No. 22-1505

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

EVAN NG,

Plaintiff-Appellant,

v.

BOARD OF REGENTS OF THE UNIVERSITY OF MINNESOTA; MARK COYLE, in his official capacity as Director of Athletics for the University of Minnesota; and JOAN T.A. GABEL, in her official capacity as President of the University of Minnesota,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Minnesota
Hon. Susan Richard Nelson, U.S. District Court Judge

# APPELLANT'S OPENING BRIEF


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## SUMMARY OF THE CASE AND REASONS FOR ORAL ARGUMENT

This is a Fourteenth Amendment and Title IX challenge to Defendants-Appellees' (collectively "University") decision to eliminate the University of Minnesota's varsity men's gymnastics team, on the grounds that the decision impermissibly discriminates on the basis of sex. Plaintiff-Appellant Evan Ng was a member of the team until school officials eliminated it to decrease the number of male athletes competing for the University. In the district court, Mr. Ng sought preliminary relief restoring the team so that he could continue competing during the pendency of this case. The district court denied his motion for a preliminary injunction and this appeal followed.

Despite finding that Mr. Ng was harmed by the elimination of his team, the district court held that Mr. Ng's efforts to avoid litigation undermined his claim of irreparable harm and that he was unlikely to succeed on the merits of his claims.

This case involves important constitutional and Title IX questions of law. For these reasons, Mr. Ng believes that oral argument will aid the Court in its deliberations and respectfully requests 20 minutes to state his case.

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## JURISDICTIONAL STATEMENT

The district court had jurisdiction to hear Plaintiff's motion for a preliminary injunction under 28 U.S.C. §§ 1331 (federal question), 1343(a) (civil rights), and 2201-2202 (the Declaratory Judgment Act). This Court has appellate jurisdiction under 28 U.S.C. § 1292(a)(1). The district court entered a final order denying Plaintiff's motion for a preliminary injunction on March 1, 2022. Plaintiff filed a timely notice of appeal on March 9, 2022—within the 30-day period required by Fed. R. App. P. 4(a)(1)(A).

## STATEMENT OF ISSUES

1. Is Mr. Ng irreparably harmed by the elimination of the men's varsity gymnastics team at the University of Minnesota?

Most apposite cases: *Elrod v. Burns*, 427 U.S. 347 (1976); *Bednar v. Neb. Sch. Activities Ass'n*, 531 F.2d 922 (8th Cir. 1976); *D.M. by Bao Xiong v. Minn. St. High Sch. League*, 917 F.3d 994 (8th Cir. 2019); *Portz v. St. Cloud State Univ.*, 196 F.Supp.3d 963 (D. Minn. 2016).

2. Is Mr. Ng's equal protection claim a collateral attack on Title IX?

Most apposite cases: *Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930 (D.C. Cir. 2004); *Nat'l Wrestling Coaches Ass'n v. Dep't of*

*Educ.*, 383 F.3d 1047 (D.C. Cir. 2004); *Miami Univ. Wrestling Club v. Miami Univ.*, 302 F.3d 608 (6th Cir. 2002); *Kelley v. Bd. of Tr., Univ. of Ill.*, 35 F.3d 265 (7th Cir. 1994).

3. Is Mr. Ng likely to succeed on the merits of his equal protection claim that the elimination of the men's gymnastics team fails to withstand intermediate scrutiny?

Most apposite cases: *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982); *United States v. Virginia*, 518 U.S. 515 (1996); *Craig v. Boren*, 429 U.S. 190 (1976); *D.M. by Bao Xiong v. Minn. St. High Sch. League*, 917 F.3d 994 (8th Cir. 2019).

4. Is Mr. Ng likely to succeed on the merits of his claim that eliminating the men's gymnastics team violates Title IX?

Most apposite cases: *Chalenor v. Univ. of N.D.*, 291 F.3d 1042 (8th Cir. 2002); *Roberts v. Col. St. Bd. of Agric.*, 998 F.2d 824 (10th Cir. 1993); *Cohen v. Brown Univ.*, 991 F.2d 888 (1st Cir. 1993).

Most apposite statutes and regulations: 20 U.S.C. § 1681(a)-(b); 34 C.F.R. § 106.41(a), (c); 44 Fed. Reg. 71,413 (1979).

5. Does the balance of harms weigh in favor of preliminarily enjoining the University's elimination of the team and ordering the team reinstated?

Most apposite cases: *Minn. Mining & Mfg. Co. v. Meter ex rel. NLRB*, 385 F.2d 265 (8th Cir. 1967); *Hill v. Xyquad, Inc.*, 939 F.2d 627 (8th Cir. 1991); *Ferry-Morse Seed Co. v. Food Corn, Inc.*, 729 F.2d 589 (8th Cir. 1984); *Ohlensehlen v. Univ. of Iowa*, 509 F.Supp.3d 1085 (S.D. Iowa 2020).

6. Is preliminarily enjoining the University's elimination of the team, and ordering the team reinstated, in the public interest?

Most apposite cases: *D.M. by Bao Xiong v. Minn. St. High Sch. League*, 917 F.3d 994 (8th Cir. 2019); *Phelps-Roper v. Nixon*, 545 F.3d 685 (8th Cir. 2008); *Portz v. St. Cloud State Univ.*, 196 F.Supp.3d 963 (D. Minn. 2016); *Ohlensehlen v. Univ. of Iowa*, 509 F.Supp.3d 1085 (S.D. Iowa 2020).

## STATEMENT OF THE CASE

### A. Evan Ng and His Successful Gymnastics Career

Evan Ng is an accomplished gymnast. He first began competing at the age of six. App. 029; R. Doc. 10, at 1. From there, he developed into a

national and state champion before being recruited by multiple universities. App. 030; R. Doc. 10, at 2. Mr. Ng ultimately decided to join the University of Minnesota men's gymnastics team—declining a more generous financial aid offer from another school—due to the relationship he developed with the team's head coach, as well as his belief in the championship-caliber program at the University. App. 030; R. Doc. 10, at 2.

In September of 2020, Mr. Ng was preparing to leave home to begin his freshman year at the University when he was informed that he needed to join his new teammates for a Zoom call with the University's Director of Athletics, Mark Coyle. App. 030; R. Doc. 10, at 2. On that call, Mr. Ng learned that the University was proposing to eliminate the men's gymnastics team at the end of the school year. App. 030; R. Doc. 10, at 2.

Learning of the program's potential demise was upsetting for Mr. Ng. App. 030-031; R. Doc. 10, at 2-3. While he was committed to staying at the University for the 2020-21 school year that had already begun, instead of focusing on preparing for the upcoming gymnastics season and getting to know new teammates and friends, he now needed to consider

whether to transfer to another university or see his promising gymnastics career end. App. 030-031; R. Doc. 10, at 2-3.

Ultimately, Mr. Ng was able to compete in the pommel horse event in two gymnastics meets during his freshman season. App. 031; R. Doc. 10, at 3. While he was thrilled to compete at the collegiate level, a shoulder injury prevented him from fully vying for opportunities to compete in meets. App. 031; R. Doc. 10, at 3. Mr. Ng's inability to showcase his abilities during the 2020-21 season diminished his opportunities to transfer schools to continue his gymnastics career elsewhere. App. 031; R. Doc. 10, at 3. But even if Mr. Ng had been able to fully perform, few transfer opportunities existed in the first place.

After the University's decision to cut men's gymnastics, only 13 NCAA Division I men's gymnastics programs remain. App. 031, 042; R. Doc. 10, at 3 and Doc. 11, at 10. As a result, not many roster spots are available for potential transferees. App. 031, 039-040; R. Doc. 10, at 3 and Doc. 11, at 7-8. In addition, due to the COVID-19 pandemic, the NCAA granted all student-athletes an additional year of eligibility, further reducing the number of available roster spots. App. 031; R. Doc. 10, at 3. All seniors that would have otherwise exhausted their eligibility after the

2020-21 season were thus able to remain on their respective teams for the 2021-22 season. App. 031; R. Doc. 10, at 3.

All that is beside the point for Mr. Ng, however; he wishes to remain at the University of Minnesota and wants to see the storied men's gymnastics team he committed to be a part of reinstated. App. 031; R. Doc. 10, at 3. Of some small consolation to Mr. Ng, a recreational club gymnastics team for men was established for the 2021-22 school year. App. 032; R. Doc. 10, at 4. While a club team is inferior to a varsity team for multiple reasons, including the lack of athletic training support and a full coaching staff, as well as the loss of nutrition support and University-provided meals, Mr. Ng joined the club team because of his love for gymnastics and to stay in shape in case the varsity team is reinstated. App. 032; R. Doc. 10, at 4.

**B. The University's Elimination of its Men's Gymnastics Team**

The University of Minnesota men's gymnastics team won the first of its 21 Big Ten championships in 1903. Big Ten, 2020-2021 Big Ten Records Book, at 224.[1] 118 years later, the storied program came to an

[1] *Available at* https://bigten.org/documents/2020/8/13/Men_s_Gymnastics.pdf.

end on April 17, 2021, after hosting the NCAA national championships. App. 042; R. Doc. 11, at 10; Rachel Blount, *Gophers men's gymnastics finishes 118-year history with 5th-place finish; Shane Wiskus wins two individual titles*, StarTribune (Apr. 18, 2021).[2] The program met its demise not because the team performed poorly—the Gophers finished with a season-high in overall points, with individual national titles on parallel bars and still rings[3]—nor because of subpar academic performance—the team had the highest GPA of any sport for the spring 2021 semester (3.72), with five members earning 4.0s. App. 040; R. Doc. 11, at 8. Rather, the team was eliminated because the University's leadership believed that to comply with Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq.*, the ratio of male and female athletes must be in parity (or "proportional") with the University's undergraduate enrollment. In other words, the team was cut because the University sought to reduce its number of male athletes by using quotas based on sex.

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[2] *Available at* https://www.startribune.com/gophers-men-s-gymnastics-finishes-118-year-history-with-5th-place-finish-shane-wiskus-wins-two-indiv/600047346/.

[3] *See id.*

On September 10, 2020, the University's Director of Athletics, Mark Coyle, announced a plan to eliminate the men's gymnastics, tennis, and indoor and outdoor track and field teams following the 2020-21 school year.[4] App. 034-036; R. Doc. 11, at 2-4. No women's teams were offered for elimination. While initially alluding to financial concerns due to projected revenue shortfalls in the tens of millions of dollars due to COVID-19 halting (then ultimately delaying)[5] fall sports, including football, the decision was primarily credited to the University's perceived need to align its ratio of male athletes with the ratio of male undergraduates under University administrators' understanding of Title IX. App. 034-035, 039, 048; R. Doc. 11, at 2-3, 7; R. Doc. 12, at 3.

Over the course of Board of Regents meetings on September 11, and October 9, 2020, where the sport-cutting plan was formally discussed and finalized, the Director of Athletics and several individual Regents specifically called out Title IX and proportionality concerns as forcing

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[4] The University ultimately decided to retain men's outdoor track and field. *See* App. 039; R. Doc. 11, at 7.

[5] *See* Alan Blinder, *Big Ten Will Play Football in 2020, Reversing Decision*, New York Times (Sept. 16, 2020), *available at* https://www.nytimes.com/2020/09/16/sports/ncaafootball/covid-big-ten-football-season.html.

their hand to cut men's sports.[6] *See*, *e.g.*, meeting of September 11, Regent Anderson, 3:16:00–3:16:50 (cuts needed to men's teams to achieve statistical proportionality with enrollment); Mr. Coyle, 3:17:15–3:18:25 (cuts to men's teams will allow athletic rosters to "mirror" University enrollment); Regent Sviggum, 3:19:55–3:20:12 (men must be cut for Title IX compliance); Mr. Coyle, 3:35:20–3:36:00, 3:38:45–3:39:32 (too expensive to add women's sports to achieve Title IX compliance); *see also* meeting of October 9, Regent Sviggum, 3:13:01–3:13:38 (expressing view that University has too many male athletes); Regent McMillan, 3:50:00–3:50:55 (discussing how Title IX is impetus for decision); Regent Mayeron, 3:56:18–3:57:42 (proportionality concern is impetus for decision and noting her view that the University can only reach compliance through reaching proportionality with its rosters). Thus, while the then-unknown financial impacts of the pandemic may have caused the University to take a hard look at its athletics budget, the University's

[6] The September 11, 2020, meeting video is available at https://www.youtube.com/watch?v=_JJuJrCcJ-c, with Mr. Coyle's presentation beginning at the 2:39:20 mark. The October 9, 2020, meeting is available at https://www.youtube.com/watch?v=f8a1pIhmRL4, with the discussion of the proposal to eliminate the men's sports teams beginning at the 2:19:04 mark.

perceived need to establish sex-based quotas by achieving statistical parity between male and female athletes and male and female undergraduates at the University was the driving force behind the decision to eliminate men's gymnastics.

After the University voted to cut the men's gymnastics team on October 9, 2020, a group of alumni and supporters—the Friends of Minnesota Men's Gymnastics—organized to attempt to reverse the decision and save men's gymnastics at the University. App. 040, 046-047; R. Doc. 11, at 8; R. Doc. 12, at 1-2. Notably, in an April 8, 2021, letter to the University, the Friends proposed a flexible self-funding model whereby the University would maintain the men's gymnastics team at the varsity level, but the funding for the program would primarily come from private sources in addition to the existing program endowment. App. 047-048, 054-055; R. Doc. 12, at 2-3; R. Doc. 12-2, at 1-2. Specifically, the letter stated that funding sufficient to maintain the men's gymnastics team for two seasons had already been secured. *Id.*

Despite those efforts, the Chair of the Board of Regents and the President of the University responded by confirming that their understanding of Title IX, rather than financial necessity, was the

impetus for the decision to cut men's gymnastics. In an April 14, 2021, email, the Chair and President stated that "[p]andemic finances certainly brought the question to the fore, but we have emphasized that the decision rests on much more than the financial. Title IX found us needing to not only pare down our men's sport offerings, but also to better manage our women's sport rosters …." App. 056; R. Doc. 12-3, at 1. As a result of the elimination of the men's teams, the Chair and President noted that the University will be "at parity with our enrollment numbers for the 2021-2022 academic year." *Id.*

Further confirming that the University's understanding of Title IX, rather than finances, was the basis for cutting men's gymnastics is the reality of the finances themselves. The University's annual athletics budget is around $125 million. *See* University of Minnesota-Twin Cities NCAA Financial Report at 66 (2020).[7] During the 2019-20 school year, the men's gymnastics program had a budget of approximately $750,000. *Id.*; *see also* App. 035; R. Doc. 11, at 3. However, the program maintains an endowment of over $900,000 that supports the team's 6.3

[7] *Available at* https://gophersports.com/documents/2021/1/19/2020_NCAA_Financial_Report.pdf.

scholarships. App. 035; R. Doc. 11, at 3. In total, University administrators acknowledged that cutting men's gymnastics, tennis, and indoor track and field would save $1.6 million dollars a year. *Supra,* at 9, n.6, October 9, 2020, Board of Regents meeting, statement by Mr. Coyle, 4:06:25.

Indeed, the Chair of the Regents confirmed his view that "the Title IX concerns based upon current enrollments need immediate attention and cannot be passed over in the hope that enrollments shift in the future." App. 048; R. Doc. 12, at 3. He therefore rejected a last-ditch effort to delay cutting the program for three years. *Id*. When the University rejected this final effort to save the Minnesota men's gymnastics program, Mr. Ng had no choice but to seek redress in court. App. 032; R. Doc. 10, at 4.

### C. Procedural History

After efforts to avoid litigation to save the Minnesota men's gymnastics team failed, Mr. Ng filed this civil rights lawsuit to vindicate his rights to equal protection under the law and to enforce the protections of Title IX. *See* App. 010; R. Doc. 1, at 1. Mr. Ng's lawsuit challenges the University of Minnesota's independent decision to eliminate the men's

gymnastics team to achieve "proportionality" between male and female students and athletes at the University, on the grounds that the University's decision violates the Fourteenth Amendment to the U.S. Constitution and Title IX. After filing his complaint and complying with local rules, Mr. Ng sought a preliminary injunction and order reinstating the gymnastics team to allow him to compete while the case proceeds. App. 027; R. Doc. 7, at 1.

The district court denied Mr. Ng's motion. App. 174; R. Doc. 50, at 1. It held that despite being harmed by the University's elimination of his team, the efforts taken to avoid litigation undermined Mr. Ng's ability to show irreparable harm and he did not have a fair chance of success on the merits of his equal protection or Title IX claims. App. 186, 194, 199; R. Doc. 50, at 13, 21, 26. Thus, the court held that the public interest weighed in favor of denying the injunction, and because preliminary relief could not save the 2021-22 gymnastics season, the balance of harms did not favor issuing the injunction. App. 199-201; R. Doc. 50, at 26-28. The district court also held that Mr. Ng's equal protection claim was a collateral attack on Title IX, leaving him with no constitutional recourse

against the University's independent decision to eliminate his team. App. 195; R. Doc. 50, at 22. This appeal followed.

## SUMMARY OF ARGUMENT

This Court should reverse the district court and hold that: (1) Mr. Ng is irreparably harmed by the elimination of the varsity men's gymnastics team; (2) Mr. Ng has a fair chance of success on both his equal protection and Title IX claims; (3) the balance of harms weighs in favor of reinstating the men's gymnastics team during the pendency of this case; and (4) the public interest favors preliminary relief.

Because of the "fleeting nature" of school athletics, a student suffers irreparable harm when he "loses the opportunity to participate in h[is] sport of choice on a continuous and uninterrupted basis." *Portz v. St. Cloud State Univ.*, 196 F.Supp.3d 963, 972 (D. Minn. 2016). This Court previously held that "deprivations of temporally isolated opportunities," like school athletics, "are exactly what preliminary injunctions are intended to relieve." *D.M. by Bao Xiong v. Minn. St. High Sch. League*, 917 F.3d 994, 1003 (8th Cir. 2019). Despite acknowledging Mr. Ng's harm resulting from his team's elimination, the district court held that he failed to show irreparable harm because he took too long to

seek judicial recourse. But Mr. Ng's "delay" was reasonable due to the efforts taken to avoid litigation by first attempting to persuade the University to reinstate the team. In any event, reinstatement of the team is the only recourse for Mr. Ng for the University's unconstitutional and illegal decision to eliminate men's gymnastics to reduce the number of male athletes at the University.

Title IX, 20 U.S.C. § 1681(a), prohibits universities from denying opportunities to compete in athletics due to a student's sex. Nevertheless, primarily relying on this Court's decision in *Chalenor v. Univ. of N. Dakota*, 291 F.3d 1042 (2002), the district court held that Mr. Ng has no fair chance of success on his Title IX claim. But the district court's reliance on *Chalenor* is misplaced because *Chalenor* involved a fundamentally different scenario than this case.

In *Chalenor*—and in every case cited for support by *Chalenor*—courts upheld the elimination of men's teams as not violating Title IX where the respective universities sought to address significant disparities between the ratio of female athletes in comparison to the ratio of female undergraduates. In such cases, large disparities were evidence of discrimination against female students due to their relative lack of

athletic opportunities. Here, however, the record shows that the University did not have a disparity warranting the drastic step of eliminating men's teams. In fact, as recently as 2018 the U.S. Department of Education determined the University sufficiently accommodated its student athletes despite a slight female underrepresentation. App. 083; R. Doc. 29-1, at 6; *see also* 20 U.S.C. § 1681(b). While enrollment fluctuations changed the calculus by fall 2021, the record does not support a finding that any subsequent disparity was evidence of discrimination justifying the elimination of men's teams. Thus, Mr. Ng has a fair chance of success in showing that the elimination of men's gymnastics violates Title IX's rule against sex discrimination.

Mr. Ng also has a fair chance of success on his Fourteenth Amendment equal protection claim. First, the district court erroneously held that Mr. Ng's claim was a collateral attack on Title IX. But Ng does not challenge the validity of the Title IX statute, its implementing regulations, or any interpretive guidance. Rather, he challenges the *University's decision* to eliminate the men's gymnastics team. In a similar case, the D.C. Circuit held that such decisions are made independently by schools, and that parties only have standing to sue schools—not the

Department of Education—over such decisions. *See Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930, 933, 936-37, 947 (D.C. Cir. 2004) (abrogation on other grounds recognized by *Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 620 (D.C. Cir. 2017)).

Second, the decision to eliminate men's gymnastics cannot survive scrutiny. As the decision to cut men's gymnastics was made to reduce the number of male athletes at the University, it "expressly discriminates . . . on the basis of gender," and is subject to intermediate scrutiny. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 723 (1982); *Craig v. Boren*, 429 U.S. 190, 197 (1976). None of the justifications cited by the University sufficiently further, or substantially relate to, any important governmental objective.

As noted, the record does not support any finding of discrimination against females by the University resulting from the slight statistical disparity between the ratio of female athletes versus undergraduates. Eliminating men's gymnastics thus does nothing to remedy or prevent discrimination against females.

Relatedly, the University cannot point to its need to comply with Title IX to excuse its discrimination against Mr. Ng. Title IX states that

it "shall [not] be interpreted to 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 [athletics]…." 20 U.S.C. § 1681(b). Thus, the University cannot claim that Title IX required it to eliminate men's gymnastics.

Nor can the University plead financial necessity for its decision. The record shows that eliminating men's gymnastics saved less than 1% of the University's total annual athletics budget and accounted for less than 2% of the University's feared COVID-19-related budget deficits at the time the decision was made to cut the team. It is simply not "exceedingly persuasive" that cutting men's gymnastics was needed to address any financial difficulties.

The balance of harms favors Mr. Ng. The district court recognized the University would not be harmed by the issuance of preliminary relief, but misunderstood the harm suffered by Mr. Ng. In addition to already losing the 2021-22 competitive gymnastics season, Mr. Ng continually misses out on the benefits associated with being a varsity athlete. While Mr. Ng cannot get his lost season back, an injunction would immediately

restore his status as a varsity athlete and set the course for reinstatement of the team—and a return to competition—as soon as possible.

The public's interest in vindicating Mr. Ng's constitutional right to be free from sex discrimination is "compelling." *Portz*, 196 F.Supp.3d at 978; *see also Phelps-Roper v. Nixon*, 545 F.3d 685, 694 (8th Cir. 2008) (public is best served by the "preservation of constitutional rights") (overruled on other grounds). While it is true that the University is a public institution presumably engaged in serving the State of Minnesota, any such status is outweighed here because Mr. Ng has a fair chance of success in showing the University's decision to eliminate men's gymnastics violates the Constitution and Title IX.

Because all preliminary injunction factors weigh in favor of Mr. Ng, this Court should reverse the district court's denial of his motion for preliminary injunction.

## STANDARD OF REVIEW

This Court reviews a denial of a motion for a preliminary injunction for an abuse of discretion. *Lankford v. Sherman*, 451 F.3d 496, 503 (8th Cir. 2006). When the district court rests its conclusions on "clearly

erroneous factual findings or erroneous legal conclusions," it abuses its discretion. *Id.* at 503-04. However, where appellants raise purely legal questions, "this court owes no special deference to the district court." *Id.* at 504; *see also Child Evangelism Fellowship of Minn. v. Minneapolis Special Sch. Dist. No. 1*, 690 F.3d 996, 1000 (8th Cir. 2012) ("We review the district court's legal conclusions de novo.").

Consideration of a preliminary injunction motion requires the Court to analyze "(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.").

## ARGUMENT

## I

## MR. NG IS IRREPARABLY HARMED BY THE ELIMINATION OF THE GYMNASTICS TEAM

Without preliminary relief Mr. Ng suffers ongoing irreparable harm due to the elimination of the University's men's gymnastics team. As Mr. Ng's sophomore year comes to an end, he only has three years of eligibility remaining to compete as a collegiate athlete.[8] Because of the University's elimination of his team, Mr. Ng has already lost the 2021-22 season—a season he can never get back. Unless this Court reverses the district court's decision denying preliminary relief, he will also lose at least the 2022-23 season.

As detailed above, the University cut its men's gymnastics program because it believes it must have fewer male athletes. Therefore, Mr. Ng lost his opportunity to compete as a varsity college athlete solely because of his sex. The University's decision violates Mr. Ng's Fourteenth

[8] The NCAA gave student-athletes an additional year of eligibility due to the COVID-19 pandemic. App. 031; R. Doc. 10, at 3.

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 v. Burns*, 427 U.S. 347, 373 (1976) (deprivation of constitutional rights "for even minimal periods of time, unquestionably constitutes irreparable harm"). Because Mr. Ng'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).

Due to the "fleeting nature" of school athletics, a plaintiff suffers irreparable harm when he "loses the opportunity to participate in h[is] sport of choice on a continuous and uninterrupted basis." *Portz*, 196 F.Supp.3d at 972; *see also D.M. by Bao Xiong*, 917 F.3d at 1003; *Bednar v. Neb. Sch. Activities Ass'n*, 531 F.2d 922, 923 (8th Cir. 1976); *McCormick ex rel. McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 302 n.25 (2d Cir. 2004) (collecting cases and finding that depriving students of the opportunity to play a sport constitutes irreparable harm).

In *D.M. by Bao Xiong*, this Court held that two high school boys who were denied the opportunity to try out for their high school

competitive dance teams due to their sex were irreparably harmed. 917 F.3d at 1003. According to the Court, "deprivations of temporally isolated opportunities," like school athletics, "are exactly what preliminary injunctions are intended to relieve." *Id.*

Likewise, in *Portz*, athletes on St. Cloud State University's women's tennis team were irreparably harmed when the university eliminated the team. 196 F.Supp.3d at 972. In the absence of preliminary relief, the athletes would have lost at least one season of competition, and student recruiting efforts, as well as the ability to retain or hire coaches, would be adversely affected even by a temporary elimination of the team. *Id.* Further, because the elimination of the team denied the athletes their Fourteenth Amendment equal protection rights and rights to equal treatment enforced by Title IX—even if just temporarily—the court held that they suffered additional irreparable harm. *Id.* at 973.

Here, the University eliminated its men's gymnastics team at the conclusion of the 2020-21 school year. Mr. Ng now hopes that the University's decision will be remedied by a favorable court decision. In the interim, most of his gymnastics teammates have graduated or transferred. Those that remain are no longer NCAA varsity athletes. As

a result, Mr. Ng is irreparably harmed by the University's decision to cut men's gymnastics.

The district court acknowledged that the University did not dispute Mr. Ng is harmed by the elimination of the gymnastics team. App. 186; R. Doc. 50, at 13. But the district court discounted the irreparable harm suffered by Mr. Ng, holding that he failed to establish his harm due to a "not reasonable" and "significant" delay in seeking preliminary relief. App. 187-189; R. Doc. 50, at 14-16.

For starters, Mr. Ng—a teenaged college student—did not pursue litigation lightly. He first joined the efforts of Coach Burns and the Friends of Minnesota Men's Gymnastics to convince the University to keep the team. *See* App. 037-038, 040; R. Doc. 11, at 5-6, 8. Mr. Ng sued only after those efforts failed in May 2021. App. 032, 047-048; R. Doc. 10, at 4; R. Doc. 12, at 2-3. After securing pro bono counsel and complying with the district court's local rules, Mr. Ng filed his Complaint and Motion for Preliminary Injunction on October 29 and November 8, 2021, respectively. App. 004; R. Doc. 1, at 7.

To the district court, however, Mr. Ng's efforts undermined his claim of irreparable harm because the team was eliminated by the time

he sought preliminary relief. Initially, the court seems to have held against Mr. Ng the efforts to avoid litigation following the University's announcement of the plan to eliminate men's gymnastics. App. 187; R. Doc. 50, at 14 ("Plaintiff waited approximately 13 months to seek a preliminary injunction after learning about the University's decision to eliminate men's varsity gymnastics team."). But holding efforts to avoid litigation against plaintiffs when they seek injunctive relief after those efforts fail, disincentivizes future plaintiffs from pursuing such efforts and incentivizes them to rush straight to court instead. Possibly recognizing the implications of disincentivizing non-litigation efforts, the district court also considered whether it was reasonable for Mr. Ng to initiate this action in October of 2021 and seek preliminary relief a week later once the University made its position clear on May 7, 2021, that it would not reinstate the team. *See* App. 060-061, 188; R. Doc. 50, at 15; R. Doc. 12-5, at 1-2.

The district court's focus on the team being eliminated by the time Mr. Ng filed suit—and holding that he is not irreparably harmed as a result—is due to its misunderstanding of the preliminary relief sought. App. 187; R. Doc. 50, at 14. Mr. Ng did not seek reinstatement of the team

solely to compete in the 2021-22 season that concluded in April 2022. For the team to compete, it must first be reinstated, which would then necessitate hiring a coaching staff, followed by recruitment efforts to fill the team's roster, and a return to varsity-level training. App. 044-045; R. Doc. 11, at 12-13. It was already unlikely that each of those steps could be completed in time for the 2021-22 season when Mr. Ng's motion for preliminary injunction was filed. *Id*. But those steps are critical for the team to compete in the 2022-23 season and beyond.

In the interim, reinstatement of the team would also return Mr. Ng to his status as a varsity athlete and allow him to again enjoy the accompanying benefits that he lost following his freshman year. App. 032; R. Doc. 10, at 4; *Cf. Ohlensehlen v. Univ. of Iowa*, 509 F.Supp.3d 1085, 1102-03 (D. Iowa 2020) ("[removing] the grit and confidence and determination gained through athletic competition [that] helps them excel academically…from their experience is likely to have negative consequences on their education and development as young women."). By considering only a narrow aspect of Mr. Ng's requested relief (the 2021-22 season), the district court erroneously held that Mr. Ng unduly delayed in seeking relief. App. 188; R. Doc. 50, at 15; *cf. Safety-Kleen Sys.,*

*Inc. v. Hennkens*, 301 F.3d 931, 936 (8th Cir. 2002) (seven-month delay between initiation of defendant's activities leading to plaintiff's filing of a complaint and motion for preliminary injunction was reasonable).

Further, none of the cases cited by the district court warrant a finding of unreasonable delay here because they are easily distinguishable. In *Hubbard Feeds, Inc. v. Animal Feed Supplement, Inc.*, 182 F.3d 598, 601-03 (8th Cir. 1999), this Court held that a delay of nine years between a plaintiff's knowledge of trademark infringement and its assertion of rights constituted a delay that "belies any claim of irreparable injury." In *Novus Franchising, Inc. v. Dawson*, 725 F.3d 885, 895 (8th Cir. 2013), this Court held that a 17-month delay between a defendant's cessation of payments to plaintiff and plaintiff's initiation of legal proceedings undermined the plaintiff's claimed irreparable harm, which was questionable in any event due to the potential for money damages. Similarly, in *CHS, Inc. v. PetroNet, LLC*, No. 10-94, 2010 WL 4721073, at *3 (D. Minn. Nov. 15, 2010), an unexplained delay of eight months between the filing of the complaint and motion for preliminary injunction undermined the plaintiff's claimed irreparable harm. And in *H.D. Vest, Inc. v. H.D. Vest Mgmt. and Servs., LLC*, No. 3:09-cv-00390-L,

2009 WL 1766095, at *4 (N.D. Tex. June 23, 2009), the court found a five-month delay between a plaintiff's discovery of alleged trademark infringement and the filing of a motion for preliminary injunction negated the plaintiff's irreparable harm. Importantly though, the court also held that plaintiff failed to show any harm could not adequately be addressed via monetary damages. *Id.*

In citing *Cafferty v. Trans World Airlines, Inc.*, 488 F.Supp. 1076, 1080 (W.D. Mo. 1980), the district court omitted key language from the portion quoted. App. 188-189; R. Doc. 50, at 15-16. The full quote is: "The clearest reason for denying the injunction is the Court's view that there is no provision of the Railway Labor Act which would give any and all employees an absolute right, as here claimed, to a court-imposed preliminary injunction restoring a status quo which has been dead for more than a year prior to the filing of suit." But Mr. Ng does not require a statutory grant of rights to restore the status quo here, and as discussed below, in this Circuit it is entirely appropriate to restore the status quo with preliminary relief.

*Beame v. Friends of the Earth*, 434 U.S. 1310, 1313 (1977), is also inapposite. There, Justice Marshall, as Circuit Justice, denied a stay of

the court of appeals' judgment pending the full Court's consideration of a petition for writ of certiorari. Concluding that the petitioners failed to carry their burden of showing the balance of harms favored a stay, Justice Marshall noted that the delay in seeking a stay undermined the claimed irreparable harm—which was questionable in any event. *Id.*

The district court also overread the distinguishable factors in *Ohlensehlen*, 509 F.Supp.3d 1085; App. 189; R. Doc. 50, at 16. There, after the University of Iowa announced its intention to eliminate the women's swimming and diving team, members of the team unsuccessfully attempted to convince the school to reinstate the team. 509 F.Supp.3d at 1093. By the time they filed suit a few months later, "several of its coaches ha[d] left the school, and 15 of its 35 members ha[d] put in to transfer and swim elsewhere." *Id.* at 1102. Even though the court noted the transfer decisions were reversible, the court recognized that serious damage was already sustained by the program due to the planned elimination, and should injunctive relief not be granted, such damage would be "existential." *Id.*

It is uncontested that Mr. Ng is harmed by the elimination of the men's gymnastics team. It can also not reasonably be contested that the

only remedy for that harm is the reinstatement of the team. Therefore, any delay in Mr. Ng initiating this action does not call into question the reality or severity of his harm. Rather, a conclusion that Mr. Ng is not irreparably harmed due to a delay in seeking preliminary relief says that a plaintiff's speed—or lack thereof—in seeking to redress his harm outweighs the actual harm suffered by the plaintiff even where no other remedy is available. Mr. Ng is irreparably harmed.

## II

## MR. NG HAS A FAIR CHANCE OF PREVAILING ON THE MERITS OF HIS CLAIMS

### A. Standard of Review

When analyzing the probability of success prong in considering a preliminary injunction motion to enjoin something other than the "implementation of a duly enacted state statute," the "fair chance" of success standard applies. *Planned Parenthood of Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 732 (8th Cir. 2008) (en banc); *Portz*, 196 F.Supp.3d at 974 (applying "fair chance" standard where students raised Title IX and equal protection challenge to university's decision to eliminate women's tennis team); *Ohlensehlen*, 509 F.Supp.3d at 1094 ("Because they do not challenge the validity of a state or federal law, Plaintiffs need

only show a "fair chance" of succeeding on the merits of their Title IX claims."). Under the "fair chance" standard, plaintiffs seeking preliminary injunctions are not required to show they are more than 50% likely to prevail on the merits of their claims. *D.M. by Bao Xiong*, 917 F.3d at 999. Rather, they must only show that they have a "fair chance" of success, which is something less than 50% likely. *Rounds*, 530 F.3d at 730.

Recognizing that Mr. Ng "does not challenge the validity of any statute," the district court correctly applied the "fair chance" standard. App. 190; R. Doc. 50, at 17. On appeal, this Court should do the same.

### B. The University's Decision to Eliminate Men's Gymnastics Violates Title IX

Congress enacted Title IX to prohibit sex discrimination in any educational program or activity that receives federal financial assistance. 20 U.S.C. § 1681(a). That prohibition applies to intercollegiate athletics by preventing institutions from excluding individuals from athletics on the basis of sex. 34 C.F.R. § 106.41(a). Thus, the rule under Title IX is that opportunities to participate in collegiate athletics cannot be denied to someone due to his or her sex.

Despite Title IX's rule, the University eliminated the men's gymnastics team because it decided that it has too many male athletes. But that action is precisely what Title IX prohibits: sex-based decisions that deny opportunity to someone on the basis of sex. *See* 20 U.S.C. § 1681(a). It cannot reasonably be disputed that the University cut the men's gymnastics program for any reason other than establishing sex-based quotas for athletes. Simply, Mr. Ng is no longer a varsity gymnast at the University of Minnesota because of his sex.

Of course, Title IX's rule does not categorically bar the University from considering sex in making athletics decisions. To assist schools with determining whether their students enjoy equal opportunity to participate in athletics, federal regulations enumerate ten factors to consider, including "[w]hether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes." 34 C.F.R. § 106.41(c). To assess compliance with this factor, schools frequently look to the Department of Education's non-binding 1979 Policy Interpretation guidance, which includes what is known as the "three-part test." *See* 44 Fed. Reg. 71,413. Relevant here, the first prong of the test considers "whether intercollegiate level

participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments." 44 Fed. Reg. at 71,418. Under the guidance, only one prong of the test must be satisfied.

Pointing to the substantial proportionality prong, as well as this Court's decision in *Chalenor*, 291 F.3d 1042, the district court excused the University's decision to reduce its number of male athletes and deny Mr. Ng his opportunity to continue competing as a varsity athlete at the University.[9] App. 191-194; R. Doc. 50, at 18-21. In addition to the distinctions between *Chalenor* and this case discussed below that caution against *Chalenor* controlling the outcome here, permitting the substantial proportionality prong to excuse the University's sex-based discrimination against Mr. Ng perversely turns the anti-discrimination statute into one permitting sex-based quotas. Such an application of Title IX also ignores the statute's express qualifying language that its demand for equal opportunity does not:

[9] Mr. Ng does not challenge the district court's holding that he has no fair chance of success on his Title IX claim against defendants Coyle and Gabel in their official capacities. App. 191; R. Doc. 50, at 18 n.1. He does, however, appeal the court's holding that he has no fair chance of success on his Title IX claim against defendant Board of Regents.

> 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 [athletics], in comparison with the total number or percentage of persons of that sex [enrolled in the university.]

20 U.S.C. § 1681(b). Therefore, invoking proportionality concerns while cutting men's gymnastics in an alleged effort to reach statistical parity does not free the University from Title IX's prohibition on sex discrimination. *See Chalenor*, 291 F.3d at 1047 ("Title IX does not require proportionality"); *Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824, 831 (10th Cir. 1993) ("a Title IX violation may not be predicated solely on a disparity between the gender composition of an institution's athletic program and the gender composition of its undergraduate enrollment…"); *Cohen v. Brown Univ.*, 991 F.2d 888, 895 (1st Cir. 1993) (being out of proportion is not a per se violation of Title IX's prohibition against sex discrimination).

It is true that this Court previously applied Title IX to uphold a university's elimination of a men's team over concerns about proportionality between the university's enrollment and its number of male and female athletes. *See Chalenor*, 291 F.3d at 1043-44. For four

reasons, *Chalenor* does not doom Mr. Ng's claim that Title IX prohibits the elimination of the men's gymnastics team.

***First***, the University of North Dakota eliminated its men's wrestling team to reduce a 13.58% underrepresentation for female athletes, *Chalenor v. Univ. of N.D.*, 142 F.Supp.2d 1154, 1158 (D.N.D. 2000)—a disparity that persisted after the addition of three new women's teams, 291 F.3d at 1044. In upholding the university's decision under Title IX to reduce its disparity by cutting men's wrestling, this Court relied on multiple cases where other universities likewise sought to remedy large statistical deviations. *See id*. at 1049 (citing *Neal v. Bd. of Trs. of California St. Univ.*, 198 F.3d 763, 765 (9th Cir. 1999) (25% disparity); *Boulahanis v. Bd. of Regents*, 198 F.3d 633, 635 (7th Cir. 1999) (21% disparity); *Kelley v. Bd. of Trs.*, 35 F.3d 265, 269 (7th Cir. 1994) (20.6% disparity); *Roberts*, 998 F.2d at 829 (10.5% disparity); *Cohen*, 991 F.2d at 892 (11.4% disparity)). *See also Portz*, 196 F.Supp.3d at 975 (deviations "by 10 or more percentage points…are very rarely substantially proportionate."). That Title IX is not offended when teams are eliminated to directly address significant statistical disparities is entirely consistent with the remedial nature of Title IX. *Neal*, 198 F.3d

at 771 ("the plain meaning of the nondiscrimination principle set forth in 20 U.S.C. § 1681(a) does not bar remedial actions designed to achieve substantial proportionality between athletic rosters and student bodies"). But that is not the case here.

Relying on data submitted by the University, the district court determined that the University had a disparity of 3.88% in favor of males when it decided to eliminate men's gymnastics. App. 066, 193; R. Doc. 27-1, at 2; R. Doc. 50, at 20. Because 3.88% exceeded the rough 3.5% threshold recognized in *Portz*, as well as the 3.62% disparity found disproportionate in *Biediger v. Quinnipiac Univ.*, 691 F.3d 85 (2d Cir. 2012), the district court held that 3.88% was not substantially proportionate and was sufficient to warrant eliminating men's gymnastics. App. 193; R. Doc. 50, at 20. But in doing so, the district court ignored data submitted by Mr. Ng showing the disparity to be only 2.99%: a number no court has found to lack substantial proportionality. App. 050-053; R. Doc. 12-1, at 1-4.[10] Further, the district court's focus on 3.88%

[10] Mr. Ng obtained enrollment data from the University by totaling the numbers for the fall 2020 and spring 2021 semesters for undergraduates at the Twin Cities campus based on reported sex. *See* Official Enrollment Statistics Report, https://idr.umn.edu/reports-by-topic-enrollment/

overemphasized the number without fully considering the circumstances of this case where the University's disparity has only grown since the U.S. Department of Education's Office of Civil Rights (OCR) 2018 finding of no-discrimination due to enrollment fluctuations. App. 193-194; R. Doc. 50, at 20-21; *see also Biediger*, 691 F.3d at 106-08 (upon considering the specific circumstances, disparity "was almost entirely attributable to Quinnipiac's own careful control of its athletic rosters.").

The district court also ignored the University's projected 2021-22 data, which show that the University would be substantially proportionate if men's gymnastics was reinstated. Adding the 18-man gymnastics roster into the University's projections yields 337 men, with 368 women. App. 066; R. Doc. 27-1, at 2. The fall 2021 undergraduate enrollment at the Twin Cities campus is 45.91% male and 53.88% female. *See* https://idr.umn.edu/reports-by-topic-enrollment/enrollments. Thus, if men's gymnastics were reinstated, men would only be overrepresented by 1.89%.[11]

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enrollments. For the 2020-21 school year, men made up 46.69% of the undergraduate enrollment, with women making up the remaining 53.14%.

[11] OCR previously found a disparity of 1.47% to be substantially proportionate. App. 193-194; R. Doc. 50, at 20-21.

Even under the alternative approach taken by OCR in considering the disparity on a per-person basis and comparing that to the average team size, the University would still be substantially proportionate if it had not cut men's gymnastics.[12] As the district court noted, OCR "calculated the average female team size to be 35.85 female athletes in the 2016-2017 academic year," thus the then-current "disparity of 28 did not reach that threshold" and as a result, the University was substantially proportionate. App. 193-194; R. Doc. 50, at 20-21. While the numbers did change by the 2020-21 school year, the district court failed to consider the numbers had men's gymnastics been retained. As noted at the hearing on the preliminary injunction motion, under such a scenario, strict numerical parity would require 25 additional spots for women be added after the men's tennis and indoor track and field teams were eliminated. App. 168; R. Doc. 63, at 30. But because the average

[12] The Sixth Circuit recently held that a per-person count is the only permissible method of determining whether a participation gap is excessive. *Balow v. Mich. St. Univ.*, 24 F.4th 1051, 1060 (6th Cir. 2022). But as noted by the dissent, such a conclusion is an outlier that has not been adopted by any other court of appeals. *See id.* at 1065-67 (Guy, J., dissenting).

female team size at the University is now 28, the University remains substantially proportionate. *Id.*

***Second***, the financial context also distinguishes *Chalenor*. There, the university implemented the Governor's request for a government-wide budget reduction, and the elimination of men's wrestling accounted for 52% of the athletic department's reduction. 291 F.3d at 1044. In contrast, here, the men's gymnastics team, with its estimated budget of $750,000 and private endowment of around $900,000, App. 035; R. Doc. 11, at 3, accounts for a meager 0.06% of the University's estimated $125,000,000 budget, *supra* n.7. And in the face of feared deficits of $45–65 million due to the COVID-19 pandemic, cutting men's gymnastics would account for only 1.15–1.66% of that deficit. *See* App. 073; R. Doc. 29, at 3. Even if the combined budgets of all three eliminated men's teams are considered ($1.6 million), *supra,* at 9 (October 9, 2020, Board of Regents meeting, statement by Mr. Coyle, 4:06:25), that still would only address 2.5–3.55% of the feared deficit. Therefore, while significantly addressing a needed budget reduction may have sufficed in *Chalenor*, this case presents a fundamentally different scenario.

***Third***, the *Chalenor* panel relied on a Department of Education policy that has since been reversed. In support of its holding that Title IX permitted cutting a men's team to address a significant disparity of female athletes, this Court cited the university's reliance on the Department of Education's 1996 clarification memorandum. 291 F.3d at 1046. The 1996 memorandum stated, among other things, that "limiting men's teams in pursuit of equalizing athletic opportunities between the sexes is consistent with Title IX." *Id*. But the Department reversed that position in a 2003 memorandum where it stated that eliminating teams was a "disfavored" method of complying with the three-part test and "contrary to the spirit of Title IX for the government to require or encourage an institution to eliminate athletic teams." Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance (July 11, 2003).[13]

***Fourth***, the *Chalenor* panel discounted the men's wrestling supporters' proposal to self-fund the program because it lacked necessary details and using donated funds would not free the university from

[13] *Available at* https://www2.ed.gov/about/offices/list/ocr/title9guidanceFinal.html.

needing to remedy the significant statistical deviation present in that case. 291 F.3d at 1048. Here, however, the University's men's gymnastics supporters presented a plan to fund the team for two seasons—a plan that Defendant Gabel and the Chair of the Board of Regents dismissed out of hand. App. 056-057; R. Doc. 12-3, at 1-2. Further, because the University did not have a legally significant statistical disparity between male and female athletes in relation to the undergraduate enrollment, this Court's refrain that self-funding does not solve participation disparities, while true, is not implicated by this case.

*Chalenor* does not therefore necessitate affirming the district court's holding that Mr. Ng does not have a fair chance of success on his Title IX claim. Simply, the primary holding of *Chalenor*—eliminating men's teams to address significant disproportionality of female athletes is permissible under Title IX—is not offended where Mr. Ng has shown that men's gymnastics was eliminated despite there being no significant disparity in need of remedying.

Finally, to succeed in showing he has a fair chance of prevailing on his Title IX claim, it must be shown that Mr. Ng's interests and abilities in competing in athletics are no longer "fully and effectively

accommodated" by the University. *Roberts*, 998 F.2d at 831–32; *see also* 34 C.F.R. § 106.41(c). In *Roberts*, Colorado State University failed to effectively accommodate members of the women's softball team after the team was cut. 998 F.2d at 832. The district court had previously made extensive findings "concerning the unmet abilities and interests of the plaintiff softball players, and the feasibility of their organizing a competitive season of play." *Id.* at 831. The district court also "credited the plaintiffs' testimony regarding their commitment to softball, the recognition they have achieved both as a team and as individuals, and the substantial interest in softball among first year CSU students who are participating in a club team." *Id.* As a result, because the softball team was a "successful varsity softball team that played a competitive schedule" at the time it was cut, the plaintiffs easily showed they were no longer effectively accommodated by the university. *Id.*

The same is true here. App. 029-033, 035-037, 040-041; R. Doc. 10, at 1-4; R. Doc. 11, at 1, 3-5, 8-9. While male athletes are not currently underrepresented at the University, the burden in challenging sex-based decisions is "less vexing when plaintiffs seek the reinstatement of an established team rather than the creation of a new one." *Roberts*, 998

F.2d at 831; *see also Cohen*, 991 F.2d at 904. Thus, Mr. Ng has a fair chance of prevailing on his claim that the University's decision to cut men's gymnastics violates Title IX and its implementing regulations. *See* 34 C.F.R. § 106.41(c).

### C. Eliminating Men's Gymnastics Violates Mr. Ng's Right to Equal Protection

Even if this Court disagrees that the University's independent decision to eliminate its men's gymnastics team violates Title IX, the University's decision unquestionably violates the Equal Protection Clause of the Fourteenth Amendment.

#### 1. Mr. Ng's Equal Protection Claim is Not a Collateral Attack on Title IX

Mr. Ng does not challenge the validity of the Title IX statute, its implementing regulations, or the 1979 Policy Interpretation guidance. Instead, he challenges the University's independent decision to eliminate the men's gymnastics team as a violation of the Title IX statute and regulations, as well as the Fourteenth Amendment. App. 019-024; R. Doc. 1, at 10-15. That the University defended its decision below by pointing to the Policy Interpretation does not convert Mr. Ng's challenge to the University's action into one challenging the Interpretation itself.

Mr. Ng's irreparable harm stemming from the University's elimination of men's gymnastics results from the "independent decision[] of [a] federally funded institution[] that ch[o]se to eliminate" the team. *Nat'l Wrestling Coaches*, 366 F.3d at 933. In *Nat'l Wrestling Coaches*, organizations sued the Department of Education challenging the Policy Interpretation's three-part test in response to universities eliminating men's wrestling teams partly due to the test's proportionality prong. *Id.* The D.C. Circuit held that the plaintiffs lacked standing to sue the Department where the complained-of decisions to eliminate teams were independently made by the universities. *Id.* at 933, 936–37; *Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 383 F.3d 1047, 1048 (D.C. Cir. 2004). Thus, the proper defendant in an action challenging a university's decision to eliminate a sports team is the university itself. 366 F.3d at 947.

Here, the district court declined to address *Nat'l Wrestling Coaches*, pointing instead to the University's reliance on the Policy Interpretation to conclude that the University's sex-based decision to cut men's gymnastics is not subject to constitutional scrutiny. App. 195-196; R. Doc. 50, at 22-23. The district court fundamentally erred because the

Interpretation is non-binding agency guidance. *See Nat'l Wrestling Coaches*, 383 F.3d at 1048. Neither the statute, the regulations, nor the Interpretation mandate statistical balancing. In fact, the statute expressly states that statistical imbalances are insufficient for finding that the University engaged in discrimination. 20 U.S.C. § 1681(b). Therefore, the University's claim that its decision to eliminate men's gymnastics is immunized from constitutional challenge because it allegedly sought to comply with Title IX and the Policy Interpretation, is nothing more than a magic-words theory. Because the Interpretation does not require the University to do anything, and non-compliance with it is not grounds for finding that Title IX was violated, the University's decision to eliminate men's gymnastics is subject to constitutional scrutiny.

Importantly, even if proportionality was required, the University complies with Title IX and the Policy Interpretation without cutting men's gymnastics. As noted above, *supra,* at 36-39, the University's athletics program is substantially proportionate with the men's gymnastics team reinstated. In other words, because the University

already complied with Title IX without cutting men's gymnastics, then it cannot point to Title IX as compelling its decision to eliminate the team.

The district court's reliance on the Seventh Circuit's decision in *Kelley v. Bd. of Trustees* is misplaced. There, in the context of remedying a 20.6% underrepresentation of female athletes at the University of Illinois, the men's swimming team was cut. 35 F.3d at 269, 272. *See also Miami Univ Wrestling Club v. Miami Univ.*, 302 F.3d 608, 611 (6th Cir. 2002) (men's teams cut to remedy 13% female underrepresentation remaining after four women's teams added). But here, the University has not defended its decision to eliminate men's gymnastics on the grounds that it is remedying past discrimination against women. Instead, it simply assumes that any statistical imbalance is impermissible discrimination itself. For the reasons discussed below, that is not so.

Further, should the Court hold that Mr. Ng's equal protection claim is a collateral attack on Title IX and its regulatory components, then no viable § 1983 claim would remain for instances of sex-based decisions alleged to be discriminatory. As noted above, the D.C. Circuit has already held that plaintiffs cannot sue the U.S. Department of Education even when schools explicitly state that a team was only eliminated in an effort

to comply with Title IX. A holding here that Mr. Ng's equal protection claim is barred would thus leave plaintiffs without a constitutional remedy. Such a result is foreclosed by binding precedent. As the Supreme Court held in *Fitzgerald v. Barnstable Sch. Comm.*, "§ 1983 suits based on the Equal Protection Clause remain available to plaintiffs alleging unconstitutional gender discrimination in schools." 555 U.S. 246, 258 (2009).

At the heart of the district court's holding that Mr. Ng's equal protection claim is a collateral attack is the misunderstanding of what Title IX requires, in contrast to what it may permit. As discussed above, Title IX does not require the University to reach substantial proportionality. It may *permit* schools to use proportionality in certain circumstances, but permitting an action in circumstances not present here is fundamentally different from legally requiring one. If Title IX did require the University to be substantially proportionate, then perhaps a constitutional claim against actions taken to reach proportionality would be collateral attacks. But that is not the case here.

### 2. Eliminating Men's Gymnastics Does Not Survive Intermediate Scrutiny

There is a "strong presumption that gender classifications are invalid." *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 152 (1994) (Kennedy, J., concurring). As the University's decision to eliminate men's gymnastics is unquestionably a sex-based decision, the team's elimination is presumed unconstitutional and the University bears the burden of justifying its decision under intermediate scrutiny.

#### a. The Decision to Cut Men's Gymnastics is Subject to Intermediate Scrutiny

The University's decision to cut the men's gymnastics team to decrease its number of male athletes "expressly discriminates . . . on the basis of gender, [and] it is subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment." *Miss. Univ. for Women*, 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). That a challenged classification discriminates against males rather than females "does not exempt it from scrutiny or reduce the standard of review." *Hogan*, 458 U.S. at 723; *see also United States v. Virginia*, 518 U.S. 515, 532 (1996) (the Supreme Court carefully inspects "official action that closes a door or denies opportunity to women (or to men).").

Indeed, the party defending a sex-based classification "must carry the burden of showing an 'exceedingly persuasive justification' for the classification." *Hogan*, 458 U.S. at 724 (citation omitted); *Virginia*, 518 U.S. at 533 (burden of justifying policies that discriminate on sex is "demanding and it rests entirely on the State."). The government's justifications "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)). Even where the government offers justifications based on a "benign, compensatory purpose," courts are not to take those justifications at face value but must consider them with skepticism to ensure the purposes are real rather than merely

rationalizations. *Weinberger*, 420 U.S. at 648; *Virginia*, 518 U.S. at 535–36.

### b. Cutting Men's Gymnastics Does Not Further an Important Governmental Objective

In the district court, the University cited its objectives in eliminating the men's gymnastics team as: "federal law compliance, avoiding the use of University resources to support discriminatory practices, providing individual student-athletes…protection from such practices, and responsible management of public resources." Defs' Memo. of Law, R. Doc. 26, at 31. Rather than analyzing whether those objectives are furthered by the elimination of men's gymnastics, the district court merely accepted them as "important," and determined that the University satisfied its first burden under intermediate scrutiny as a result. App. 197-198; R. Doc. 50, at 24-25. To the contrary, none of the University's stated objectives are sufficiently furthered by the elimination of men's gymnastics.

First, citing Title IX compliance as justification for eliminating men's gymnastics ignores that Title IX did not *require* the University to cut the team. Title IX's rule that "[n]o person … shall, on the basis of sex, be excluded from participation in, [or] be denied the benefits of … any

education program or activity" like intercollegiate athletics, 20 U.S.C. § 1681(a), is contrary to the University's belief that Title IX required it to eliminate men's gymnastics. *See* 34 C.F.R. § 106.41(a).[14] Indeed, Title IX expressly states that its demand for equal opportunity "shall [not] be interpreted to 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 [athletics]…." 20 U.S.C. § 1681(b). *See also Chalenor*, 291 F.3d at 1047 ("Title IX does not require proportionality"); *Roberts*, 998 F.2d at 829 n.5 ("an institution is not required to maintain gender balance"); *Cohen*, 991 F.2d at 894 ("Title IX prohibits discrimination, it does not mandate strict numerical equality"). Therefore, even if the University lacked substantial proportionality, the University could not be found in violation of Title IX on those grounds alone. As a result, there is no legal basis for the University to claim

[14] Should this Court hold that Title IX *permits* the use of proportionality as one factor supporting the elimination of sports teams in circumstances not present here, that is still fundamentally different from a holding that Title IX *requires* strict proportionality at all times and thus compels the University to immediately seek out strict proportionality for its athletics programs. Simply, voluntary actions that may be permitted by a statute are not the same as mandatory actions taken to comply with one.

Title IX required it to eliminate the men's gymnastics team to achieve substantial proportionality.

Nor does the U.S. Department of Education's 1979 Policy Interpretation guidance for the implementation of regulations enforcing Title IX, which includes the "three-part test," require the University to achieve substantial proportionality. *See* 44 Fed. Reg. 71,413. And even if it did, an agency guidance document cannot supersede the language of the statute itself by requiring that which the statute does not.

Further, subsequent clarifications to the three-part test issued in 1996 and 2003 also noted that meeting any of the three prongs was sufficient for compliance, that reductions to men's teams are not required, and elimination of teams as a means of compliance is "disfavored" and "contrary to the spirit of Title IX." *See supra,* at 40; *see also Kelley*, 35 F.3d at 271 (Policy Interpretation does not "mandate statistical balancing."); *Cohen*, 101 F.3d at 175–76 (rejecting university's view that proportionality prong of three-part test creates quotas). Therefore, because Title IX does not require the University to cut men's gymnastics even if a legally significant disproportionality was established, eliminating the program to create sex-based quotas for

athletes does not further an important governmental objective in complying with the statute. In fact, the decision directly conflicts with the statute's text and purpose prohibiting discrimination.

Second, no evidence has been produced that the University engages in discriminatory practices against female athletes that must be avoided or that students need protection from. Instead, the University assumes that its slight statistical disparity between female athletes and undergraduates is sufficient. While there is no set number that defines substantial proportionality, *see Portz*, 196 F.Supp.3d at 975 (deviations "by 10 or more percentage points . . . are very rarely substantially proportionate…[and] deviation[s] of less than 3.5 percentage points typically" suffice) (citing examples), and the numbers cited by Mr. Ng and the University differ slightly for 2020-21 prior to the elimination of men's gymnastics, *compare* App. 066; R. Doc. 27-1, at 2, *with supra,* at 36-37, women were only underrepresented by 2.99% or 3.88%, and thus in line with previous findings of proportionality, *see Portz*, 196 F.Supp.3d at 975.

Most importantly, considering the projected 2021-22 numbers, the University would undoubtedly be substantially proportionate with men's

gymnastics reinstated. Adding the 18-man roster into the University's projections yields 337 men, with 368 women. App. 066; R. Doc. 27-1, at 2. The fall 2021 undergraduate enrollment at the Twin Cities campus is 45.91% male and 53.88% female. *See* Official Enrollment Statistics Report, https://idr.umn.edu/reports-by-topic-enrollment/enrollments. Thus, if men's gymnastics remained, men would only be overrepresented by 1.79%. Resultingly, the University has no interest in avoiding or preventing discriminatory practices that is furthered by cutting men's gymnastics. *See D.M. by Bao Xiong*, 917 F.3d at 1002.

Third, the University's interest in responsible financial management is not furthered by eliminating men's gymnastics. While initially stating that feared budget shortfalls due to COVID-19 contributed to the University considering whether to cut teams, the University acknowledged that cutting men's gymnastics, tennis, and indoor track and field would only save a combined $1.6 million. *Supra,* at 9, n.6 (October 9, 2020, Board of Regents meeting, statement by Mr. Coyle, 4:06:25). More specifically, cutting men's gymnastics saves the University between $750,000 and $825,000, *see supra,* at 11 n.7 at 66; App. 035; R. Doc. 11, at 3, which is substantially less than 1% of the

University's total annual athletics budget. But even assuming that achieving such savings is sufficient to justify the University's decision to single out men's sports for elimination, *but see Ohlensehlen*, 509 F.Supp.3d at 1104 ("financial hardship is not a defense to a [probable] Title IX violation.") (quoting *Mayerova v. Eastern Mich. Univ.*, 346 F. Supp. 3d 983, 998 (E.D. Mich. 2018)), the University rejected out-of-hand a proposal by the Friends of Minnesota Men's Gymnastics alumni group to self-fund the program. App. 048; R. Doc. 12, at 3. Thus, any claim by the University that securing its financial health was the objective in eliminating the team is belied by the facts. *See Hogan*, 458 U.S. at 730 (reciting a benign purpose is insufficient "to establish that the alleged objective is the actual purpose underlying the discriminatory classification.").

In sum, cutting men's gymnastics does not further an important governmental objective. But even if the Court were to hold that the University's decision furthers an interest in complying with Title IX, maintaining healthy finances, or preventing discrimination against women, Mr. Ng still has a fair chance of succeeding on the merits of his equal protection claim.

### c. Cutting Men's Gymnastics is Not Substantially Related to an Important Governmental Objective

To survive intermediate scrutiny there must be a "direct, substantial relationship between objective and means," and the burden is on the University to show that direct relationship. *See Hogan*, 458 U.S. at 725. 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. The University's demonstration of the proper means-ends relationship must also be "exceedingly persuasive." *Id.* at 724; *see also Virginia*, 518 U.S. at 533 (burden of justifying official policies that discriminate on sex is "demanding and it rests entirely on the State").

Here, even if eliminating men's gymnastics furthers a governmental interest in complying with Title IX, that decision is not substantially related to such an interest. As noted, the statute expressly states that universities are not required to adversely treat "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 [athletics] . . . ." 20 U.S.C. § 1681(b). To the extent that the three-part

test lends support to the University's consideration of proportionality in deciding the makeup of its athletics programs, more recent agency clarifications of the test, as well as case law interpreting the test, outweigh any interpretation that the University is required to achieve strict statistical parity. *See*, *e.g.*, Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance (July 11, 2003) ("it is contrary to the spirit of Title IX for the government to require or encourage an institution to eliminate athletic teams."); *see also Kelley*, 35 F.3d at 271 (Policy Interpretation does not "mandate statistical balancing."); *Cohen*, 101 F.3d at 175-76 (rejecting university's view that proportionality prong of three-part test creates quotas). In short, the University does not have to reach strict statistical parity between its male and female athletes. As a result, any attempt by the University to show that cutting men's gymnastics is substantially related to complying with Title IX requirements will fail to be "exceedingly persuasive." *See Hogan*, 458 U.S. at 724.

More fundamentally, eliminating the men's gymnastics team to reach strict statistical parity or proportionality creates impermissible sex-based quotas. At the heart of the University's decision to cut men's

gymnastics—and the district court's holding that the University lacked substantial proportionality, App. 198-199; R. Doc. 50, at 25-26—is the false notion that the failure to show proportionality is evidence of sex-based discrimination. *See Washington v. Davis*, 426 U.S. 229, 240-41 (1976) (noting the Court's rejection of allegations of racial discrimination when allegations only based on lack of statistical proportionality); *Taylor v. Teletype Corp.*, 648 F.2d 1129, 1133 (8th Cir. 1981) ("Numbers must be statistically significant before one can properly conclude that any apparent racial disparity results from some factor other than random chance"); *Main Line Paving Co. v. Bd. of Educ.*, 725 F.Supp. 1349, 1363 (E.D. Pa. 1989) (government must "detail the cause of th[e] disparity" or "say for certain that it was caused by gender discrimination, rather than other conditions in the general economy"); *Saunders v. White*, 191 F.Supp. 2d 95, 132 (D.D.C. 2002) (government must articulate how "raw data should be interpreted and the reasons why it supports a classification."); *Mallory v. Harkness*, 895 F.Supp. 1556 (S.D. Fla. 1995) (invalidating sex-based quota where government "did not positively identify any discriminatory policy or practices" and pointed solely to disparities). In fact, statistical disparities may result from any number of

factors, including the individual preferences, needs, and choices of the students involved. *Cf. City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507 (1989) (race-based contracting quota "rests upon the 'completely unrealistic' assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population.") (citing *Sheet Metal Workers v. EEOC*, 478 U.S. 421, 494 (1986) (O'Connor, J., concurring in part and dissenting in part)). Here, as OCR determined in 2018 that the University was fully accommodating the interests and abilities of its student-athletes, any increased disproportionality since that time is attributable to enrollment and roster fluctuations, not discrimination. Thus, the University's aim to prevent or avoid discriminatory practices—as evidenced solely by a claimed lack of proportionality—by eliminating men's gymnastics, is not substantially related to an important governmental objective.

Nor is the University's interest in responsible financial management substantially related to the elimination of men's gymnastics. The men's gymnastics team, with its estimated budget of $750,000 and private endowment of around $900,000, App. 035; R. Doc. 11, at 3, accounts for a miniscule 0.06% of the University's estimated

$125,000,000 budget, *supra* n.7. With feared deficits of $45–65 million due to the COVID-19 pandemic, cutting men's gymnastics would account for only 1.15-1.66% of the University's deficit. App. 073; R. Doc. 29, at 3. Even if the combined budgets of all three eliminated men's teams are considered ($1.6 million), *supra,* at 9 (October 9, 2020, Board of Regents meeting, statement by Mr. Coyle, 4:06:25), that still would only address 2.5-3.55% of the feared deficit. It is simply not exceedingly persuasive that cutting men's gymnastics was necessary to reduce the feared deficit, and even if it is, the meager savings gained is not substantially related to addressing the deficit. Mr. Ng has a fair chance of success on his equal protection claim.

## III

## THE BALANCE OF HARMS WEIGHS IN FAVOR OF GRANTING A PRELIMINARY INJUNCTION

In analyzing the balance of harms, the district court did not find that the University would suffer any harm due to the issuance of a preliminary injunction. App. 199; R. Doc. 50, at 26. In fact, the court recognized that Mr. Ng "is harmed by losing his opportunity to compete as a gymnast at the University." *Id*. Yet the court nonetheless held that "issuing an injunction cannot resolve that harm because nothing in the

record suggests that, even if the injunction issued, Plaintiff could compete this year." *Id.*

As discussed above, however, Mr. Ng's harm in the absence of an injunction extends beyond the lost 2021-22 gymnastics season. *Supra* at 21-26. In addition to Mr. Ng almost certainly losing the 2022-23 season should this Court affirm denial of preliminary relief, Mr. Ng also suffers the continual loss of benefits that go along with being a varsity athlete—benefits that he would enjoy immediately upon the team's reinstatement regardless of the team's ability to compete right away. App. 032; R. Doc. 10, at 4.

In similar circumstances, this Court previously held the balance of harms favored preliminary injunctive relief. In *D.M. by Bao Xiong*, two high school boys appealed the denial of their motion for preliminary injunction seeking a court order allowing them to try out for their high school competitive dance teams. 917 F.3d at 998. By the time the Court was able to hold oral argument (in December of 2018), the competitive dance season was already halfway complete. Oral argument at 0:42-1:18 (http://media-oa.ca8.uscourts.gov/OAaudio/2018/12/183077.MP3). Even though the Court's decision reversing the denial of the boys' motion for

preliminary relief was issued in March—after that year's dance season was complete—the Court still held the balance of harms favored injunctive relief because the boys had a remaining year of eligibility in which they could join their respective teams. 917 F.3d at 998, 1004.

Further placing the balance in favor of preliminary relief here is that an injunction and order reinstating the men's gymnastics team would restore the status quo. This Court defines the status quo as the "last uncontested status which preceded the pending controversy." *Minn. Mining & Mfg. Co. v. Meter ex rel. NLRB*, 385 F.2d 265, 273 (8th Cir. 1967) (citation omitted); *see also* 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2948 (2d ed. 1995). That definition "allows the court to restore the status quo ante when the continuation of the changed situation would inflict irreparable harm on plaintiff." Wright and Miller, § 2948; *see also Hill v. Xyquad, Inc.*, 939 F.2d 627, 631 (8th Cir. 1991) ("One of the goals in an injunction case such as this is a return to the status that existed before the violative action occurred."); *FerryMorse Seed Co. v. Food Corn, Inc.*, 729 F.2d 589, 593 (8th Cir. 1984) (affirming preliminary injunction to restore status quo of activity interrupted by challenged action). Thus, parties may

sometimes be compelled to reverse their actions that disturbed the status quo. *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 1013 (10th Cir. 2004) (McConnell, J., concurring).

The district court ignored this Court's definition for the status quo, and instead relied on a contrary district court decision defining the status quo as "refer[ing] to the existing state of affairs" at the time litigation commences to refuse to "go back in time and recapture the status quo of an earlier time." App. 186; R. Doc. 50, at 13 (citing *Cenveo Corp. v. S. Graphic Sys., Inc.*, Civ. No. 08-5521, 2009 WL 161210, at *3 (D. Minn. Jan. 22, 2009)). As the district court's approach is belied by Circuit precedent, this Court should reverse and hold that the balance of harms favors preliminary relief here.

## IV

## THE PUBLIC INTEREST FAVORS PRELIMINARY RELIEF

Enjoining the discriminatory decision to cut men's gymnastics at the University of Minnesota is in the public interest. The public is best served, not by the fulfillment of discriminatory decisions affecting athletics at a public university, 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")); *McLaughlin by McLaughlin v. Boston Sch. Comm.*, 938 F.Supp. 1001, 1017 (D. Mass. 1996) (issuance of preliminary injunction to allow one eighth-grade student to transfer schools "affirmatively serve[d]" the public interest because student avoided being kept on "pins-and-needles about her educational future" during potentially lengthy litigation). More specifically, the public has a compelling interest in "eradicating sex discrimination." *Portz*, 196 F.Supp.3d at 978 (citing *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983)).

In *D.M. by Bao Xiong*, this Court held that preliminary relief served the public interest because the rule prohibiting boys from trying out for high school competitive dance teams likely violated their Fourteenth Amendment equal protection rights. 917 F.3d at 1004. Similarly, in *Portz*, the court held that preliminary relief enjoining St. Cloud State University's elimination of its women's tennis team served the public interest because the athletes were likely to succeed on their Title IX

claim, and "because the public's interest in eradicating sex discrimination is compelling." 196 F.Supp.3d at 978. More recently, in *Ohlensehlen*, the Southern District of Iowa preliminarily enjoined the University of Iowa from cutting its women's swimming team, holding that the public interest was served by the injunction because "the public interest demands that [the University of Iowa] comply with federal law and in this instance that means compliance with Title IX." 509 F.Supp.3d at 1105 (quoting *Barrett v. West Chester Univ. of Penn. of St. Sys. of Higher Educ.*, 2003 WL 22803477, at *15 (E.D. Penn. 2003)).

Here, Mr. Ng has a fair chance of prevailing on his claims that the University's decision to cut the men's gymnastics team violates his equal protection rights, as well as Title IX. As a result, enjoining the University from continuing the elimination of men's gymnastics, and an order compelling the University to reinstate the team during this case, serves the public interest.

## CONCLUSION

This Court should reverse the district court's decision denying preliminary relief and order the University's men's gymnastics team be reinstated while this case proceeds.

DATED: April 29, 2022.

Respectfully submitted,

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