

Petitioners,

v.

SOPHIA BALOW, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF *AMICI CURIAE* OF THE UNIVERSITY OF MICHIGAN, THE OHIO STATE UNIVERSITY, AND VANDERBILT UNIVERSITY IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*[1]

Amici Curiae are institutions of higher education located in the territorial jurisdiction of the Sixth Circuit.

Amici are deeply committed to the ideals of Title IX and to gender equality in student athletics. To ensure that they are complying with Title IX and providing "equal athletic opportunity for members of both sexes," 34 C.F.R. § 106.41(c), *Amici* have long relied on the Office of Civil Rights' ("OCR") "substantial proportionality" standard and, in particular, on settled precedent and well-reasoned OCR guidance regarding how "substantial proportionality" is assessed. The percentage-based standard courts and regulators have long utilized to assess Title IX compliance provides *Amici* and other institutions much-needed flexibility to account for natural fluctuations in participation and enrollment numbers and to maximize athletic opportunities for male and female students alike.

In the decision below, the Sixth Circuit effectively jettisoned the percentage-based "substantial proportionality" standard on which *Amici* have long relied. In its place, the Sixth Circuit has adopted a strict, numbers-based rule that is both highly disruptive and profoundly unworkable. Because *Amici* must comply with Sixth Circuit precedent in administering their athletic departments, they have a strong interest in this case. They submit this brief to highlight the importance of the Question Presented and to explain

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[1] No counsel for a party authored any portion of this brief or made any monetary contribution intended to fund its preparation or submission. All parties received timely notice and have consented to the filing of this brief.

why this Court should grant certiorari and reverse the decision below.

INTRODUCTION AND SUMMARY OF ARGUMENT

Gender balance in student athletics yields profound benefits for universities and their students alike. Those benefits also redound to society more broadly. Since Title IX's enactment, universities across the country have made enormous progress toward achieving gender balance in their athletic programs. And *Amici* remain as committed as ever to promoting and maintaining gender balance in college sports.

The narrow Question Presented in this case is about how gender balance must be measured under Title IX. Consistent with the text of Title IX and longstanding agency guidance regarding its application, universities may establish compliance with Title IX by providing "substantially proportionate" opportunities for male and female college athletes. *See* Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,418 (Dec. 11, 1979). For decades, courts and regulators have generally taken a percentage-based approach to "substantial proportionality," assessing Title IX compliance by reference to the differential between male and female athletic participation rates—measured in percentage terms.

In a divided opinion below, the Sixth Circuit rejected that percentage-based approach in favor of a strict numerical standard that is "tantamount to requiring perfection." Pet. App. 33a (Guy, J., dissenting). According to the Sixth Circuit, athletic opportunities are not "substantially proportionate" if the number of additional students necessary to establish

perfect equality in participation rates is theoretically sufficient to support any "viable team." *Id.* at 17a (majority op.). That standard finds no support in Title IX, formal agency guidance, or common sense. *See* Pet. 24–29. In addition, the Sixth Circuit's ruling entrenched a clear circuit split regarding what is required to achieve "substantial proportionality" under Title IX. *See id.* at 18–24; *compare, e.g.*, *Boulahanis v. Bd. of Regents*, 198 F.3d 633 (7th Cir. 1999); *Equity in Athletics, Inc. v. Dep't of Educ.*, 639 F.3d 91 (4th Cir. 2011); *with, e.g.*, *Biediger v. Quinnipiac Univ.*, 691 F.3d 85 (2d Cir. 2012); Pet. App. 1a.

The Sixth Circuit's strict numerical standard is also profoundly unworkable in practice. For starters, athletic-participation rates and university enrollment numbers are fluid—not only year-to-year, but also throughout any given year. As a result, compliance with the Sixth Circuit's standard—whereby Title IX compliance may hinge on just a few students' participation and enrollment decisions—is all but impossible. Moreover, the Sixth Circuit's standard makes it more difficult for universities to invest in creating new athletic opportunities for men and women alike. It creates incentives for universities to cut teams or rosters (rather than add to them) in order to achieve perfect parity. And it puts universities—some of which, like Petitioner Michigan State University ("MSU"), are State institutions funded by taxpayer dollars—in a serious fiscal bind.

Absent intervention by the Court, the Sixth Circuit's "inflexible and unworkable compliance standard will wreak havoc with intercollegiate athletics pro-

grams." Pet. 2. This Court should grant MSU's petition, reverse the Sixth Circuit's judgment, and restore the "substantial proportionality" standard on which universities have long and successfully relied in seeking to achieve gender balance in collegiate athletics.

ARGUMENT

I. Gender Balance in Student Athletics Benefits Universities and Their Students.

The benefits of athletic participation are well-documented. Playing college sports "promotes good health," encourages "teamwork and cooperation," and fosters "a competitive spirit." U.S. Comm'n on Civil Rights, *More Hurdles to Clear: Women and Girls in Competitive Athletics* (July 1980). Athletic participation has been shown to correlate with academic and career success. *See, e.g.*, James J. Heckman & Colleen P. Loughlin, *Athletes Greatly Benefit from Participation in Sports at the College and Secondary Level* 5 (Univ. of Chi., Becker Friedman Inst. for Econ., Working Paper No. 2021-86, 2021). And athletic programs support broader diversity, equity, and inclusion efforts. *See generally id.*; *see also, e.g.*, NCAA, *Student-Athlete Ethnicity Report* 7 (2010).

These benefits were not always available to women. Many courts and commentators have detailed the unfortunate "historic emphasis" on men's athletics "to the exclusion of" women's athletics. *Williams v. Sch. Dist. of Bethlehem*, 998 F.2d 168, 175 (3d Cir. 1993); *see, e.g.*, Helen Lenskyj, *Out of Bounds: Women, Sport, and Sexuality* 11–16 (1987); Carole Oglesby, *Women and Sport: From Myth to Reality*

(1978). That exclusion often reflected harmful stereotypes that women and girls need not, could not, or ought not play sports. U.S. Comm'n on Civil Rights, *More Hurdles to Clear*, *supra*, at 1, 5; *see McCormick ex rel. McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 295–96 (2d Cir. 2004) (explaining how "girls and women were historically denied opportunities for athletic competition based on stereotypical views"). These archaic and discriminatory attitudes persisted and resulted in "[l]ow participation rates" among female athletes well into the Twentieth Century. *See* U.S. Comm'n on Civil Rights, *More Hurdles to Clear*, *supra*, at 5; Deborah Brake, *The Struggle for Sex Equality in Sport and the Theory Behind Title IX*, 34 U. Mich. J.L. Reform 13, 48 & n.163 (2001) (citing 44 Fed. Reg. at 71,414) (noting "female sports participation has been and continues to be limited by institutional discrimination"); *see also, e.g.*, *Hollander v. Conn. Interscholastic Athl. Conf., Inc.*, Civ. No. 12-49-27 (Conn. Super. Ct. Mar. 29, 1971) ("Athletic competition builds character in . . . boys. We do not need that kind of character in our girls . . . ."), *appeal dismissed*, 295 A.2d 671 (Conn. 1972), quoted in Note, *Sex Discrimination and Intercollegiate Athletics: Putting Some Muscle on Title IX*, 88 Yale L.J. 1254, 1268 n.110 (1979).

Thankfully, times have changed. Before Title IX's passage, fewer than 30,000 women participated in college sports nationwide. NCAA, *NCAA Sports Sponsorship and Participation Rates Report* 227 (2022). Today, that number is about 220,000—more than seven times the pre-Title IX baseline. *See id.* at 86. Over the same time period, the proportion of U.S. student-athletes who are female has increased from 15%

to 44%. And the proportion of women playing championship sports at Division I schools is even higher. *See id.* at 89 (pegging that number around 47%). Although many factors have increased female participation in athletics, Title IX—and, in particular, OCR's attendant "substantial proportionality" requirement—deserves substantial credit. *See* U.S. Comm'n on Civil Rights, *More Hurdles to Clear*, *supra*, at 1. "[T]he tremendous growth in women's participation in sports since Title IX was enacted disproves [the] argument that women are less interested in sports for reasons unrelated to lack of opportunity." *Cohen v. Brown Univ.*, 101 F.3d 155, 180 (1st Cir. 1996).

Amici remain as committed as ever to gender equality in student athletics. And their women's athletic teams have increasingly achieved national spotlight and success. *See, e.g.*, Andrew Kahn, *Michigan women's basketball ranked in top 10 for first time*, MLive (Dec. 20, 2021), https://bit.ly/3BujEeZ; Ryan Zuke, *Michigan women's gymnastics wins first national title*, MLive (Apr. 17, 2021), https://bit.ly/3JEcJCC; Franny Lazarus, *Six women's ice hockey Buckeyes headed to Beijing*, Ohio State News (Feb. 9, 2022), https://bit.ly/3zoAn43; Aiden Rutman, *Vanderbilt Women's golf advances to NCAA Championship*, The Vanderbilt Hustler (May 12, 2022), https://bit.ly/3Kw8Q4p.

In addition, *Amici* continue to develop new initiatives to celebrate and promote gender diversity in athletics. *See, e.g.*, Univ. of Mich. Athletics Dep't, *WOMAN on Mission to Empower, Educate and Evaluate* (June 29, 2021), https://bit.ly/3JIG0w9, Univ. of Mich. Sports, Health, & Activity Rsch. & Pol'y Ctr.,

Persistence Pays Off: How Women Athletics Changed the Game at the University of Michigan (Nov. 20, 2014), https://bit.ly/3Ig3sRe; Ohio State Univ. Athletics Dep't, *Ohio State Athletics to Celebrate 50th Anniversary of Title IX* (Feb. 28, 2022), https://bit.ly/3IYByKI; Vanderbilt Univ. Athletics Dep't, *Vanderbilt Celebrates 50 Years of Title IX* (June 23, 2022), https://bit.ly/3pQJNj9; *see also, e.g.*, Vanderbilt Univ. Athletics Dep't, *Vanderbilt Adds Volleyball as Varsity Sport* (Apr. 19, 2022), https://bit.ly/3csCawd.

II. The Sixth Circuit's Interpretation of the Title IX Standard Is Wrong and in Clear Conflict with Other Circuits' Interpretations.

Title IX requires universities to provide "equal athletic opportunity for members of both sexes." 34 C.F.R. § 106.41(c). For decades, OCR has recognized that an institution can comply with Title IX by providing "substantially proportionate" opportunities for male and female college athletes. *See* 44 Fed. Reg. at 71,418. In assessing an institution's compliance with that requirement, OCR and courts look to what is sometimes called the "participation gap"—*i.e.*, the disparity between one gender's athletic participation rate and that gender's enrollment rate. *See, e.g.*, Off. of Civ. Rts., U.S. Dep't of Educ., *Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test* (Jan. 16, 1996), https://bit.ly/3JHRu2T ("1996 Clarification"); *Equity in Athletics*, 639 F.3d at 110 (finding that a disparity between 1% and 2% is "substantially proportionate").

Until now, OCR and the majority of federal courts—including the Sixth Circuit—have generally

assessed whether that gap is consistent with the guarantee of "substantial proportionality" in percentage terms. Specifically, they have looked to the difference between (i) the percentage of student-athletes who are female (or male) to (ii) the percentage of enrolled students who are female (or male). Pet. 18–22; *see, e.g.*, *Equity in Athletics*, 639 F.3d at 97, 110 (finding "substantial proportionality" where disparity was below 2%); *Boulahanis*, 198 F.3d at 639 (finding "substantial proportionality" where "athletic participation of men remained within three percentage points of enrollment"); *Miami Univ. Wrestling Club v. Miami Univ.*, 302 F.3d 608, 610 (6th Cir. 2002) (upholding decision to eliminate men's sports programs to remedy OCR's finding that the "rates of participation in athletics [did] not correspond to the percentage of male and female students"). *But see, e.g.*, *Biediger*, 691 F.3d at 106 (noting that there is no "statistical safe harbor at . . . any other percentage").[2]

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[2] Courts and regulators have recognized that this percentage-based approach is not the only way an institution can establish substantial proportionality. Courts and regulators have also taken a numerical approach by comparing (i) the absolute number of female (or male) athletes that would need to be added in order to achieve perfect parity to (ii) the university's average team size. *See, e.g.*, Letter from Zachary Pelchat, Team Leader, Off. of Civ. Rts., U.S. Dep't of Educ., to Jason Archard, Principal, Innovative Horizons Charter School, at 5 (July 15, 2016), https://bit.ly/3v3b8Cs; Letter from Ann Cook-Graver, Supervisory Attorney, Off. of Civ. Rts., U.S. Dep't of Educ., to Eric Kaler, President, University of Minnesota-Twin Cities, at 6 (Sept. 27, 2018), https://bit.ly/3LO6v56; *accord Ng v. Bd. of Regents of Univ. of Minn.*, No. 21-cv-2404, 2022 WL 602224, at *9 (D. Minn. Mar. 1, 2022) (citing same average-team framework); *see also* Pet. 28 n.5. This numerical approach is superior to the Sixth

This approach is rooted in Title IX itself, in formal OCR guidance, and in historical litigation positions of the United States. Title IX defines "imbalance" "with respect to the total number or percentage of persons of that sex." 20 U.S.C. § 1681(b). OCR guidance uses "substantial proportionality" language and explains that a participation gap of 1% or 2% "would satisfy" Title IX. 1996 Clarification, RE 8-10, Page ID # 489–90. And the United States has also long looked to percentages in assessing Title IX compliance. *See, e.g.*, Brief for the United States as Amicus Curiae at 12, *Cohen v. Brown Univ.*, 101 F.3d 155 (1st Cir. 1995) (No. 95-2205), 1995 WL 17829532, at *12 ("Prong one of the Policy Interpretation requires a relatively simple comparison of the gender ratio of participating athletes with the gender ratio of the student population."); *see also* Pet. 32–33.

In the decision below, the Sixth Circuit discards these decades-old metrics. Instead, it instructs that courts must "look[] at the [participation] gap in *numerical* terms, not as a percentage," and that they must then ask whether *any* "viable team" could be formed to close the numerical gap. Pet. App. 13a, 16a. The facts of this case illustrate the problem with that approach. Using MSU's Title IX data, the participation gap at that institution now amounts to just 15 students, or 0.87%, while the average team size is 35

Circuit's "any viable team" metric. But it is best understood as an additional means of establishing compliance with Title IX under a numerical approach—particularly for institutions with small athletic programs such that a larger percentage gap may correlate with very small numerical difference. *See* Pet. 8. The percentage approach adopted by other courts remains an independent means of establishing compliance with Title IX.

students. *See* Pet. 13. Allowing the Plaintiffs' claim to proceed on those facts, as the dissent below explained, "is tantamount to requiring perfection." Pet. App. 33a (Guy, J., dissenting). And perfection is a far cry from "substantial proportionality." *See id.*

Perhaps the greatest irony in the majority's logic—noted by Judge Guy in dissent—is that restoring only the women's program in this case would result in an even larger participation gap of 21 *in the other direction*. *See* Pet. App. 35a. And that new disparity could itself violate Title IX under the Sixth Circuit's metric. *Cf., e.g.*, *Boulahanis*, 198 F.3d at 638 (noting that the same standard applies to men's claims). In fact, a lawsuit based on that fact pattern arose nearly two decades ago, in *Kelley v. Board of Trustees*, 35 F.3d 265 (7th Cir. 1994). In *Kelley*, the University of Illinois elected to eliminate its men's swimming program but retained its women's swimming program in response to significant financial challenges. Members of the men's team then brought suit, alleging that the elimination of its team (but not the women's team) violated Title IX. The University was ultimately spared from liability—but only because "after eliminating the program, men's participation in athletics would continue to be more than substantially proportionate to their presence in the University's student body." *Id.* at 270. Here, restoring only the women's program would render men's participation *not* substantially proportionate under the Sixth Circuit's standard. So if only the women's team is restored and members of the men's filed the sort of suit the male swimmers did in *Kelley*, they would likely prevail.

The Sixth Circuit's approach thus deviates from

Title IX, OCR formal guidance, and common sense. It is therefore unsurprising that—as the Sixth Circuit itself acknowledged—"[m]any cases" from other circuits have rejected it. Pet. App. 13a n.3; *see id.* at 21a ("[T]he majority announces legal standards that no other federal circuit court has adopted—and for good reason—because the standards blatantly contradict Title IX and agency guidance.") (Guy, J., dissenting). Indeed, as MSU's petition explains, the decision below creates a clear circuit conflict. *See* Pet. 18–24 (describing split). This Court should resolve this division of authority and clarify that the time-tested "substantial proportionality" metrics apply.

III. The Sixth Circuit's Unworkable Standard Will Harm Universities and Students.

Universities across the country have long relied on the well-established percentage-based framework to assess and ensure compliance with Title IX's requirements. If allowed to stand, the Sixth Circuit's strict numerical rule would put universities in an impossible bind—and threatens to undermine the very interests Title IX was intended to serve.

A. The (still quite limited) flexibility that a percentage-based framework provides is absolutely vital to the functioning of university athletic departments. That is chiefly because of fluctuation in (1) the number and gender distribution of students interested in participating in athletics and (2) the number and gender distribution of students enrolled in a university. Both of those numbers and distributions vary not only year-on-year, but also throughout any particular year. The number of athletic participants changes each year

based on differing interests across an evolving student body—and then stays in constant flux, as student-athletes try out, transfer, and even quit teams throughout the year. *See* Pet. 29–30. Overall student enrollment numbers, in turn, differ based on variance in rates of offers and acceptances. And in any given year, enrollment numbers are not settled until weeks *after* each academic year begins.

Yet the Sixth Circuit's strict numerical approach could subject universities to strict liability under Title IX based on even the slightest numerical disparities. *See* Pet. App. 33a (Guy, J., dissenting). After all, to take only a couple of examples, a viable rifle team requires only four participants, and a viable triathlon team requires only five. *See* NCAA, *2022–23 NCAA Rifle Rules Modifications* 3 (July 28, 2022); NCAA, *Women's Triathlon NCAA Emerging Sport Fact Sheet* (2015); *see also* Pet. App. 33a (Guy, J., dissenting) (noting the possibility of a "4-person tennis team"). Even a viable swimming team may require as few as 11 participants. *See* NCAA, *Division II Championship Sponsorship/Participation Information* 3 (Feb. 3, 2021); *see also* NCSA, *Women's College Swimming Scholarships*, https://bit.ly/3KtgvAs (last accessed Aug. 29, 2022) (listing average team sizes across divisions). So under the Sixth Circuit's numerical approach, small differences in participation or enrollment numbers can throw a university out of compliance with Title IX and subject it to potential liability. A percentage approach, by contrast, allows for some fluctuation in numbers, particularly at larger schools, but still demands substantial proportionality.

Lawsuits making such claims—which are sure to

come in the wake of this ruling, and which are sure to resurge every time a university's participation rates or enrollment numbers change—would be incredibly disruptive to university athletic programs and to their educational missions more broadly. Instead of encouraging universities to develop thoughtful, long-term strategies to foster gender diversity within their athletic programs, the threat of liability will force them to rely on a series of quick fixes in response to every small fluctuation in team or enrollment numbers. *See* Pet. 29–30, 31–32.

B. Indeed, the Sixth Circuit's rule could conceivably result in *fewer* athletic opportunities for student-athletes of both genders at some schools. That is true, first and foremost, because a strict numerical standard will disincentivize universities from creating new athletic programs. After all, establishing a new program could subject the university to immediate liability if it results in even a small numerical advantage for female (or male) student-athletes. Moreover, new programs may prove effectively impossible to ever eliminate. As the dissent below noted, "student-athletes (male and female alike) may establish a Title IX violation by simply relying on the prior existence of their team to show that there is enough interest, ability, and competition for their team." Pet. App. 33a (Guy, J., dissenting). Coupled with a standard whereby even a slight numerical gap can establish a Title IX violation, the Sixth Circuit has thus effectively created a "Title IX right to insist that their team continue to participate in perpetuity." MSU Petition for En Banc Review, R. 45, at 13–14 (collecting authorities).

In addition, universities could in some cases be incentivized to cut teams or rosters, rather than add to them, in working toward perfect parity. *Cf.* 1996 Clarification, RE 8-10, Page ID # 489–90 (describing different hypotheticals based on program size). That is particularly true of Division I schools, which may struggle to identify and recruit additional student-athletes who are able to compete at the requisite level. For example, if a university cannot recruit six new male athletes to its program, it may well be forced to cut six existing female athletes so as to achieve numerical parity—only to find itself needing to cut different rosters next year when participation and enrollment numbers invariably fluctuate.

C. Furthermore, the Sixth Circuit's rule subjects universities in the Sixth Circuit—many of which are State institutions funded in part with taxpayer dollars—to significant fiscal challenges. This is a case in point. Faced with a pandemic-fueled, eight-figure budget deficit, MSU made the difficult decision to eliminate its entire swimming and diving program for both male and female students. It did so in part because the swimming and diving facilities needed "major upgrades and repairs." Pet. App. 20a (Guy, J., dissenting). But under the majority's reasoning, MSU apparently cannot eliminate that program—even on an equal basis—and must instead bear major capital costs to preserve the status quo. Those costs may well be borne by taxpayers. And they will surely be felt by students and faculties involved in athletic or other programs that may face cuts as a consequence.

D. Finally, the Sixth Circuit's rule opens the door

to extremely disruptive—and in some cases practically impossible—forms of injunctive relief. Here, for example, to reestablish a women's swimming and diving team, MSU would need to recruit new athletes, hire a new coach, and make repairs to and upgrade closed facilities. But "schools cannot create a new team simply with the wave of a magic wand." Pet. 30; *cf.* 44 Fed. Reg. at 71,417 (requiring active programs to have gender equity in quality of facilities and other opportunities). And even if they *could*, a requirement that they *must* is particularly impractical—since they will be free (and, as a practical matter, may have no choice but) to achieve compliance by leveling down rather than up. *See* Pet. App. 34a–35a (Guy, J., dissenting); *Horner v. Ky. High Sch. Athletic Ass'n*, 43 F.3d 265, 275 (6th Cir. 1994) ("An institution need not pour ever-increasing sums into its athletic programs in order to bring itself into compliance, but has the option of reducing opportunities for the overrepresented gender while keeping opportunities for the underrepresented gender stable.").

* * *

In short: The potential consequences of the Sixth Circuit's holding for universities and students are staggering. With a new school year just underway and universities already struggling to grapple with the implications of the Sixth Circuit's new rule, certiorari is warranted now.

CONCLUSION

The petition for writ of certiorari should be granted and the decision below should be reversed.

August 31, 2022

Respectfully submitted,

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