IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA
THIRD DIVISION

D.M., a minor, by BAO XIONG, the mother, legal guardian, and next friend of D.M.; and Z.G., a minor, by JOEL GREENWALD, the father, legal guardian, and next friend of Z.G.,	**JURY TRIAL DEMANDED**
Plaintiffs,	
v.	Case No. _____
MINNESOTA STATE HIGH SCHOOL LEAGUE; DAVID SWANBERG in his official capacity as President of the Board of Directors for the MINNESOTA STATE HIGH SCHOOL LEAGUE; ERICH MARTENS in his official capacity as Executive Director of the MINNESOTA STATE HIGH SCHOOL LEAGUE; CRAIG PERRY in his official capacity as an Associate Director of the MINNESOTA STATE HIGH SCHOOL LEAGUE; and BOB MADISON in his official capacity as an Associate Director of the MINNESOTA STATE HIGH SCHOOL LEAGUE,	**MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**
Defendants.	

INTRODUCTION

Bao Xiong and Joel Greenwald were shaken to learn that the Minnesota State High School League (MSHSL) prohibits their teenage sons from competing on their schools' Dance Team solely because of their sex. Both boys have been dancing and training with the girls on their respective high school teams for years. Xiong Dec. ¶ 4; Greenwald Dec. ¶ 7. Moreover, the girls and high schools are very encouraging and supportive of the boys participating on

their high school teams. Xiong Dec. ¶¶ 6-8; Greenwald Dec. ¶ 11. It is only MSHSL's discriminatory rule that is preventing the boys from participating.

Ms. Xiong and her son D.M. were particularly distressed because Dance Team provides D.M.—a shy boy—with pride and a feeling of belonging. Xiong Dec. ¶ 5. That feeling was taken away once D.M. was denied the opportunity to compete based solely on his sex. He once again felt alone and like he did not belong in the activity he loves. Xiong Dec. ¶ 9. Likewise, Z.G. is saddened by MSHSL's stifling of his personal and social development through the activity he is passionate about, Greenwald Dec. ¶ 9, and his father, Dr. Greenwald, misses the opportunity to see his son engage with the passion he has spent years practicing. Greenwald Dec. ¶ 10.

MSHSL's sex-discriminatory rule restricting Dance Team to girls has all the appearances of an official policy that relies on "overbroad generalizations about the different talents, capacities, or preferences of males and females." *United States v. Virginia*, 518 U.S. 515, 533 (1996). Such a policy violates the Equal Protection Clause of the Fourteenth Amendment and Title IX of the Education Amendments of 1972 (Title IX).

The Court should enter a preliminary injunction enjoining MSHSL's girls-only rule for Dance Team because the rule violates the Equal Protection Clause as explained in *Virginia* and *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982). Official rules and policies that discriminate on the basis of sex are unconstitutional unless they are substantially related to achieving important governmental objectives. *Craig v. Boren*, 429 U.S. 190, 197 (1976). MSHSL cannot meet that heavy burden and, as a result, D.M. and Z.G. are likely to succeed on the merits of their Equal Protection claim.

In addition, MSHSL's girls-only rule also violates Title IX. Under Title IX, "[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). As with the Equal Protection Clause, single-sex extracurricular activities are also subject to intermediate scrutiny under Title IX, but the accepted rationales are substantially narrower. *See* 34 C.F.R. § 106.34(b)(1)(i)(A)-(B). Thus, MSHSL can find no safe harbor under Title IX, and D.M. and Z.G. are likely to succeed on the merits of their Title IX claim.

Even though D.M. and Z.G. are likely to succeed on the merits of their lawsuit, they will suffer irreparable harm if MSHSL's girls-only rule is not enjoined during this litigation. The 2018-19 winter Dance Team season begins in late October. If a preliminary injunction does not issue, D.M. and Z.G. will be forced to miss yet another Dance Team season—a season they can never get back. The deprivation of constitutional rights "for even minimal amounts of time, unquestionably constitutes irreparable harm." *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

Finally, the balance of equities and the public interest both favor preliminary relief here. Without a preliminary injunction, the potential harm to D.M. and Z.G. is severe: if not enjoined, both boys will be banned from an "opportunity to participate in [their activity] of choice on a continuous and uninterrupted basis." *Portz v. St. Cloud State Univ.*, 196 F. Supp. 3d 963, 972 (D. Minn. 2016). Any countervailing interest by MSHSL in avoiding a potential administrative burden by allowing boys to compete in Dance Team is insufficient to override D.M.'s and Z.G.'s interest in equal treatment under the law. *See City of Richmond v. J.A. Croson*

Co., 488 U.S. 469, 508 (1989) ("[T]he interest in avoiding the bureaucratic effort necessary to tailor remedial relief" does not justify discriminatory rules or policies.). And the public is best served, not by the continuance of discriminatory rules for competitive Dance Team, but rather by the "preservation of constitutional rights." *Phelps-Roper v. Nixon*, 545 F.3d 685, 694 (8th Cir. 2008) (overruled on other grounds).

STATEMENT OF FACTS

D.M. is a sixteen-year-old boy who lives in Maplewood, Minnesota. Xiong Dec. ¶ 3. He attends Roseville High School where he will be in the eleventh grade for the 2018-19 school year. Xiong Dec. ¶ 3. D.M. is passionate about dance. Xiong Dec. ¶ 4. Since his initial introduction to dance over a year ago, he has studied and practiced jazz, kick, and several other dance techniques. Xiong Dec. ¶ 4.

Before D.M.'s sophomore year he tried out for his school's recreational summer dance program.[1] Xiong Dec. ¶ 6. He made the team. Xiong Dec. ¶ 6. He was welcomed by his female teammates as a member of the recreational team, and he treasured the camaraderie and teamwork. Xiong Dec. ¶ 7. Because D.M. enjoyed being part of the dance team, he also joined the team for the school's fall recreational program.[2] Xiong Dec. ¶ 7. During the fall program the team learned and performed a routine that included D.M. Xiong Dec. ¶ 7. D.M. continued to enjoy being a part of the team and learning dance routines, so he sought to try out for Roseville's competitive Dance Team during the winter of his sophomore year. Xiong Dec. ¶ 7.

[1] The summer recreational program does not discriminate on the basis of sex.
[2] The fall recreational program does not discriminate on the basis of sex.

His coach allowed him to try out for the team that winter, but once the coach learned of MSHSL's rules prohibiting boys from participating in competitive Dance Team, D.M. was no longer allowed to practice or compete with his teammates. Xiong Dec. ¶ 8. This exclusion caused D.M. to be very upset and feel left out, especially since he was no longer able to perform the routine he learned and practiced with his teammates during the fall program. Xiong Dec. ¶ 8. Distraught, but resolute, D.M. volunteered to be his team's student manager during MSHSL events so he could still support the team. Xiong Dec. ¶ 10. If not for the MSHSL rules prohibiting boys from competing on the Dance Team, D.M. would practice and perform with his teammates at winter MSHSL competitions just as he does during the summer and fall recreational seasons. Xiong Dec. ¶ 11.

Z.G. is a sixteen-year-old boy who lives in Minnetonka, Minnesota. Greenwald Dec. ¶ 3. He attends Hopkins High School where he will be in the eleventh grade during the 2018-19 school year. Greenwald Dec. ¶ 3. Z.G. began dancing when he was in fifth grade after attending recreational dance classes in a professional studio. Greenwald Dec. ¶ 4. Since the eighth grade, Z.G. has regularly danced in a private studio. Greenwald Dec. ¶ 5. Z.G. is particularly driven by the competitive aspect of dance. Greenwald Dec. ¶ 8.

When Z.G. was in seventh grade, his father attended an informational meeting for parents whose children wanted to join the school dance team. Greenwald Dec. ¶ 6. During that meeting he was informed that Dance Team was only for girls. Greenwald Dec. ¶ 6. Angry over his exclusion from the school's Dance Team, Z.G. nevertheless continues to attend dance classes at the private studio where he regularly practices with the very girls who are on the school's competitive Dance Team. Greenwald Dec. ¶ 7. Z.G.'s female friends on the school

Dance Team, as well as the school's athletic director, are supportive of Z.G. joining the team, but their hands are tied by MSHSL's discriminatory rule. Greenwald Dec. ¶ 11.

MSHSL Bylaw 412 of the MSHSL Official Handbook[3] states that competitive Dance Team is a girls-only activity. As a result, solely because of D.M.'s and Z.G.'s sex, they are prohibited from competing on the Dance Team. Therefore, D.M. and Z.G. seek preliminary injunctive relief enjoining MSHSL's discriminatory rule for the upcoming school year, in order to join their friends, coaches, and teammates. Granting such relief will not only allow these boys to participate on the Dance Team, it will also vindicate their rights under the Fourteenth Amendment's Equal Protection Clause and Title IX.

STANDARD OF REVIEW

In deciding whether to issue a preliminary injunction under Rule 65 of the Federal Rules of Civil Procedure, the Court must consider "(1) the threat of irreparable harm to the movant; (2) the state of balance between this harm and the injury that granting the injunction will inflict…; (3) the probability that movant will succeed on the merits; and (4) the public interest." *Grasso Enters., LLC v. Express Scripts, Inc.*, 809 F.3d 1033, 1036 n.2 (8th Cir. 2016) (quoting *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981) (en banc)). In applying the test, the Court must weigh the factors flexibly, *Dataphase*, 640 F.2d at 113, but the movant is required to show the threat of irreparable harm. *Id.* at 114 n.9; *see also Calvin Klein Cosmetics Corp. v. Lenox Labs., Inc.*, 815 F.2d 500, 503 (8th Cir. 1987) ("No single factor in itself is dispositive; in each case all the factors must be considered to determine whether on balance they weigh towards granting the injunction.").

[3] Available as Exhibit 1 to this Memorandum.

ARGUMENT

I

D.M. AND Z.G. SUFFER ONGOING IRREPARABLE HARM DUE TO MSHSL'S DISCRIMINATORY RULE

Unless the Court issues a preliminary injunction, D.M. and Z.G. will continue to suffer irreparable harm. MSHSL's discriminatory rule categorically prohibits D.M. and Z.G. from participating in competitive Dance Team solely because of their sex. Both D.M. and Z.G. are rising high school juniors, and they have been excluded from Dance Team for their first two years of high school. While the Court cannot give D.M. and Z.G. those two years back, the 2018-19 Dance Team season will begin in late October or early November of this year. Thus, by granting a preliminary injunction, the Court can ensure that D.M. and Z.G. are given the opportunity to dance with their friends and teammates on the Dance Team this season.

The harm caused to D.M. and Z.G. is a direct result—indeed, the very aim—of MSHSL's rule restricting Dance Team to girls. That rule violates D.M.'s and Z.G.'s Fourteenth Amendment right to equal protection of the laws, and that alone "supports a finding of irreparable injury." *Planned Parenthood of Minn., Inc. v. Citizens for Cmty. Action*, 558 F.2d 861, 867 (8th Cir. 1977); *see also Elrod*, 427 U.S. at 373 (deprivation of constitutional rights "for even minimal periods of time, unquestionably constitutes irreparable harm"). Because D.M.'s and Z.G.'s right to equal protection is harmed, a finding of irreparable harm is "mandate[d]." *Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 338 (5th Cir. 1981).

This Court recognizes that due to the "fleeting nature" of school athletics, a plaintiff suffers irreparable harm when she "loses the opportunity to participate in her sport of choice on a continuous and uninterrupted basis." *Portz*, 196 F. Supp. 3d at 972; *see also McCormick ex*

rel. McCormick v. Sch. Dist. of Mamaroneck, 370 F.3d 275, 302 n.25 (2nd Cir. 2004) (collecting cases and finding that depriving students of the opportunity to play a sport constitutes irreparable harm). D.M. and Z.G. have already been denied the opportunity to participate in competitive Dance Team for their first two high school years. Because MSHSL prohibits them from competing in MSHSL Dance Team competitions, they do not have the opportunity to participate on a "continuous and uninterrupted basis." *Portz*, 196 F. Supp. 3d at 972. Unless the Court issues a preliminary injunction, it is certain that D.M. and Z.G. will be unable to fully participate in Dance Team during their junior year of high school. Therefore, MSHSL's rule prohibiting boys from participating in competitive Dance Team causes D.M. and Z.G. to suffer significant and ongoing irreparable harm.

II

D.M. AND Z.G. ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIMS

A. Girls-Only Dance Team Does Not Withstand Constitutional Scrutiny

Regardless of whether the Court holds that MSHSL's discriminatory dance rule is likely to comply with Title IX, D.M. and Z.G. are likely to succeed in their claim that the rule runs afoul of the Fourteenth Amendment's Equal Protection Clause. *See J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 152 (1994) (Kennedy, J., concurring) (there is a "strong presumption that gender classifications are invalid").

1. MSHSL's rule is subject to intermediate scrutiny

Because MSHSL's rule limiting competitive Dance Team to girls "expressly discriminates among applicants on the basis of gender, it is subject to scrutiny under the Equal

Protection Clause of the Fourteenth Amendment." *Hogan*, 458 U.S. at 723 (citing *Reed v. Reed*, 404 U.S. 71, 75 (1971)). Courts apply "intermediate scrutiny" when reviewing sex-based classifications under the Equal Protection Clause. *Craig*, 429 U.S. at 197.

To withstand intermediate scrutiny, a sex-based classification "must serve important governmental objectives and must be substantially related to achievement of those objectives." *Craig*, 429 U.S. at 197; *see also Ways v. City of Lincoln*, 331 F.3d 596, 600 (8th Cir. 2003). The party "seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an 'exceedingly persuasive justification' for the classification." *Hogan*, 458 U.S. at 724 (citing *Kirchberg v. Feenstra*, 450 U.S. 455, 461 (1981)); *see also Craig*, 429 U.S. at 199-204; *Duckworth v. St. Louis Metro. Police Dep't*, 491 F.3d 401, 407 (8th Cir. 2007) (justifications for assigning female officers to nightwatch were not important governmental objectives because the rationales offered by superiors were not "exceedingly persuasive."). The government's justification "must be genuine, not hypothesized or invented *post hoc* in response to litigation," and "must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females." *Virginia*, 518 U.S. at 533 (citing *Weinberger v. Wiesenfeld*, 420 U.S. 636, 643, 648 (1975)). MSHSL's ban on boys dancing cannot satisfy this high bar.

2. MSHSL's girls-only rule does not further an important governmental objective

In attempting to show there is an "important governmental objective" in explicitly discriminating against boys in dance based on their sex, MSHSL will likely argue that the objectives served by the girls-only Dance Team rule include: (1) remedying past discrimination against females in athletics or extracurricular programs, and (2) providing an equal opportunity

for members of both sexes to participate in athletic or extracurricular programs. Neither rationale is likely to withstand scrutiny.

Only "[i]n limited circumstances" will a "gender-based classification favoring one sex…be justified if it intentionally and directly assists members of the sex that is disproportionately burdened," but "'the mere recitation of a benign, compensatory [i.e., remedial] purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme.'" *Hogan*, 458 U.S. at 728. Thus, MSHSL can only claim an interest in remedying past discrimination if it carries its burden in this case to produce evidence showing that MSHSL or Minnesota high schools have a history of discriminating against girls in high school extracurricular activities like dance. *See id.* at 728-30. MSHSL is unlikely to make that showing here.

MSHSL cannot show that girls have lacked opportunities to dance in the past, or that girls currently lack opportunities to participate in extracurricular activities like dance. Rather, it is more likely that MSHSL's rule "tends to perpetuate the stereotyped view" that dance is only for girls. *See Hogan*, 458 U.S. at 729; *see also Fegans v. Norris*, 537 F.3d 897, 912 (8th Cir. 2008) (Melloy, J., concurring and dissenting) ("'[G]eneralizations or tendencies' about the differences between men and women…are impermissible justifications…under intermediate scrutiny."). Further, similar to the discriminatory nursing program in *Hogan*, MSHSL's prohibition of boys participating in Dance Team "lends credibility to the old view that women, not men, should become [dancers], and makes the assumption that [dancing] is a field for women a self-fulfilling prophecy." *Id.* at 730. D.M. and Z.G. are therefore likely to succeed on

the merits because MSHSL is unlikely to meet its evidentiary burden to show its discriminatory rule furthers an important governmental objective.

3. MSHSL's girls-only rule is not substantially related to an important governmental objective

Even if MSHSL meets its burden in providing evidence that supports a likely finding of an important governmental objective in discriminating against male dancers, the restrictive and discriminatory rule is not substantially related to an important governmental objective. To survive intermediate scrutiny, there must be a "direct, substantial relationship between objective and means." *Hogan*, 458 U.S. at 725. MSHSL bears the burden of demonstrating that there is a direct relationship between its discriminatory rule and its purported interests. The Court must be "assure[d] that the validity of a classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women." *See id.* at 725-26. Further, MSHSL's demonstration of the proper means-ends relationship must be "exceedingly persuasive." *Id.* at 724; *see also Virginia*, 518 U.S. at 533 (the burden of justifying official policies that discriminate on sex is "demanding and it rests entirely on the State"); *Duckworth*, 491 F.3d at 406-07. MSHSL cannot satisfy that high standard here.

As previously noted, boys are allowed to participate in school-sponsored recreational dance competitions and programs. Xiong Dec. ¶¶ 6-7. But during MSHSL dance competitions,[4] boys are prohibited from joining their teammates in competition. Allowing

[4] To be clear, this is a substantial exclusion for boys. The winter Dance Team season includes up to 15 competitions from November to February. *See* https://www.mshsl.org/mshsl/activetypage.asp?actnum=464.

boys to participate in school dance programs, except competitive Dance Team, is wholly arbitrary.

This arbitrary exclusion from competition causes D.M. and Z.G. to feel discriminated against and left out. *See*, *e.g.*, Xiong Dec. ¶ 9. For example, when D.M. was forced to sit on the sidelines as the manager while his teammates competed and performed the routine he had learned with them during the fall, he was very upset and felt excluded. Xiong Dec. ¶¶ 8-9. MSHSL has not provided any explanation that can justify arbitrarily allowing boys to participate in aspects of the Dance Team program while banning them from competing. As a result, MSHSL's discriminatory rule is not substantially related to remedying any alleged past discrimination or enhancing opportunities for girls. *See Hogan*, 458 U.S. at 730-31. Instead, it arbitrarily excludes boys for one season of the year. Therefore, MSHSL falls "far short of establishing the 'exceedingly persuasive justification' needed to sustain the gender-based classification." *Id.* at 731.

B. Girls-Only Dance Team Violates Title IX

Title IX prohibits discrimination on the basis of sex in any education program or activity that receives federal financial assistance. 20 U.S.C. § 1681(a). MSHSL is subject to Title IX because it is an indirect recipient of federal financial assistance through its member schools which receive direct federal financial assistance. *See Grove City Coll. v. Bell*, 465 U.S. 555, 564 (1984) (superseded by statute on other grounds). MSHSL administers and enforces the eligibility rules for extracurricular activities and athletics for Minnesota high schools that receive federal financial assistance. Because MSHSL prohibits boys from participating in competitive Dance Team solely based on their sex, MSHSL's discriminatory rule violates

Title IX. 20 U.S.C. § 1681(a) ("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.").

Title IX regulations differentiate between extracurricular activities and athletics or sports. Relevant here, depending on whether Dance Team is classified as an extracurricular activity versus a sport, MSHSL's flexibility to engage in sex discrimination varies. However, if Dance Team is an extracurricular activity, MSHSL has much less leeway.

In any event, Dance Team is properly classified as an extracurricular activity rather than a sport or athletic program. *See* Peter E. Holmes, U.S. Department of Education, Office of Civil Rights, *Letter to Chief State School Officers, Title IX Obligations in Athletics*, (Sept. 1975) (activities such as "drill teams, cheerleaders and the like" are covered as extracurricular activities rather than athletics);[5] Letter from Mary Frances O'Shea, National Coordinator for Title IX Athletics, Office of Civil Rights, United States Department of Education, to David V. Stead, Executive Director, Minnesota State High School League (Apr. 11, 2000) ("[T]here is a presumption…that drill teams, cheerleading and other like activities are extracurricular activities and are not considered sports…within the meaning of the Title IX regulation.");[6] *Biediger v. Quinnipiac Univ.*, 691 F.3d 85, 103-05 (2nd Cir. 2012) (recognizing presumption that competitive cheerleading is an extracurricular activity rather than a sport, and analyzing multiple factors to distinguish cheerleading from a sport).

[5] Available at https://www2.ed.gov/about/offices/list/ocr/docs/holmes.html.
[6] Available as Exhibit 2.

Because Dance Team is an extracurricular activity, Title IX's implementing regulations prohibit MSHSL from limiting Dance Team to girls unless MSHSL can show that the single-sex limitation is based on an important objective:

> (A) To improve educational achievement of its students, through a recipient's overall established policy to provide diverse educational opportunities, provided that the single-sex nature of the class or extracurricular activity is substantially related to achieving that objective; or
>
> (B) To meet the particular, identified educational needs of its students, provided that the single-sex nature of the class or extracurricular activity is substantially related to achieving that objective.

34 C.F.R. § 106.34(b)(1)(i)(A)-(B). MSHSL cannot meet its burden here because neither exemption applies to MSHSL's decision to exclude boys from Dance Team.

First, there is no evidence that MSHSL conducted an individualized assessment of student needs, or that it has an overall established policy to improve educational achievement by offering a diversity of extracurricular options. Nor has MSHSL considered or conducted research demonstrating that girls-only Dance Team is substantially related to improved educational achievements or any other important educational objectives. Therefore, MSHSL cannot satisfy the exemption from sex-discriminatory behavior under 34 C.F.R. § 106.34(b)(1)(i)(A).

Second, MSHSL cannot identify particular educational needs of Minnesota students that are being met by limiting Dance Team to girls. Thus, MSHSL cannot satisfy the exemption for sex-discriminatory behavior set out in 34 C.F.R. § 106.34(b)(1)(i)(B).

Further, MSHSL fails to provide substantially similar coeducational extracurricular activities for male dancers as required by 34 C.F.R. § 106.34(b)(1)(iv). And MSHSL also lacks any documentation concerning periodic evaluations undertaken by MSHSL that its sex-based

extracurricular activities "are based upon genuine justifications and do not rely on overly broad generalizations about the different talents, capacities, or preferences of either sex" as required by 34 C.F.R. § 106.34(b)(4). As a result, MSHSL cannot meet its burden of proof to justify limiting Dance Team—as an extracurricular activity—to girls, and D.M. and Z.G. are likely to succeed on the merits of their claim that MSHSL's discriminatory rule violates Title IX.

If Dance Team is considered to be a sport instead of an extracurricular activity, Title IX regulations require that "[n]o person shall, on the basis of sex, be excluded from participation in … any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis." 34 C.F.R. § 106.41(a). An exemption for the general prohibition on single-sex athletics exists "where selection for such teams is based upon competitive skill or the activity involved is a contact sport." 34 C.F.R. § 106.41(b). Neither exemption applies to Dance Team because (1) Dance Team is not a contact sport, and (2) selection to the team is based on artistic skill rather than "competitive" skill. No known cases have ever given a court the opportunity to interpret "competitive skill." However, a logical interpretation of the term shows its meaning to refer to activities in which members of one sex are inherently disadvantaged from a competitive standpoint. Such is not the case with dance. In fact, as seen with D.M.'s and Z.G.'s own experience with dance noted above, it is common for girls and boys to perform together.

III

PRELIMINARY RELIEF IS IN THE PUBLIC INTEREST AND THE HARM TO PLAINTIFFS OUTWEIGHS ANY PURPORTED HARM TO DEFENDANTS

A. The Public Interest Favors an Injunction

An order enjoining the discriminatory girls-only rule for Dance Team is in the public interest. The public is best served, not by the continuance of discriminatory rules for competitive Dance Team, but rather by the "preservation of constitutional rights." *Phelps-Roper*, 545 F.3d at 694; *see also Awad v. Ziriax*, 670 F.3d 1111, 1132 (10th Cir. 2012) (quoting *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994) (a preliminary injunction that vindicates constitutional rights is "always in the public interest")). More specifically, the public has a compelling interest in "eradicating sex discrimination." *Portz*, at 978 (citing *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983)).

Here, because D.M.'s and Z.G.'s teammates, coaches, and schools support their inclusion on their respective teams as a dancer, Xiong Dec. ¶¶ 6-11; Greenwald Dec. ¶ 11, a preliminary injunction will not harm the public interest. If MSHSL's discriminatory rule is enjoined, D.M.'s coach would allow him to join the competitive Dance Team and his teammates would welcome him. Xiong Dec. ¶ 11. Similarly, Z.G. is friends with many of the girls on his school's dance team from the private studio, and they would be happy for him to be able to join the school team. Greenwald Dec. ¶¶ 7, 11. Further, there is no evidence of any opposition to D.M. and Z.G. being allowed to participate in Dance Team. Therefore, an injunction "affirmatively serves" the public interest by vindicating D.M.'s and Z.G.'s

constitutional right to equal protection. *See McLaughlin by McLaughlin v. Boston Sch. Comm.*, 938 F. Supp. 1001, 1017 (D. Mass. 1996).

B. MSHSL Is Not Harmed by Preliminary Relief

As discussed above, absent a preliminary injunction, Plaintiffs will continue to suffer significant and irreparable harm: the violation of their constitutional rights; the indignity of being treated as second-class citizens; and the foreclosure of the opportunity for D.M. and Z.G. to compete with their friends in the activity they love. Those harms far outweigh any conceivable harm that MSHSL may encounter if preliminary relief is granted for two boys in the State of Minnesota for the upcoming school year.

Plaintiffs seek to enjoin only the MSHSL rule that prohibits them from participating in competitive Dance Team solely because of their sex. While preserving the status quo is typically favored in balancing the equities on motions for a preliminary injunction, *see Hill v. Xyquad, Inc.*, 939 F.2d 627, 630 (8th Cir. 1991), it is not the only consideration. *See*, *e.g.*, *Bednar v. Nebraska Sch. Activities Ass'n*, 531 F.2d 922, 923 (8th Cir. 1976) (issuance of preliminary relief affirmed where mother of a tenth grade girl sought an injunction to allow her daughter to join the boys cross-country team since there was no team for girls).

Furthermore, it is doubtful that MSHSL can conjure up any harm besides hypothetical administrative inconvenience. But allowing two boys to participate in Dance Team for the upcoming school year can hardly inconvenience MSHSL. And even if it did, MSHSL's convenience is not enough to tip the equities in its favor. *See J.A. Croson Co.*, 488 U.S. at 508 ("[T]he interest in avoiding the bureaucratic effort necessary to tailor remedial relief" does not justify discriminatory rules or policies.); *see also Portz*, 196 F. Supp. 3d at 973-74. As a result,

the balance of equities favor the issuance of a preliminary injunction in this case because it is in the public's interest and little, if any, harm will inure to MSHSL.

CONCLUSION

The Court should grant D.M.'s and Z.G.'s motion for a preliminary injunction and enjoin MSHSL from enforcing its discriminatory rule that prohibits boys from participating in competitive Dance Team.

DATED: July 25, 2018.

Respectfully submitted,

s/ Caleb R. Trotter

JOSHUA P. THOMPSON (Cal. Bar No. 250955*)
ANASTASIA P. BODEN (Cal. Bar No. 281911*)
CALEB R. TROTTER (Cal. Bar No. 305195*)
TIMOTHY SNOWBALL (Cal. Bar No. 317379*)
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
Email: JThompson@pacificlegal.org
Email: ABoden@pacificlegal.org
Email: CTrotter@pacificlegal.org
Email: TSnowball@pacificlegal.org
**Pro Hac Vice pending*

ERICK G. KAARDAL (Minn. Bar No. 0229647)
Mohrman, Kaardal and Erickson, P.A.
150 S. 5th Street, Suite 3100
Minneapolis, Minnesota 55402
Telephone: (612) 341-1074
Facsimile: (612) 341-1076
Email: kaardal@mklaw.com

Attorneys for Plaintiffs D.M. and Z.G.

CERTIFICATE OF COMPLIANCE

As required by Local Rule 7.1(f)(2), I certify that the MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION complies with the type-size limit of Local Rule 7.1(h) and contains 4,678 words (including all text, headings, footnotes, and quotations, but excluding the portions of the document exempted by Local Rule 7.1(f)(1)(C)), according to the word count function of the Microsoft Word 2013 word-processing program used to prepare it.

DATED: July 25, 2018.

Respectfully submitted,

s/ Caleb R. Trotter

CALEB R. TROTTER (Cal. Bar No. 305195*)
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
Email: CTrotter@pacificlegal.org
**Pro Hac Vice pending*

Attorney for Plaintiffs D.M. and Z.G.

CERTIFICATE OF SERVICE

I hereby certify that on July 25, 2018, I filed the foregoing document with the Clerk of Court via the CM/ECF system, and that I caused a copy of the MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION, and the notice of electronic filing of it, to be sent overnight via Federal Express on Defendants at:

Minnesota State High School League
2100 Freeway Boulevard
Brooklyn Center, MN 55430-1735
763-560-2262

and

David Swanberg
President of Board of Directors of
of Minnesota State High School League
LeSueur-Henderson HS
901 East Ferry Street
LeSueur, MN 56058
507-665-5804

DATED: July 25, 2018.

Respectfully submitted,

s/ Caleb R. Trotter

CALEB R. TROTTER (Cal. Bar No. 305195*)
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
Email: CTrotter@pacificlegal.org
**Pro Hac Vice pending*

Attorney for Plaintiffs D.M. and Z.G.

INDEX OF EXHIBITS

MSHSL Bylaw 412 of the MSHSL Official Handbook .....Ex. 1

Letter from Mary Frances O'Shea, National Coordinator for Title IX Athletics, Office of Civil Rights, United States Department of Education, to David V. Stead, Executive Director, Minnesota State High School League (Apr. 11, 2000) .....Ex. 2