UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

EVAN NG, Plaintiff, 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. GABLE in her official capacity as President of the University of Minnesota, Defendants.	Case No. 21-cv-02404-NEB-BRT **MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION**

INTRODUCTION

Starting college is an exciting, if anxious, time in the life of a young adult. For Plaintiff Evan Ng, the experience was more than he originally bargained for. In addition to navigating the COVID-19 pandemic as he prepared to enter the University of Minnesota in the fall of 2020 as a freshman member of the University's varsity men's gymnastics team, Mr. Ng received the startling news that the University was proposing to eliminate the team at the end of the 2020-21 school year. Ng Decl. ¶ 6.

While the elimination of the men's gymnastics team was initially presented by the University as an unfortunate reaction to anticipated budget shortfalls due to the pandemic, the University also made clear that it believed

Title IX of the Education Amendments of 1972 compelled it to eliminate men's athletic teams. Burns Decl. ¶ 5. Indeed, in the face of public scrutiny and outspoken support for the men's gymnastics team, the University quickly—and consistently—credited its decision to its perceived need to achieve statistical parity between the number of male and female athletes in relation to the University's overall undergraduate enrollment. Burns Decl. ¶ 5; Meeker Decl. ¶¶ 7, 9. In other words, the University believed it had too many male athletes, so the century-old men's gymnastics program was targeted for elimination.

The University's sex-based decision to cut its men's gymnastics program violates Mr. Ng's Fourteenth Amendment right to equal protection, as well as the prohibitions against sex discrimination enshrined in Title IX, 20 U.S.C. § 1681(a). Because Mr. Ng satisfies the criteria for preliminary relief, this Court should enjoin the University from maintaining its decision to cut men's gymnastics and should restore the status quo by ordering the team reinstated during the pendency of this case.

STATEMENT OF FACTS

A. Evan Ng

Evan Ng is an accomplished gymnast. He first began competing at the age of six. Ng Decl. ¶ 3. From there, he developed into a national and state champion before being recruited by multiple universities. Ng Decl. ¶ 4. 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 (Mike Burns), as well as his belief in the championship-caliber program that Coach Burns oversaw at the University. Ng Decl. ¶ 5.

In September of 2020, Mr. Ng was preparing to leave home for the first time to begin his freshman year at the University. Ng Decl. ¶ 6. Due to the University's COVID-19 protocols, his arrival on campus was delayed. Ng Decl. ¶ 6; Burns Decl. ¶ 14. As a result, he was waiting in his doctor's office for an MRI on his injured shoulder when he was informed that he needed to join his teammates for a Zoom call with the University's Director of Athletics, Mark Coyle. Ng Decl. ¶ 6. 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. Ng Decl. ¶ 6.

Learning that the program might be eliminated was very upsetting for Mr. Ng. Ng Decl. ¶ 7. 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 begin considering whether to transfer to another university or see his promising gymnastics career end. Ng Decl. ¶ 7.

As the school year wore on and the men's gymnastics season approached, Mr. Ng's shoulder healed. Ultimately, he was able to compete in the pommel horse event in two gymnastics meets. Ng Decl. ¶ 8. While he was thrilled to compete at the collegiate level against top competition, his shoulder prevented him from fully vying for opportunities to participate in meets. Ng Decl. ¶ 9. Mr. Ng's inability to fully showcase his abilities during the 2020-21 season substantially diminished his opportunities to transfer schools to continue his gymnastics career elsewhere. Ng Decl. ¶ 9. 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. Ng Decl. ¶ 10; Burns Decl. ¶ 28. As a result, not many roster spots are available for potential transferees. Ng Decl. ¶ 10; Burns Decl. ¶ 21. 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. Ng Decl. ¶ 10; *see also* Dan Murphy, *NCAA grants extra year of eligibility for all winter sport athletes, voids .500 rule for bowl teams*, ESPN (Oct. 14, 2020).[1] All seniors that would have otherwise exhausted their eligibility after the 2020-21 season are thus able to

[1] *Available at* https://www.espn.com/college-sports/story/_/id/30116895/ncaa-grants-extra-year-eligibility-all-winter-sport-athletes.

remain on their respective teams for the 2021-22 season. Ng Decl. ¶ 10; Murphy, *supra* at 4.

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. Ng Decl. ¶ 11. Of some small consolation to Mr. Ng, a new recreational club gymnastics team for men has been established for the 2021-22 school year. Ng Decl. ¶ 12. While a club team is inferior to a varsity collegiate 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 has joined the club team because of his love for gymnastics and to stay in shape in case the varsity team is reinstated. Ng Decl. ¶¶ 12–13.

B. The Men's Gymnastics Team And The University's Decision To Eliminate It

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.[2] 118 years later, the storied program came to an end on April 17, 2021, after hosting the NCAA national championship meet. Burns Decl. ¶ 27; Rachel Blount, *Gophers men's gymnastics finishes 118-year history with 5th-place*

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

finish; Shane Wiskus wins two individual titles, StarTribune (April 18, 2021).[3] The program met its demise not because the team performed poorly—the Gophers finished with a season-high 406.291 points overall, with individual national titles on parallel bars and still rings[4]—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. Burns Decl. ¶ 22. Rather, the team was eliminated because the University's leadership believed that to comply with Title IX, the ratio of male and female athletes must be in parity (or "proportional") with the University's general undergraduate enrollment. In other words, the team was cut because the University seeks to reduce its number of male athletes by using quotas based on sex.

On September 10, 2020, University of Minnesota Director of Athletics Mark Coyle announced to the University's athletics community that he was proposing to the University's Board of Regents a plan to eliminate the men's gymnastics, tennis, and indoor and outdoor track and field teams following the 2020-21 school year.[5] Burns Decl. ¶¶ 5–6, 9–10. No women's teams were offered for elimination. While initially alluding to financial concerns due to

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

[4] *See id.*

[5] The University ultimately decided to maintain the men's outdoor track and field program. *See* Burns Decl. ¶ 19.

projected revenue shortfalls in the tens of millions of dollars due to COVID-19 halting (then ultimately delaying)[6] 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. Burns Decl. ¶¶ 5, 20; Meeker Decl. ¶¶ 7, 9.

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 their hand to cut men's sports.[7] *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–

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[6] *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.

[7] 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.

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, so cuts needed); 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 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. Burns Decl. ¶ 23; Meeker Decl. ¶¶ 2, 4–5. Notably, in an April 8, 2021 letter to the University, the Friends proposed a 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. Meeker Decl. ¶ 6. 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 to the group 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 …." Meeker Decl. ¶ 7. 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 of Minnesota athletics budget is around $125 million annually. *See* University of Minnesota-Twin Cities NCAA Financial Report at 66 (2020).[8] During the 2019-20 school year, the men's

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

gymnastics program had a budget of approximately $750,000. *Id.*; *see also* Burns Decl. ¶ 8. However, the men's gymnastics program maintains an endowment of over $900,000 that largely supports the team's 6.3 scholarships. Burns Decl. ¶ 7. In total, University athletics administrators acknowledged that cutting men's gymnastics, tennis, and indoor track and field would save the University $1.6 million dollars a year in total. *Supra* n.7, October 9, 2020, Board of Regents meeting, statement by Mr. Coyle, 4:06:25.

Indeed, the Chair of the Board of 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." Meeker Decl. ¶ 9. As a result, he 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 with this Court. Ng Decl. ¶ 15.

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.").

ARGUMENT

I

EVAN NG SUFFERS ONGOING IRREPARABLE HARM DUE TO THE UNIVERSITY'S DECISION TO CUT MEN'S GYMNASTICS

Unless the Court issues a preliminary injunction, Mr. Ng will continue to suffer irreparable harm due to the University's decision to cut the varsity men's gymnastics team. Mr. Ng is a sophomore and has four remaining years of eligibility to compete in college gymnastics.[9] By granting a preliminary injunction the Court can ensure that Mr. Ng is given the opportunity to compete as a varsity gymnast for the University while this case proceeds. *Cf. Portz v. St. Cloud State Univ.*, 196 F.Supp.3d 963, 972 (D. Minn. 2016) (preliminary injunction appropriate to prevent irreparable harm to athletes

[9] As previously noted, the NCAA granted student-athletes an additional year of eligibility due to the COVID-19 pandemic. Murphy, *supra* at 4.

due to cutting of their college sport where case unlikely to conclude before upcoming season); *Ohlensehlen v. Univ. of Iowa*, 509 F.Supp.3d 1085, 1102 (S.D. Iowa 2020) (same).

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

This Court recognizes that 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 v. Minn. St. High Sch. League*, 917 F.3d 994, 1003 (8th Cir. 2019); *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 (2nd Cir. 2004) (collecting cases and

finding that depriving students of the opportunity to play a sport constitutes irreparable harm).

In *Portz*, this Court held that 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—this Court held that they suffered additional irreparable harm. *Id*. at 973.

Similarly, in *D.M. by Bao Xiong*, the Eighth Circuit 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 Eighth Circuit, "deprivations of temporally isolated opportunities," like school athletics, "are exactly what preliminary injunctions are intended to relieve." *Id*.

Here, the University eliminated its men's gymnastics team at the conclusion of the 2020-21 school year. Rather than transferring, Mr. Ng remains at the University with the hope that the University's unconstitutional

and illegal decision will be remedied by this Court. In the interim, many of his gymnastics teammates have graduated or transferred. Those that remain are no longer NCAA varsity athletes. Without preliminary relief, Mr. Ng and his remaining teammates will lose out on at least one season of varsity competition. As a result, Mr. Ng is irreparably harmed by the University's decision to cut men's gymnastics.

II

EVAN NG HAS A FAIR CHANCE OF SUCCEEDING ON THE MERITS OF HIS CLAIMS

Under Eighth Circuit precedent, Mr. Ng must only show that he has a fair chance of succeeding on the merits of either of his claims that the University's decision to eliminate men's gymnastics violates Title IX or his Fourteenth Amendment right to equal protection. As discussed below, he has a fair chance of prevailing on both claims, and preliminary relief is therefore warranted in this case.

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 is applied. *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.

Here, Mr. Ng does not challenge the "implementation of a duly enacted state statute." *Rounds*, 530 F.3d at 732. While the University's decision to cut men's gymnastics was subject to a debate by the Board of Regents culminating with a narrow final vote, Burns Decl. ¶ 19, the "full play of the democratic process" as envisioned by the Eighth Circuit in *Rounds* was absent. *Rounds*,

530 F.3d at 732 n.6; *c.f. Mulla v. Univ. of Minn.*, No. 20-cv-931-SRN/LIB, 2020 WL 5249586, at *4 (D. Minn. Sep. 3, 2020) (applying "fair chance" standard to challenge to University action). First, cutting men's gymnastics did not include "both the legislative and executive branches" engaging in the typical bi- or unicameralism and presentment process. *See D.M. by Bao Xiong*, 917 F.3d at 1000. The University and Board of Regents are equivalent to a state agency, subject to legislative oversight and authority. *See Star Trib. Co. v. Univ. of Minn. Bd. of Regents*, 683 N.W.2d 274, 279 (Minn. 2004). Second, the members of the Board of Regents are chosen by the Minnesota legislature, Minn. Stat. § 137.0246, and are not democratically accountable to the individuals subject to their decisions, like students, athletes, and coaches, *see D.M. by Bao Xiong*, 917 F.3d at 1000. As a result, the "fair chance" standard applies—and is satisfied—here.[10]

B. The University's Decision to Cut Men's Gymnastics Violates the Equal Protection Clause

Regardless of whether the Court holds that the University's decision to cut the men's gymnastics team is likely prohibited by Title IX, Mr. Ng has a fair chance of succeeding with his claim that the decision runs afoul of the Fourteenth Amendment's Equal Protection Clause. *See J.E.B. v. Alabama ex*

[10] For the reasons that follow, Mr. Ng also prevails under the heightened "likelihood" of success standard.

rel. T.B., 511 U.S. 127, 152 (1994) (Kennedy, J., concurring) (there is a "strong presumption that gender classifications are invalid").

1. 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 v. Hogan*, 458 U.S. 718, 723 (1982) (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 v. Boren*, 429 U.S. 190, 197 (1976).

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).") (parenthetical in original).

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 official 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.

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

As detailed above, the University has consistently claimed that Title IX compelled it to cut the men's gymnastics team. Assuming compliance with a federal statute is generally an important governmental objective, any University finger-pointing at Title IX is nevertheless unavailing here.

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). Indeed, the Title IX statute 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 v. Univ. of N.D.*, 291 F.3d 1042, 1047 (8th Cir. 2002) ("Title IX does not require proportionality"); *Roberts v. Col. St. Bd. of Agric.*, 998 F.2d 824, 829 n.5 (10th Cir. 1993) ("an institution is not required to maintain gender balance"); *Cohen v. Brown Univ.*, 991 F.2d 888, 894 (1st Cir. 1993) (*Cohen I*) ("Title IX prohibits discrimination, it does not mandate strict numerical equality"). Despite the statute's unequivocal language, the University erroneously claimed that Title IX requires it to eliminate the men's gymnastics team to achieve statistical parity between male and female athletes. *See supra* at 9.

In support of such an a-textual reading of the statute, the University likely relied on the U.S. Department of Education's 1979 Policy Interpretation guidance for the implementation of regulations enforcing the Title IX statute,

which includes what is known as the "three-part test."[11] *See* 44 Fed. Reg. 71,413. But an agency guidance document cannot be read to supersede the language of the statute itself by requiring that which the statute does not.

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* Further Clarification of Intercollegiate Athletics Policy Guidance Regarding Title IX Compliance (July 11, 2003)[12]; *see also Kelley v. Bd. of Tr., Univ. of Ill.*, 35 F.3d 265, 271 (7th Cir. 1994) (Policy Interpretation does not "mandate statistical balancing."); *Cohen v. Brown Univ.*, 101 F.3d 155, 175–76 (1st Cir. 1996) (*Cohen II*) (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, 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 sex discrimination.

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[11] Most 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.

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

Nor does eliminating men's gymnastics further an important governmental objective in satisfying the three-part test's proportionality prong. It is true that the Eighth Circuit previously held that Title IX "does not forbid" consideration of proportionality under the Policy. *See Chalenor*, 291 F.3d at 1047; *see also* 20 U.S.C. § 1681(b). But courts have only found significant statistical deviations to lack "substantial proportionality." *See*, *e.g.*, *Portz*, 196 F.Supp.3d at 975 (collecting cases and finding, "When the female-to-male ratio in an athletics program deviates from the ratio in the student body by 10 or more percentage points, the two ratios are very rarely substantially proportionate."); *Chalenor v. Univ. of N.D.*, 142 F.Supp.2d 1154, 1158 (D. N.D. 2000) (men overrepresented in athletics by 13.58%). In contrast, here, the University already attained "substantial" proportionality without cutting men's gymnastics. *Infra* n.14—15; Meeker Decl., Exh. A. It cannot therefore continue to rely on that justification in making sex-based decisions. *D.M. by Bao Xiong*, 917 F.3d at 1002. Further, the University has gone beyond seeking substantial proportionality, and has stated it seeks statistical "parity" instead. Meeker Decl. ¶ 7. Yet as noted above, courts have routinely rejected the notion that statistical parity is required.

Absent Title IX as an "exceedingly persuasive" justification, *Hogan*, 458 U.S. at 724, the University will likely claim that cutting men's gymnastics

furthers an important interest in maintaining the University's finances or remedying past discrimination. Neither are availing here.

While initially stating that feared budget shortfalls due to the COVID-19 pandemic contributed to the University considering whether to cut athletic programs, the University acknowledged that cutting men's gymnastics, tennis, and indoor track and field would only save a combined $1.6 million. October 9, 2020, Board of Regents meeting, statement by Mr. Coyle, 4:06:25. More specifically, cutting the men's gymnastics team saves the University between $750,000 and $825,000, *see supra* at 9 n.8 at 66; Burns Decl. ¶ 8, 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. Meeker Decl. ¶ 7. 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.").

Nor can the University point to remedying past discrimination against females as justification for cutting men's gymnastics. As recently as 2018, the U.S. Department of Education's Office for Civil Rights determined that the University was in compliance with Title IX, due in part to women being overrepresented in athletics by 1.47%. Letter from OCR Supervisory Attorney Ann Cook-Graver to University of Minnesota President Kaler 5–6 (Sept. 27, 2018);[13] *see also D.M. by Bao Xiong*, 917 F.3d at 1002 (prohibiting boys from joining high school dance team did not further government's interest in remedying past discrimination because girls were not underrepresented in Minnesota high school athletics). Even though the University's ratio shifted by the 2019-20 school year,[14] the slight disparity was not significant enough to support a finding that women are underrepresented in athletics. *See Equity in Athletics, Inc. v. Dep't of Educ.*, 639 F.3d 91, 109-10 (4th Cir. 2011) (less than 3% disparity is acceptable); *Boulahanis v. Bd. of Regents*, 198 F.3d 633, 636, 638–39 (7th Cir. 1999) (less than 3.43% disparity is acceptable). Indeed, the

[13] *Available at* https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/05152038-a.pdf?fbclid=IwAR3ucwtthgEZ3l3jJDAKnVlr_fL7GkpfnKdZrK31qLkFbrLufVJgNW-3Nv4.

[14] In March 22, 2021, correspondence to men's tennis supporters, Mr. Coyle reported the University's 2019-20 athletics participation numbers as 50.7% male and 49.3% female, with the undergraduate enrollment comprising 46.4% males and 53.6% females. *See also* Meeker Decl., Exh. A. Thus, due to normal fluctuations men were overrepresented by 4.3% for the 2019-20 school year.

numbers shifted again during the 2020-21 school year, with men's overrepresentation dropping to 2.99%.[15] Thus, because the University does not discriminate against its female athletes, it cannot discriminate against men in turn. *D.M. by Bao Xiong*, 917 F.3d at 1002 ("for a government actor to classify individuals based on gender for the purpose of remedying a prior lack of opportunities, the individuals must continue to lack opportunities or the classification is not constitutionally justified."); *Hogan*, 458 U.S. at 729 (university's women-only policy was unconstitutional because university "made no showing ... that women [were] currently ... deprived of" opportunities).

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

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[15] For the 2020-21 school year, men made up 46.77% of the undergraduate enrollment, with women making up the remaining 53.23%. These numbers were obtained from the University by totaling the data for the fall 2020 and spring 2021 semesters for undergraduates at the Twin Cities campus based on reported gender. *See* https://oir.umn.edu/student/enrollment. In contrast, men accounted for 49.76% of the varsity athletes at the University, with women accounting for 50.24%. Meeker Decl., Ex. A.

3. 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 (the 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 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 II*, 101 F.3d at 175–76 (rejecting university's view that proportionality prong of three-part test creates quotas). In short, the University is simply mistaken that it must reach statistical parity between its male and female athletes.[16] 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 statistical parity or proportionality creates impermissible sex-based quotas. At the core of the University's decision to cut men's gymnastics 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

[16] That is not to say that the University cannot consider statistics to determine whether any imbalances exist. *See* 20 U.S.C. § 1681(b). It is the use of sex to reach certain statistical ratios that implicates the Equal Protection Clause.

lack of statistical proportionality); *Main Line Paving Co. v. Bd. of Educ.*, 725 F.Supp. 1349, 1363 (E.D. Penn. 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)). Thus, the University's aim to achieve statistical parity is not substantially related to an important governmental objective.

If saving less than 1% of its annual athletics budget by cutting men's gymnastics furthers an interest in maintaining the University's finances, such a limited benefit is not substantially related to that aim. This is confirmed by

the University maintaining the scholarships of the remaining members of the gymnastics team and the gymnastics equipment and training facilities, Burns Decl. ¶¶ 21, 30, and that the University declined a proposal by alumni to increase the existing team endowment to self-fund the program, Meeker Decl. ¶ 7. The University has at no point claimed that if it did not cut men's gymnastics it would be unable to financially maintain all of its remaining athletics programs. The University has likewise not claimed that it will use the limited savings from cutting men's gymnastics to increase its women's athletic offerings. In addition, the University's claims of coming financial doom were predicated on the possibility of no fall sports being played in 2020, Burns Decl. ¶ 5, but they were merely delayed, *supra* at 7 n.6; *see also Ohlensehlen*, 509 F.Supp.3d at 1104. Thus, it is not exceedingly persuasive that financial concerns were the reason for cutting men's gymnastics, or that the slight savings obtained by cutting men's gymnastics are substantially related to maintaining a healthy financial outlook for the athletic department.

Finally, while the University did not publicly state that cutting men's gymnastics was necessary to address past discrimination against female athletes—and thus, such a rationale would be an impermissible post hoc rationalization, *see Virginia*, 518 U.S. at 533—cutting the team is not substantially related to that aim. The Department of Education determined as recently as 2018 that female athletes at the University were overrepresented

in relation to males. *Supra* n.13. And while the enrollment numbers have since slightly shifted, the difference remains insufficient to hold that women are currently discriminated against. *See supra* at 23. Were it otherwise, every time the University's enrollment swung toward more women, a men's sport would be at risk of being cut. Further, cutting men's gymnastics does not create any additional opportunities for women to compete in athletics at the University. Therefore, eliminating the men's gymnastics team is not substantially related to remedying past discrimination against females. *See D.M. by Bao Xiong*, 917 F.3d at 1002.

C. The University's Decision to Cut Men's Gymnastics Violates Title IX

Congress enacted Title IX of the Education Amendments of 1972 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.

To assist schools with determining whether their students enjoy equal opportunity to participate in athletics, federal regulations enumerate ten factors that must be considered, 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 whether compliance with this factor has been accomplished, schools frequently look to the Department of Education's 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. Only one prong must be satisfied to comply with the test.

It seems that the University has chosen to cut men's gymnastics out of its belief that "effectively accommodat[ing] the interests and abilities of members of both sexes" requires it to establish sex-based quotas to reach a statistical balance. *See* 34 C.F.R. § 106.41(c). But Title IX expressly states that its demand for equal opportunity does not:

> require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in [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 teams 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*, 998 F.2d at 831 ("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 I*, 991 F.2d at 895 (being out of proportion is not a *per se* violation of Title IX's prohibition against sex discrimination).

Indeed, cutting men's gymnastics because the University decided that it has too many male athletes is precisely what Title IX prohibits—sex-based decisions that deny opportunity to someone on the basis of their sex. *See* 20 U.S.C. § 1681(a). It cannot reasonably be disputed that the University has 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. Thus, 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 lower court 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 lower 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. Burns Decl. ¶¶ 2, 7–8, 12–13, 22, 24; Ng Decl. ¶¶ 2, 7, 11–14. 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 I*, 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).

III

PRELIMINARY RELIEF IS IN THE PUBLIC INTEREST AND THE HARM TO EVAN NG OUTWEIGHS ANY PURPORTED HARM TO THE UNIVERSITY

A. The Public Interest Favors an Injunction

An order 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 v. Nixon*, 545 F.3d 685, 694 (8th Cir. 2008) (overruled on other grounds); *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*, the Eighth Circuit 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*, this 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. Most 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, as discussed above, 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 to carry out its decision to cut men's gymnastics, and an order compelling the University to reinstate the team, serves the public interest.

B. The Balance of Harms Favors Preliminary Relief

Absent a preliminary injunction, Mr. Ng will suffer significant and irreparable harm stemming from the elimination of the men's gymnastics team: the violation of his constitutional and statutory rights; the indignity of being treated as a second-class citizen solely on account of his sex; and the foreclosure of the opportunity to continue as a varsity athlete in an NCAA program.

In addition, preliminary relief here would merely maintain the status quo. "The point of prohibitive injunctive relief is to preserve the 'last uncontested status between the parties which preceded the controversy.'" *Ohlensehlen*, 509 F.Supp.3d at 1104 (quoting *Pashby v. Delia*, 709 F.3d 307, 320 (4th Cir. 2013)). While "it is sometimes necessary to require a party who has recently disturbed the status quo to reverse its actions," a preliminary injunction in such a case "restores, rather than disturbs, the status quo ante." *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 1013 (10th Cir. 2004). The status quo here is a University of Minnesota with an active varsity men's gymnastics program. Reinstating that program thus "restores … the status quo ante." *Id.*; *see also Ohlensehlen*, 509 F.Supp.3d at 1104 (reinstating women's swimming and diving team restored the status quo); *Portz*, 196 F.Supp.3d at 974 (reinstating women's tennis team "requires nothing more than the maintenance of the status quo").

Should this Court grant preliminary relief, the University is unlikely to endure anything more than minor administrative and financial costs. According to the University's own records, for the 2019-20 men's gymnastics season, the program incurred about $750,000 in expenses versus about $55,000 in revenue. *Supra* at 9 n.8 at 38, 66. The men's gymnastics team also maintains an endowment of over $900,000, which offsets some of the cost of maintaining the program. Burns Decl. ¶ 7. In fact, the University has agreed to honor Mr. Ng's scholarship, as well as those of his eight remaining teammates at the University, thus the amount of savings is diminished even further for the next three to four years. Burns Decl. ¶¶ 21, 29. Further, the University maintains ownership of the men's gymnastics facility and equipment. Burns Decl. ¶ 25–26, 30. When considering the overall University athletics budget of nearly $125,000,000, the reinstatement of men's gymnastics will result in a negligible additional cost of less than 1%. As "financial hardship is not a defense to a Title IX violation," *Mayerova v. Eastern Mich. Univ.*, 346 F.Supp.3d 983, 998 (E.D. Mich. 2018), such a "hardship" here is insufficient to outweigh the irreparable harms suffered by Mr. Ng. *See also Ohlensehlen*, 509 F.Supp.3d at 1104 (additional cost of $1.1 million to reinstate women's swimming and diving team not offset by harms to athletes whose team was cut).

IV

NO SECURITY SHOULD BE REQUIRED

While it is true that "[c]ourts in this circuit have almost always required a bond before issuing a preliminary injunction," *Richland/Wilkin Joint Powers Auth. v. U.S. Army Corps of Eng'rs*, 826 F.3d 1030, 1043 (8th Cir. 2016), exceptions are granted where defendants do not object to the lack of security and where the potential for damages is not shown to be incurred as a result of preliminary relief being granted in error. *Id.* Importantly, in analogous cases courts have also not required security. *See id.*; *see also D.M. by Bao Xiong*, 917 F.3d at 1004; *Portz*, 196 F.Supp.3d at 978–79; *Biediger v. Quinnipiac Univ.*, 616 F.Supp.2d 277, 293 n.8 (D. Conn. 2009). And unlike in *Ohlensehlen*, 509 F.Supp.3d at 1105, the University here cannot claim dire "financial straits" due to COVID-19. As discussed above, the gymnastics program incurs minor expenses in relation to the overall athletics budget at the University and is supported by a private endowment. Security should be waived or set at a nominal amount.

CONCLUSION

Mr. Ng has a fair chance of prevailing on the merits of his claims that the University of Minnesota's decision to eliminate its men's gymnastics program violates his constitutional and Title IX rights. Because all other relevant factors also weigh in favor of preliminary relief, the Court should

enjoin the University from maintaining its decision to eliminate men's gymnastics and order the University to reinstate the men's gymnastics team while this case proceeds.

DATED: November 8, 2021.

Respectfully submitted:

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LR 7.1(f) & LR 72.2(d) CERTIFICATE OF COMPLIANCE

I, Caleb R. Trotter, certify that the

X Memorandum titled: MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION complies with Local Rule 7.1(f).

or

☐ Objection or Response to the Magistrate Judge's Ruling complies with Local Rule 72.2(d).

I further certify that, in preparation of the above document, I:

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Date: November 8, 2021.

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