No. 18-3077

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

D.M., a minor, by BAO XIONG, the mother, legal guardian, and next friend of D.M.; and Z.G., a minor, by JOEL GREENWALD, the father, legal guardian, and next friend of Z.G.,

Plaintiffs – Appellants,

v.

MINNESOTA STATE HIGH SCHOOL LEAGUE; BONNIE SPOHN-SCHMALTZ, in her official capacity as President of the Board of Directors for the Minnesota State High School League; ERICH MARTENS, in his official capacity as Executive Director of the Minnesota State High School League; CRAIG PERRY, in his official capacity as an Associate Director of the Minnesota State High School League; and BOB MADISON, in his official capacity as an Associate Director of the Minnesota State High School League,

Defendants – Appellees.

On Appeal from the United States District Court
for the District of Minnesota-Third Division
Hon. Paul A. Magnuson, U.S. District Court Judge

APPELLANTS' 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 a rule created and enforced by the Minnesota State High School League (MSHSL) that expressly discriminates on the basis of sex. The challenged rule prohibits boys from participating on Minnesota high school competitive Dance Teams. Plaintiffs-Appellants D.M. and Z.G. are eleventh grade boys who wish to try out for their schools' competitive Dance Teams, but have been prohibited from doing so solely because of their sex. No federal or state law mandates that MSHSL prohibit boys from dancing. In the district court below, D.M. and Z.G. sought preliminary relief from the discriminatory rule so that they could dance with their friends and teammates this year. The district court denied their motion for a preliminary injunction and this appeal followed.

Despite finding that D.M. and Z.G. are irreparably harmed by MSHSL's discriminatory rule, the district court ruled that D.M. and Z.G. are unlikely to succeed on the merits of their Equal Protection or Title IX claims. The district court held that a state statute—that is not challenged by D.M. and Z.G. in this action—supports the constitutionality of MSHSL's rule.

This case involves important constitutional issues as well as Title IX questions of first impression in the Eighth Circuit. For these reasons, D.M. and Z.G. believe that oral argument will aid the Court in its deliberations, and respectfully request 20 minutes to state their case.

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JURISDICTIONAL STATEMENT

The district court had jurisdiction to hear Plaintiffs' 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 Plaintiffs' motion for a preliminary injunction on September 27, 2018. Plaintiffs filed a timely notice of appeal on September 27, 2018—within the 30-day period required by Fed. R. App. P. 4(a)(1)(A).

STATEMENT OF ISSUES

1. Are D.M. and Z.G. likely to succeed on the merits of their Equal Protection Clause claim that MSHSL's rule does not survive 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); *Bednar v. Nebraska Sch. Activities Ass'n*, 531 F.2d 922 (8th Cir. 1976).

2. Are D.M. and Z.G. likely to succeed on the merits of their claim that MSHSL's discriminatory rule violates Title IX's prohibition against single-sex activities or sports?

Most apposite case: *Biediger v. Quinnipiac Univ.*, 691 F.3d 85 (2nd Cir. 2012).

Most apposite statutes and regulations: 20 U.S.C. § 1681(a); 34 C.F.R. §§ 106.34(b)(1)(i)(A)-(B), 106.34(b)(1)(iv), 106.34(b)(4); 106.41(a)-(b).

3. Is preliminary relief enjoining MSHSL's discriminatory rule in the public interest?

Most apposite cases: *Portz v. St. Cloud State Univ.*, 196 F. Supp. 3d 963 (D. Minn. 2016); *G & V Lounge, Inc. v. Mich. Liquor Control Comm'n*, 23 F.3d 1071 (6th Cir. 1994); *McLaughlin by McLaughlin v. Boston Sch. Comm.*, 938 F. Supp. 1001 (D. Mass. 1996).

4. Does the balance of harms weigh in favor of preliminarily enjoining MSHSL's discriminatory rule?

Most apposite case: *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

STATEMENT OF THE CASE

A. D.M. and Z.G.

D.M. is a sixteen-year-old boy who lives in Maplewood, Minnesota. App. 180, ¶ 3. He attends Roseville High School where he is in the eleventh grade for the 2018-19 school year. App. 180, ¶ 3. D.M. is passionate about dance. App. 180, ¶ 4. Since his initial introduction to dance over a year ago, he has studied and practiced jazz, kick, and several other dance techniques. App. 180, ¶ 4.

Before D.M.'s sophomore year he tried out for his school's recreational summer dance program. App. 180, ¶ 6. He made the team. *Id.* He was welcomed by his female teammates as a member of the recreational team, and he treasured the camaraderie and teamwork. App. 180, ¶ 7. Because D.M. enjoyed being part of the dance team, he also joined the team for the school's fall recreational program. *Id.* During the fall program the team learned and performed a routine that included D.M. *Id.* D.M. continued to

enjoy being a part of the team and learning dance routines, so he sought to try out for Roseville's competitive Dance Team during the winter of his sophomore year. App. 180, ¶ 7.

His coach allowed him to try out for the team that winter, but once the coach learned of MSHSL's rules prohibiting boys from participating in competitive Dance Team, D.M. was no longer allowed to practice or compete with his teammates. App. 181, ¶ 8. This exclusion caused D.M. to be very upset and feel left out, especially since he was no longer able to perform the routine he learned and practiced with his teammates during the fall program. App. 181, ¶ 8. Distraught, but resolute, D.M. volunteered to be his team's student manager during MSHSL events so he could still support the team. App. 181, ¶ 10. If not for the MSHSL rules prohibiting boys from competing on the Dance Team, D.M. would practice and perform with his teammates at winter MSHSL competitions just as he does during the summer and fall recreational seasons. App. 181, ¶ 11.

Z.G. is a sixteen-year-old boy who lives in Minnetonka, Minnesota. App. 184, ¶ 3. He attends Hopkins High School where he is in the eleventh grade for the 2018-19 school year. App. 184, ¶ 3. Z.G. began dancing when he was in fifth grade after attending recreational dance classes in a professional studio. App. 184, ¶ 4. Since the eighth grade, Z.G. has regularly danced in a private studio. App. 184, ¶ 5. Z.G. is particularly driven by the competitive aspect of dance. App. 185, ¶ 8.

When Z.G. was in seventh grade, his father attended an informational meeting for parents whose children wanted to join the school dance team. App. 184, ¶ 6. During that meeting his father was informed that Dance Team was only for girls. *Id.* Angry over his exclusion from the school's Dance Team, Z.G. nevertheless continues to attend dance classes at the private studio where he regularly practices with the very girls who are on the school's competitive Dance Team. App. 184, ¶ 7. Z.G.'s female friends on the school Dance Team, as well as the school's athletic director, are supportive of Z.G. joining the team, but their hands are tied by MSHSL's discriminatory rule. App. 185, ¶ 11.

B. MSHSL's Discriminatory Rule

MSHSL is a nonprofit corporation that is a voluntary association of public high schools. MSHSL is comprised of public and private high schools whose governing boards have delegated their control of extracurricular activities and sports to MSHSL. *See* Minn. Stat. § 128C.01. MSHSL also governs interscholastic athletic and fine arts competitions for Minnesota-region participating high schools.

In order to join MSHSL, a school must adopt the constitution, bylaws, rules, and regulations of MSHSL, which are published in MSHSL's Official Handbook. The Handbook establishes the eligibility rules for participation in interscholastic and fine arts competitions for MSHSL member schools. Bylaw 412 of the Handbook "identifies the MSHSL Sponsored Activities for girls' [sic] and the activities that are available for

either sex." *See* App. 173. Under MSHSL Bylaw 412, Dance Team is offered only for girls. *Id.*

C. Procedural History

Last year, D.M. tried out for, and made, his school's competitive Dance Team before his coach discovered that boys are not allowed on the team. Z.G. has for years sought to join his school's Dance Team, but has not been allowed to try out because he is a boy. In July, 2018, D.M. and Z.G. filed a civil rights lawsuit in federal court to vindicate their rights to equal protection under the law and to enforce the protections of Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. § 1681 *et. seq.* *See* App. 1-14. They do not challenge MSHSL's authority to create sex-specific sports generally. *See* Minn. Stat. § 121A.04, subd. 3(a). Rather, they only allege that MSHSL's specific decision to discriminate against boys by classifying dance as girls-only violates the Fourteenth Amendment's Equal Protection Clause and Title IX. Shortly after filing the complaint, D.M. and Z.G. sought a preliminary injunction to allow them the opportunity to try out for their respective schools' Dance Teams. App. 170-72.

The district court denied D.M.'s and Z.G.'s motion for a preliminary injunction. App. 293-301. It held that despite D.M. and Z.G. being irreparably harmed by MSHSL's discriminatory rule, they were not likely to succeed on the merits of their Equal Protection or Title IX claims, and thus, the public interest and balance of harms weighed in favor of denying the injunction. App. 295-301. This appeal followed.

SUMMARY OF ARGUMENT

At the outset, the lower court incorrectly held that D.M. and Z.G. must show that they have a greater than 50% chance of prevailing on the merits. In doing so, the court conflated challenging a statute—which mandates a higher hurdle—with challenging a rule that is merely "supported by" a statute. Because D.M. and Z.G. do not challenge a statute, they need only show they have a "fair chance" of prevailing on the merits. *Planned Parenthood of Minn., N. Dak., S. Dak. v. Rounds*, 530 F.3d 724, 730-32 (8th Cir. 2008) (en banc).

Regardless of the standard, D.M. and Z.G. are entitled to a preliminary injunction. Not only has MSHSL failed to present evidence of the need to classify dance as a girls-only sport, it has failed to allege that such evidence exists (or previously existed when the classification was originally made). As a result, D.M. and Z.G. are likely to succeed on the merits of their equal protection claim. Under intermediate scrutiny, MSHSL must produce evidence that discriminating against boys in dance on the basis of their sex is substantially related to an important governmental objective. *See Craig*, 429 U.S. at 197. MSHSL's justifications must be "exceedingly persuasive." *Hogan*, 458 U.S. at 724. And even if MSHSL offers "benign" purposes, the Court must not accept them "automatically," but must carefully review the evidence to ensure MSHSL is not simply rationalizing a decision actually based on impermissible grounds. *Virginia*, 518 U.S. at 535-36.

By pointing to a generic state statute and data showing that boys—not girls—are underrepresented in Minnesota high school athletics, MSHSL has not shown that it has important governmental objectives in keeping boys out of Dance Team. But even if MSHSL had produced evidence that its justifications for discriminating against boys are "exceedingly persuasive," it has failed to produce evidence showing that banning boys from Dance Team is substantially related to those interests.

Simply, there is no evidence that single-sex Dance Team creates more opportunities for girls, or addresses past discrimination against girls, any more than having mixed-sex Dance Team. In fact, the evidence shows that girls' opportunities will not be limited by allowing boys to try out for Dance Team because there are no meaningful limitations on the number of participants in dance. Thus, assuming MSHSL is pursuing an important governmental objective, it was the creation of Dance Team that increased opportunity for girls, not the restriction of the activity to girls. There is no evidence that restricting the activity to girls increases female opportunity any more than making the activity mixed-sex does. To the contrary, MSHSL admits that it knows of only three boys who have ever expressed interest in participating in Dance Team. Therefore, prohibiting boys from Dance Team is not substantially related to any important governmental interest, and as a result, D.M. and Z.G. are likely to succeed on their Equal Protection claim.

D.M. and Z.G. are also likely to succeed on the merits of their Title IX claim. Under *Quinnipiac Univ.*, 691 F.3d 85, and the Office for Civil Rights' previous guidance,

MSHSL has failed to show that competitive Dance Team is a sport for Title IX purposes. Indeed, MSHSL's Handbook recognizes that Dance Team cannot be counted as a sport for Title IX purposes. App. 173. Thus, the *Quinnipiac* presumption applies, and Dance Team is properly classified as an extracurricular activity.[1]

Even if Dance Team is a sport for Title IX purposes, neither of the two exceptions to Title IX's prohibition against single-sex sports applies. *See* 34 C.F.R. § 106.41(b). First, MSHSL admits that Dance Team is not a contact sport that would allow it to be classified as girls-only. Second, MSHSL has not provided evidence—or even argued—that the "competitive skill" exception applies to Dance Team. Therefore, irrespective of whether Dance Team is an extracurricular activity or a sport, MSHSL may not limit participation in Dance Team to girls only consistent with Title IX.

The public's interest in vindicating D.M.'s and Z.G.'s constitutional right to be free from sex discrimination is "compelling." *Portz*, 196 F. Supp. 3d 963. While Minn. Stat. § 121A.04, subd. 3(a), may provide some evidence that the Minnesota legislature articulated an interest in permitting MSHSL to discriminate on the basis of sex in certain circumstances, it is not evidence at all that MSHSL's specific decision to prohibit boys from Dance Team is one of those circumstances. Therefore, the public interest weighs

[1] MSHSL does not argue that Dance Team satisfies any available exception to Title IX's general prohibition against single-sex activities. *See* 34 C.F.R. §§ 106.34(b)(1)(i)(A)-(B). Accordingly, if Dance Team—like competitive cheer in *Quinnipiac*—is an activity and not a sport, it cannot be single-sex.

in favor of vindicating D.M.'s and Z.G.'s constitutional rights by granting preliminary relief. *G & V Lounge*, 23 F.3d at 1079.

The balance of harms also weighs in favor of D.M. and Z.G. Because both boys have already missed two years of Dance Team, and will surely miss a third year unless preliminary relief is granted, the harm to D.M. and Z.G. is irreparable. Indeed, the lower court recognized that D.M.'s and Z.G.'s harm is significant and irreparable. App. 299-300. Moreover, should preliminary relief be granted, it is unlikely that MSHSL will suffer any harm other than minor administrative burdens. Such minor harm is insufficient to tilt the balance in favor of MSHSL. *See Croson*, 488 U.S. at 508.

Because D.M. and Z.G. are likely to succeed on the merits of their claims, and the public interest and balance of harms weigh in favor of preliminary relief, the Court should reverse the district court's denial of D.M.'s and Z.G.'s motion for a preliminary injunction.

GENERAL STANDARDS OF REVIEW

The Eighth Circuit 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 motion for a preliminary injunction requires the Court to analyze "(1) the threat of irreparable harm to the movant;[2] (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.").

[2] The district court correctly held that D.M. and Z.G. sufficiently demonstrated irreparable harm. App. 299-300.

ARGUMENT

I

A "FAIR CHANCE" OF SUCCESS IS THE PROPER STANDARD OF REVIEW

The lower court considered whether a "fair chance" or "likelihood" of success was the proper standard under this prong of the *Dataphase* test.[3] App. 295. Purportedly applying *Rounds*, 530 F.3d at 730-32 (en banc), the district court held that "the more stringent 'likelihood of success' standard applies" because the challenged MSHSL rule "is *supported by* a Minnesota statute." App. 295 (emphasis added).

In *Rounds*, this Court clarified the *Dataphase* test and held that "the 'fair chance' standard should not be applied to motions to preliminarily enjoin the *enforcement of a state statute*." 530 F.3d at 730 (emphasis added). Rather, "where a preliminary injunction of a duly enacted state statute is sought . . . a more rigorous threshold showing that the movant is likely to prevail on the merits" is required. *Id.* The Court adopted its reasoning from the Second Circuit which explained that this higher showing "reflects the idea that governmental policies implemented through legislation or regulations developed through presumptively reasoned democratic processes are entitled to a higher degree of deference." *Id.* at 732 (quoting *Able v. United States*, 44 F.3d 128, 131 (2nd Cir. 1995)). However, the Court was careful to note that "district courts should still apply the

[3] Under the "fair chance" standard, somewhat less than a 50% chance of success must be shown, whereas under the "likelihood" of success standard, somewhat more than a 50% chance of success must be shown.

familiar 'fair chance of prevailing' test where a preliminary injunction is sought to enjoin something other than government action based on presumptively reasoned democratic processes." *Id.* at 732.

Here, D.M. and Z.G. do not seek to enjoin a state statute, and a ruling in their favor will not affect Minn. Stat. § 121A.04, subd. 3(a) at all. Whether MSHSL can constitutionally classify Dance Team as girls-only simply does not affect whether MSHSL has the *authority* to classify sports as single-sex. Of course they do; and that authority would remain unchanged if D.M. and Z.G. are successful here. Thus, the lower court erred by requiring the heightened "likelihood of success" showing.

Under *Rounds*, a heightened standard is only available where the challenged policy is (1) government action, and (2) a product of a reasoned democratic process.

The court below assumed MSHSL's rule is not government action under *Rounds*. App. 295. Therefore, it could not have logically concluded that the "likelihood of success" showing was required. Second, the district court held that because MSHSL's discriminatory girls-only dance rule is "supported by" Minn. Stat. § 121A.04, subd. 3(a), then MSHSL's rule satisfies this Court's requirement that the rule be "based on presumptively reasoned democratic processes." *See* App. 295. But that is not what is required under *Rounds*. Indeed, there is no precedent for the district court's focus on MSHSL's discriminatory rule being merely "supported by" a state statute that is not challenged by D.M. and Z.G. Instead, before the higher showing is required of D.M. and Z.G., MSHSL must show that its discriminatory rule is government action and a

product of a reasoned democratic process. It has not done so. Therefore, the less stringent *Rounds* "fair chance" standard is appropriate in this case. D.M. and Z.G. easily satisfy this standard for preliminary relief.[4]

II

D.M. AND Z.G. ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR EQUAL PROTECTION CLAIM

A. MSHSL's Rule is Subject to Intermediate Scrutiny

Because MSHSL's rule limiting competitive Dance Team to girls "expressly discriminates . . .on the basis of gender, it is subject to scrutiny under the Equal Protection Clause of the Fourteenth Amendment." *Hogan*, 458 U.S. at 723 (citing *Reed v. Reed*, 404 U.S. 71, 75 (1971)). Courts apply "intermediate scrutiny" when reviewing sex-based classifications under the Equal Protection Clause. *Craig*, 429 U.S. at 197.

To withstand intermediate scrutiny, a sex-based classification "must serve important governmental objectives and must be substantially related to achievement of those objectives." *Craig*, 429 U.S. at 197; *see also Ways v. City of Lincoln*, 331 F.3d 596, 600 (8th Cir. 2003). 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 Virginia*, 518 U.S. at 532 (the Supreme Court carefully inspects

[4] For the reasons that follow, D.M. and Z.G. should also prevail under the heightened standard of review.

"official action that closes a door or denies opportunity to women (or to men)." (parenthetical in original).

Indeed, the party "seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an 'exceedingly persuasive justification' for the classification." *Hogan*, 458 U.S. at 724 (citing *Kirchberg v. Feenstra*, 450 U.S. 455, 461 (1981)); *Virginia*, 518 U.S. at 533 (burden of justifying official policies that discriminate on sex is "demanding and it rests entirely on the State."); *see also Craig*, 429 U.S. at 199-204; *Duckworth v. St. Louis Metro. Police Dep't*, 491 F.3d 401, 407 (8th Cir. 2007) (justifications for assigning female officers to nightwatch were not important governmental objectives because the rationales offered by superiors were not "exceedingly persuasive."). The government's 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," the Court is 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. MSHSL Has Failed to Produce Evidence That Establishes an Important Governmental Objective

The district court identified the important governmental objectives in this case as "remedying the past and present effects of gender underrepresentation in interscholastic athletics in Minnesota," and providing more opportunities for girls to participate in high school sports.[5] App. 296-97. In identifying those interests, the district court held that MSHSL had met its burden to produce sufficient evidence of the interests. *Id.* However, the lower court did not address whether MSHSL's proffered justifications are "exceedingly persuasive" as required under *Hogan*, 458 U.S. at 724.

Only "[i]n limited circumstances" will a "gender-based classification favoring one sex . . . be justified if it intentionally and directly assists members of the sex that is disproportionately burdened," but "'the mere recitation of a benign, compensatory [i.e., remedial] purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme.'" *Hogan*, 458 U.S. at 728. Further, hypotheticals cannot justify overt discrimination on the basis of sex. *See Virginia*, 518 U.S. at 533 (citing *Weinberger*, 420 U.S. at 643) (justifications "must be genuine, not hypothesized or invented post hoc in response to litigation"). Thus, MSHSL can only

[5] In the court below, MSHSL also claimed interests in safety and preserving competition for girls and boys. Briefly, MSHSL has no evidence that allowing boys to dance presents any safety risk, and its "preserving competition" rationale is circular. Since the district court did not address either of those interests, D.M. and Z.G. decline to address them here in more detail beyond holding MSHSL to its burden to provide evidence to support those interests if it chooses to raise them on appeal.

claim an interest in remedying discrimination if it carries its burden in this case to produce evidence showing that MSHSL or Minnesota high schools have a history of discriminating against girls in high school extracurricular activities like dance, and that it specifically chose to discriminate against boys in dance because of that history. *See id.* at 728-30. MSHSL failed to make either showing below.

1. Minn. Stat. § 121A.04, subd. 3(a) does not help MSHSL here

Instead of providing evidence as to the justification for the specific decision to establish Dance Team in 1996 as girls-only, MSHSL points to Minn. Stat. § 121A.04, subd. 3(a). *See* App. 296. But that statute is not at issue in this case, and D.M. and Z.G. do not challenge it. D.M. and Z.G. readily concede that MSHSL has the authority to classify sports as single-sex where it is the least restrictive means of furthering an important governmental objective. That is all § 121A.04, subd. 3(a) does; it does not provide cover for a specific decision to discriminate on the basis of sex in a particular sport. And continuing to cite the statute for MSHSL's discretionary decision to create a girls-only Dance Team program is wholly misplaced.

By arguing that the statute satisfies its burden under intermediate scrutiny, MSHSL begs the question. A state statute that allows MSHSL to undertake sex discrimination when certain factors and circumstances are present does not mean that those factors and circumstances automatically exist whenever MSHSL classifies a sport as single-sex. Accordingly, it is MSHSL's specific decision in 1996 to restrict Dance Team to girls that must be justified by an "exceedingly persuasive justification," and

nodding toward Minn. Stat. § 121A.04, subd. 3(a) misses the point. Indeed, when "benign" justifications are offered, the Court must still inquire into the actual purposes underlying the challenged rule. *Hogan*, 458 U.S. at 728. Here, MSHSL has offered no evidence to explain why in 1996 Dance Team was created as a girls-only activity, or why it remains one today.

More likely, then, MSHSL's reference to § 121A.04 is an impermissible *post hoc* justification articulated in response to litigation. *See Virginia*, 518 U.S. at 533. Therefore, the district court mistakenly held that § 121A.04 satisfies MSHSL's burden to provide evidence supportive of invoking an important governmental interest in remedying discrimination in this case.

2. The data do not justify making Dance Team girls-only

It is true that the Office for Civil Rights found evidence of very minor sex-disparities in Minnesota athletics years ago,[6] App. 227, but more recent information tells a different story. When accounting for data for the 2017-18 school year, the four-year-average of female underrepresentation in Minnesota high school athletics fell from

[6] In November 2017, the mother of a Wisconsin high school boy (who is not a party in this case) filed a complaint with OCR alleging that MSHSL's girls-only dance rule violates Title IX's prohibition against single-sex activities and sports. App. 203-10. After investigating the complaint, on May 10, 2018, OCR concluded that MSHSL did not violate Title IX in limiting competitive Dance Team to girls only. App. 222. However, OCR acknowledged that its decision is not binding on the Court. App. 229.

0.9%[7] to 0.39%.[8] Furthermore, the data show a trend of increasing underrepresentation for *males* in Minnesota high school athletics. Specifically, a 0.3% underrepresentation of males in Minnesota in the 2016-17 school year has grown to a 0.35% underrepresentation for the 2017-18 school year. App. 278. Therefore, even if MSHSL had produced evidence showing it excluded males from Dance Team when it was officially sanctioned in 1996 in order to redress past discrimination against females (it has not), current data cannot justify continued discrimination against boys in Dance Team.

Nevertheless, the district court erroneously held that "there is sufficient evidence to support a determination that girls continue to be underrepresented in athletics." App. 296. To arrive at that conclusion, the lower court must have focused on the current four-year average to the exclusion of the data showing that for the previous two years boys were underrepresented. There are two problems with the district court's analysis.

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[7] OCR and MSHSL stated that the former number was 1.0%. D.M. and Z.G. assume that is a rounded number. The data in App. 227 and 278 show that average girls enrollment was 48.7% and the average number of girl athletes was 47.8%. The difference between the two is 0.9%, not 1.0%.

[8] To arrive at this result, D.M. and Z.G. used the data included by MSHSL at App. 227 and, using the same original source as OCR, added in the updated data for league athletes by gender for 2017-18. *Available at* http://www.nfhs.org/ParticipationStatics/ParticipationStatics.aspx/, and included in App. 275-76. Then, D.M. and Z.G. pulled total Minnesota high school enrollment numbers from the Minnesota Department of Education. *Available at* https://w20.education.state.mn.us/MDEAnalytics/DataTopic.jsp?TOPICID=2, and included in App. 277. For simplicity, an updated version of App. 227 is found at App. 278.

First, the 0.39% four-year average disparity is insufficient to support there currently being an important governmental objective in discriminating against boys to redress discrimination against girls. *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); *Miami Univ. Wrestling Club v. Miami Univ.*, 302 F.3d 608, 611, 615-16 (6th Cir. 2002) (less than 2% disparity is acceptable); and *Boulahanis v. Bd. of Regents*, 198 F.3d 633, 636, 638-39 (7th Cir. 1999) (less than 3.43% disparity is acceptable). Second, the evidence presented below shows that for the previous two years *boys* are underrepresented. Thus, the district court erroneously determined that "the gap has [not] closed or is [not] imminently likely to close." App. 296. Instead, the evidence shows that not only has the gap closed, it has moved in the opposite direction.

3. Without evidence, MSHSL's girls-only rule fails intermediate scrutiny

In *Hogan*, the government defended its policy of excluding men from enrolling in Mississippi University for Women's nursing program as necessary to "compensate[ ] for discrimination against women." 458 U.S. at 727. Despite the benign-sounding justification—nearly identical to MSHSL's claimed interest here—the Supreme Court conducted a "searching analysis" and concluded that the government failed to show that women lacked opportunities to receive nursing training when the school "opened its door or that women currently are deprived of such opportunities." *Id.* at 728-29. Therefore, "[r]ather than compensate for discriminatory barriers faced by women," the

school's "policy of excluding males . . . tends to perpetuate the stereotyped view of nursing as an exclusively woman's job." *Id.* at 729. As a result, the government "failed to establish that the alleged objective is the actual purpose underlying the discriminatory classification." *Id.*

Similarly, MSHSL has failed to show that girls lacked opportunities in dance when MSHSL created Dance Team as a girls-only activity in 1996, and it cannot show that girls lack opportunities today. *See* App. 278. Instead, the evidence in this case directly contradicts any claims that girls lack opportunities in *any* athletics in Minnesota at this time. Thus, even if MSHSL had produced evidence that general opportunities for girls in athletics were limited in 1996 (it did not), the same does not hold true today. Therefore, under *Hogan*, MSHSL has failed to establish that it has an important interest in remedying discrimination and creating opportunities for females such that it may overtly discriminate against males in dance.

Moreover, in holding that there was sufficient evidence to show that girls' opportunities have previously been limited, *see* App. 296, the district court failed to include any limiting principle in defining "previously." According to the district court, "previously" could mean "last year or five, ten, or twenty years ago." *Id.* But such an interpretation ignores Fourth, Sixth, and Seventh Circuit precedent mentioned above, and is internally contradicted by the facts of this case. Under the lower court's own interpretation, both boys and girls have had opportunities limited "previously." During the past two years, boys have been underrepresented and four years ago girls were

underrepresented.[9] Therefore, the district court abused its discretion by holding that girls have been "previously" underrepresented in a manner that would permit MSHSL's discrimination against boy dancers.

The lack of any evidence presented by MSHSL suggests that establishing Dance Team as a girls-only activity is the result of the "mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women," *Hogan*, 458 U.S. at 725-26, and reliance on "overbroad generalizations about the different talents, capacities, or preferences of males and females." *Virginia*, 518 U.S. at 533. It is likely—indeed, MSHSL has explicitly stated—that it does not believe boys are interested in dance, and therefore it created Dance Team as a girls-only activity. These sex-based stereotypes are precisely what courts are intended to root out by applying intermediate scrutiny to sex-based classifications. *Id.* Because MSHSL failed to produce evidence sufficient to show that its stated justifications for discriminating against boys in dance are "exceedingly persuasive," the lower court abused its discretion when it held that MSHSL is likely to establish that its girls-only dance rules further an important governmental objective.

[9] To be sure, neither the current underrepresentation of boys, nor the four-year average of underrepresentation of girls is statistically significant under *Equity in Athletics*, 639 F.3d at 109-10, or other sex-discrimination caselaw.

C. MSHSL's Girls-Only Rule is Not Substantially Related to an Important Governmental Objective

Even if the Court holds that MSHSL met its burden in providing evidence that shows its justifications for discriminating against male dancers are "exceedingly persuasive," it should reverse the lower court's decision because the discriminatory rule is not substantially related to an important governmental objective. To survive intermediate scrutiny there must be a "direct, substantial relationship between objective and means," and the burden is on MSHSL 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. Further, MSHSL'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"); *Duckworth*, 491 F.3d at 406-07.

The district court held that "[o]pening up a girls-only team to boys will not increase girls' participation, and thus it will not further the objective of increasing girls' athletic opportunities." *See* App. 296-97. But that answers a question that is not asked by this lawsuit. The correct question is whether girls' opportunities will be limited by allowing boys to participate in Dance Team. They will not, and there is absolutely no evidence demonstrating that girls will lose opportunities if boys are allowed to

participate in Dance Team. In other words, banning boys from dance does not increase girls' participation, and thus, it does not directly or substantially further the objective of increasing opportunities for girls. Simply, there is no evidence that single-sex Dance Team advances that interest substantially or directly more than having mixed-sex Dance Team. In fact, the evidence shows that girls' opportunities will not be limited by allowing boys to try out for Dance Team whatsoever.

It was the creation of Dance Team as an official activity that increased opportunity for girls, not the restriction of the activity to girls. After all, MSHSL admitted below that it knows of only three boys (D.M., Z.G., and one boy who no longer competes in Minnesota) who have ever expressed interest in joining Dance Team. App. 200. Thus, MSHSL has provided the Court with no evidence that allowing boys to participate in Dance Team prevents MSHSL from increasing opportunities for girls or addressing past discrimination. Allowing two boys to simply try out for Dance Team does not risk displacing girls by any meaningful measure.

In *Bednar*, 531 F.2d at 923 (8th Cir. 1976), the mother of a tenth grade girl sought a preliminary injunction to allow her daughter to join the boys' cross-country team. While the question before the Court was limited to whether there was irreparable harm (there was), the Court noted that even though "district and state meets are limited to five-member teams," there was no evidence that other meets have similar limits on participation. *Id.* Similarly, here, MSHSL's own Handbook shows that the individual school teams have no roster limitations. App. 95. Indeed, MSHSL's evidence shows

that teams select a large number of dancers to join their teams, and even fill varsity, junior varsity, and younger teams. App. 199, 213-14. Therefore, an injunction allowing two boys to try out for their respective school teams will not displace any girls from Dance Team, or prevent girls from having the opportunity to participate in Dance Team. As a result, the district court erred in holding that MSHSL's discriminatory dance rule is substantially related to an important governmental objective.[10]

III

D.M. AND Z.G. ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR TITLE IX CLAIM

Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex in any education program or activity that receives federal financial assistance. 20 U.S.C. § 1681(a). MSHSL is subject to Title IX because it is an indirect recipient of federal financial assistance through its member schools which receive direct federal financial assistance. *See Grove City Coll. v. Bell*, 465 U.S. 555, 564 (1984) (superseded by statute on other grounds). MSHSL administers and enforces the eligibility rules for extracurricular activities and athletics for Minnesota high schools that receive federal financial assistance. Because MSHSL prohibits boys from participating in competitive Dance Team solely based on their sex, MSHSL's discriminatory rule violates Title IX. 20 U.S.C. § 1681(a) ("No person in the United States shall, on the

[10] While D.M.'s and Z.G.'s lawsuit challenges the constitutionality of MSHSL's dance rule, granting the preliminary injunction would only permit two boys in the state to participate.

basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.").

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

A. Dance Team is an Extracurricular Activity Under Title IX

Under Title IX, Dance Team is properly classified as an extracurricular activity rather than a sport or athletic program. *See* Peter E. Holmes, U.S. Department of Education, Office for Civil Rights (OCR), *Letter to Chief State School Officers, Title IX Obligations in Athletics* (Sept. 1975) (activities such as "drill teams, cheerleaders and the like" are covered as extracurricular activities rather than athletics);[11] *Letter from Mary Frances O'Shea, National Coordinator for Title IX Athletics, Office for Civil Rights (OCR), United States Department of Education, to David V. Stead, Executive Director, Minnesota State High School League* (Apr. 11, 2000) ("[T]here is a presumption . . . that drill teams, cheerleading and other like activities are extracurricular activities and are not considered sports . . . within the meaning of the Title IX regulation.");[12] *Quinnipiac Univ.*, 691 F.3d at 103-05 (recognizing presumption that *competitive* cheerleading is an extracurricular activity rather

[11] *Available at* https://www2.ed.gov/about/offices/list/ocr/docs/holmes.html.
[12] *Available at* App. 167.

than a sport, and analyzing multiple factors to distinguish *competitive* cheerleading from a sport) (emphasis added).

In *Quinnipiac*, the Second Circuit noted that OCR made no distinction between competitive cheerleading and sideline cheerleading in establishing a presumption that neither are sports. 691 F.3d at 94. Indeed, in *Quinnipiac* there was no "record evidence of any competitive cheerleading program being recognized by [the U.S. Department of Education] as a sport." *Id.* at 103. Likewise, here, MSHSL provided no evidence that OCR categorically determined Dance Team is a sport. Indeed, the opposite is true. MSHSL acknowledges that Dance Team is not a sport for Title IX purposes. *See* App. 80 ("Girls' Dance Team, in its current form, may not rise to the level of a gender equity activity for the purpose of Title IX.").

Despite *Quinnipiac*, OCR's previous guidance, and MSHSL's statements outside of this litigation, the district court erroneously held that competitive Dance Team in Minnesota is a sport for Title IX purposes. *See* App. 297. The district court based its decision on the fact that "MSHSL has established that dance team is a sport" because it has "the authority to decide what is and is not a sport." *See id.* But that MSHSL has decided that Dance Team is a Title IX sport begs the question of whether it may properly do so.

After considering *Quinnipiac* and OCR's guidance, this Court should hold that Dance Team is an extracurricular activity for Title IX purposes. As a result, Title IX's

implementing regulations prohibit MSHSL from limiting Dance Team to girls unless MSHSL can show that the single-sex limitation is based on an important objective:

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

34 C.F.R. § 106.34(b)(1)(i)(A)-(B). Neither exception applies to MSHSL's decision to exclude boys from Dance Team, and MSHSL has not argued otherwise.

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

Second, MSHSL did not produce evidence showing that it can identify particular educational needs of Minnesota students that are being met by limiting Dance Team to girls. Thus, MSHSL did not satisfy the exception to sex-discriminatory behavior set out in 34 C.F.R. § 106.34(b)(1)(i)(B).

Further, MSHSL failed to produce evidence that it provides substantially similar coeducational extracurricular activities for male dancers as required by 34 C.F.R. § 106.34(b)(1)(iv). And MSHSL also did not show any evidence concerning periodic evaluations undertaken by MSHSL that its sex-based extracurricular activities "are based upon genuine justifications and do not rely on overly broad generalizations about the different talents, capacities, or preferences of either sex" as required by 34 C.F.R. § 106.34(b)(4). As a result, MSHSL did not meet its burden of proof to justify limiting Dance Team—as an extracurricular activity—to girls.

B. If Dance Team is a Sport, It Cannot Be Girls-Only

If after conducting the analysis set out above this Court holds that Dance Team is a sport under Title IX rather than an extracurricular activity, Title IX still does not permit MSHSL to limit Dance Team to girls. Title IX regulations require that "[n]o person shall, on the basis of sex, be excluded from participation in . . . any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis." 34 C.F.R. § 106.41(a). An exception to the general prohibition on single-sex athletics exists "where selection for such teams is based upon competitive skill or the activity involved is a contact sport." 34 C.F.R. § 106.41(b). Neither exception applies to Dance Team because (1) MSHSL admitted that Dance Team is not a contact sport, App. 225, and (2) MSHSL failed to put forth an argument that selection to school Dance Teams are based on the respective "competitive" skill of the different sexes.

Despite MSHSL's failure to argue in the district court that Dance Team may be limited to girls under Title IX's competitive skill exception, the Court may find further discussion of the exception helpful. As far as counsel can determine, this is the first case to give a court the opportunity to interpret what "competitive skill" means. However, a logical interpretation of the term shows its meaning to refer to activities in which members of one sex are inherently disadvantaged if they are required to compete against members of the opposite sex.

For example, consider baseball and softball, or tennis. Physical characteristics and talents such as size, speed, strength, and reaction time are directly related to one's ability to compete against other players in baseball, softball, and tennis. Therefore, Title IX permits the creation of single-sex teams for those sports. The same is not true for Dance Team.

While there is an athletic component to dance, team selection is primarily based on artistic performance ability, and performances do not pit individual dancers against other dancers in a contest of size, speed, or strength like they do in baseball, softball, or tennis. Furthermore, Dance Team is a team sport in which an entire team performs a dance routine together, with their performance judged in comparison to the other teams as a whole. Thus, a boy on a Dance Team would not compete against his female teammates, but would perform in conjunction with them. And even if an all-girl team competed against a team that included a boy (or boys), that *team*'s performance as a whole would be compared to the all-girl *team*'s performance. Stated differently, a boy's

performance would be considered in relation to how well it meshed with his female teammates' performance, not how he individually performed relative to other girls.

In any event, MSHSL provided no alternative interpretation of the competitive skill exception, nor did MSHSL provide any evidence—or even hint that such evidence exists—that allowing boys to participate in dance would give teams with boy participants a competitive advantage over girl-only teams.

Ignoring MSHSL's lack of evidence, and despite never actually holding that participant selection to Dance Team is based on "competitive skill," the district court interpreted the competitive skill exception by focusing on the competitive nature of dance competitions and that "dance team participants are chosen based on *athletic ability*." App. 299 (emphasis added). There are two problems with the court's interpretation of the exception.

First, that dance teams are judged in competitions based on their competitive performance does not speak to whether selection to the teams was based on "competitive skill" rather than the dancers' ability to perform routines and contribute to the team. Second, the lower court's holding that dancers are chosen "based on athletic ability" drastically expands the competitive skill exception. Under the district court's interpretation, all sports would qualify and the exception would swallow the rule. Furthermore, there would be no need for the separate contact-sport exception under the district court's interpretation, as it is implausible that selection to any contact sport team is not based on the participant's athletic ability. *See Kungys v. United States*, 485 U.S.

759, 778 (1988) (Scalia, J., plurality opinion) (it is a "cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant."). Therefore, the Court should reject the district court's interpretation of the competitive skill exception.

In addition, the district court misreads 34 C.F.R. § 106.41(b) when it notes that the second sentence mandates that members of a sex that have previously had their athletic opportunities limited must be allowed to try out for male-only non-contact sport teams, and thus, the "natural corollary" is that "schools are allowed to maintain single-sex sports for the underrepresented sex." *See* App. 299. Assuming for the sake of argument that MSHSL has shown that girls are underrepresented, schools may only establish girls-only teams for sports in which selection to its teams is based on "competitive skill." As noted above, the court failed to do so, thus no support can be found for maintaining Dance Team as girls-only under sentence two of § 106.41(b). Therefore, the Court should reverse the district court's holding that D.M. and Z.G. are unlikely to succeed on the merits of their Title IX claim. In so doing, the Court should hold that Dance Team is a Title IX extracurricular activity, or, in the alternative, that Dance Team is not a sport in which team selection is based on respective "competitive skill" of the different sexes.

IV

THE PUBLIC INTEREST AND BALANCE OF HARMS FAVOR D.M. AND Z.G.

A. Preliminary Relief is in the Public Interest

The district court held that the public interest is not served by granting preliminary relief in this case. App. 300. The lower court essentially staked its public interest holding on the results of its analysis under the likelihood of success prong.[13] In so holding, the lower court looked no further than the existence of Minn. Stat. § 121A.04, subd. 3(a) for evidence of the public interest. App. 300. But as noted above, § 121A.04 is an uncontroversial statute that is not challenged in this case nor threatened should the Court grant the preliminary injunction. This Court should reverse the district court and hold that the public interest is served by granting a preliminary injunction in this case.

The public is not served by the continuation of discriminatory rules for competitive Dance Team, but rather by the "preservation of constitutional rights." *See 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*, 23

[13] As discussed *infra* in the balance of harms analysis, the district court erred in placing dispositive weight on the likelihood of success question. *See Dataphase*, 640 F.2d at 113 ("The very nature of the inquiry on petition for preliminary relief militates against a wooden application of the probability test . . . . In balancing the equities *no single factor is determinative*.") (emphasis added); *O'Connor v. Peru State College*, 728 F.2d 1001, 1002 (8th Cir. 1984) (after *Dataphase*, courts are not to overemphasize a single factor).

F.3d at 1079 (a preliminary injunction that vindicates constitutional rights is "always in the public interest")); *McLaughlin by McLaughlin*, 938 F. Supp. at 1017 (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)).

Minn. Stat. § 121A.04, subd. 3(a) does not support a holding that the public interest favors MSHSL in this case. D.M. and Z.G. do not dispute the general validity of § 121A.04. Indeed, it differs little from Title IX's own implementing regulations that D.M. and Z.G. seek to enforce in this case. As discussed above, Title IX permits discrimination on the basis of sex *in limited circumstances*. *Supra* at 16-17. Thus, the appropriate way to view § 121A.04's relevance in this case is that the Minnesota legislature has an interest in addressing past discrimination against females by allowing MSHSL to discriminate against boys *in limited circumstances* that comply with the Constitution and Title IX. In other words, the relevant question here is whether MSHSL's specific decision to ban boys from dance is in the public interest. Of course, the public interest is not served by addressing past discrimination in a manner that violates the Constitution or federal law. That is particularly true when allowing boys to participate in Dance Team will not displace female dancers. As noted above, school

Dance Teams do not have roster limitations. *Supra* at 23-24. Therefore, preliminary relief that allows two boys to try out for their school teams will not harm the public interest.

In addition, MSHSL failed to produce evidence showing that § 121A.04 precludes it from allowing boys to participate in Dance Team. Indeed, MSHSL has not even hinted that evidence exists showing that Dance Team was created as a girls-only activity or sport because it believed § 121A.04 mandated that result. More likely, then, pointing to § 121A.04 now is an impermissible rationalization offered in response to this litigation. Therefore, the public interest is served by "eradicating [the] sex discrimination" suffered by D.M. and Z.G. and granting the preliminary injunction. *See Portz*, 196 F. Supp. 3d at 978 (citing *Bob Jones Univ.*, 461 U.S. at 604).

B. The Balance of Harms Weigh in Favor of D.M. and Z.G.

1. Standard of review

In weighing the balance of harms between D.M. and Z.G. and MSHSL, the district court set out the standard as:

> But even where the balance of hardships "tips decidedly toward plaintiff" a preliminary injunction should issue only if the plaintiff "has raised questions so serious and difficult as to call for more deliberate investigation." *Dataphase*, 640 F.2d at 113.

App. 300. That is a correct, but incomplete, statement of the standard.

The full context of that statement is necessary to correctly apply the relevant standard. *Dataphase* compares two scenarios: (1) "If the chance of irreparable injury to

the movant should relief be denied is outweighed by the likely injury to other parties litigant should the injunction be granted, the moving party *faces a heavy burden of demonstrating that he is likely to prevail on the merits*."; and (2) "*Conversely*, where the movant has raised a substantial question and the equities are otherwise strongly in his favor, the showing of success on the merits *can be less*." 640 F.2d at 113 (emphasis added). It is this second scenario that applies here.

The remaining question, then, is what does the phrase "questions so serious" mean? *Rounds* advises that this language from the *Dataphase* test derives from the Second Circuit's more lax "fair chance" standard. 530 F.3d at 731. And in *Monahan v. State of Neb.*, 645 F.2d 592, 598-99 (8th Cir. 1981), this Court affirmed issuance of a preliminary injunction, holding that allegations that state and federal statutes were inconsistent was sufficient to raise "serious questions" even though the Court was not deciding the merits. Therefore, "questions so serious" is best understood as recognizing that plausible allegations have been raised which further investigation and evidence may prove to be meritorious. Such is the case here. Nevertheless, the court below appears to have interpreted the phrase as requiring a likelihood of success of greater than 50%. App. 300-01. Such an interpretation is not correct under the modern standard.

2. The balance favors granting preliminary relief

The district court correctly held that the balance of harms favors D.M. and Z.G. *See* App. 300. Despite that holding, the court proceeded to state that D.M. and Z.G. "have not raised serious questions as to the merits of their claims" and denied

preliminary relief. App. 300-01. As discussed above, that is an incorrect application of the standard here.

In any event, in weighing the harms in this case, the district court focused on two harms that MSHSL would purportedly suffer if preliminary relief is granted: confusion in the upcoming Dance Team season and potential lack of compliance with Title IX. App. 300. Neither will occur.

There is no evidence to support a conclusion that allowing two boys to try out for their schools' competitive Dance Teams will "throw the imminent dance-team season into disarray." *See* App. 300. While the district court did not identify which aspects of the dance season would be affected by granting preliminary relief to allow two boys to try out for their school teams, MSHSL posited a few concerns in its briefing below: altering of MSHSL rules; conflict with Minn. Stat. § 121A.04, subd. 3(a); and forfeiture of contests participated in by D.M. and Z.G. if they later lose on the merits. None of these unsubstantiated concerns are sufficient to tilt the balance in favor of MSHSL.

First, that MSHSL's girls-only dance rule[14] would be altered by a preliminary injunction enjoining its enforcement is entirely the point of these proceedings. MSHSL cannot in turn claim that its inability to enforce its unconstitutional and unlawful rule

[14] D.M. and Z.G. have only sought a preliminary injunction against MSHSL's rule that limits Dance Team to girls and that would permit them to try out for their schools' teams. No other rules, students, sports, or activities would be affected should preliminary relief be granted.

somehow causes it harm. Second, as previously discussed, there is no conflict with § 121A.04 in this case. Even though MSHSL's specific decision to discriminate against boys in dance runs afoul of the Constitution and Title IX, § 121A.04 does not have the same problems. Third, should preliminary relief be granted but D.M. and Z.G. subsequently lose on the merits, their eligibility to compete during the period in which the preliminary injunction was in place could not be called into doubt. Rather, D.M. and Z.G. would simply be ineligible going forward, and MSHSL would not be required to strip titles or victories awarded to teams during the period they were eligible. Thus, none of MSHSL's concerns articulate anything beyond an "interest in avoiding the bureaucratic effort necessary to tailor remedial relief." *See Croson*, 488 U.S. at 508. That is insufficient to tilt the balance in MSHSL's favor. As a result, the district court erred in holding that MSHSL's upcoming dance season would be harmed by granting a preliminary injunction.

Nor would granting preliminary relief cause MSHSL to potentially fall out of compliance with Title IX. Indeed, such a result is only theoretically possible if the Court holds that Dance Team is not a sport for Title IX purposes. But if the Court holds that Dance Team is a Title IX sport, then this purported harm disappears. Nevertheless,

even if the Court holds Dance Team to be a Title IX extracurricular activity rather than a sport, MSHSL is still unlikely to have Title IX proportionality issues.[15] [16]

The genesis of MSHSL's proportionality concern seems to be that if Dance Team is declared an extracurricular activity under Title IX, then it will lose credit for 10,012[17] girls in determining whether female athletes are sufficiently represented in Minnesota high school sports. As discussed *supra* at 18, the evidence presented below for the 2017-18 school year shows that boys were underrepresented in Minnesota athletics by 0.35%. The average for the four-year period 2014-18 shows that girls were underrepresented by 0.4%. *Id.* If, however, 10,012 females are subtracted from the calculus, then girls were underrepresented by 1.86% percent for the 2017-18 school year, and the four-year average shows that girls were underrepresented by 1%.[18] But even under these revised numbers, precedent shows that MSHSL would not run afoul of proportionality demands. *See Equity in Athletics*, 639 F.3d at 109-10 (less than 3% disparity is acceptable); *Miami Univ.*, 302 F.3d at 611, 615-16 (less than 2% disparity is

[15] D.M.'s and Z.G.'s Complaint alleges that Title IX proportionality requirements do not apply at the high school level. App. 12, ¶ 62. However, that issue was not raised in the Motion for a Preliminary Injunction, and is thus not before the Court here. D.M. and Z.G. nonetheless preserve that argument for the merits stage of the proceedings.
[16] Furthermore, as noted above, MSHSL admits that Dance Team cannot be counted for Title IX proportionality purposes. *See* App. 80.
[17] *See* App. 275.
[18] Subtracting 10,012 girls from the 2017-18 school year nets a total number of female athletes at 107,826 for the year. *See* App. 278. From that figure the rest of the math follows. To be sure, for complete accuracy the number of female dancers would also need to be subtracted from the other three years, but that data is not part of the record.

acceptable); and *Boulahanis*, 198 F.3d at 636, 638-39 (less than 3.43% disparity is acceptable). As a result, there is no evidence to support a contention that MSHSL is likely to suffer the harm of being out of compliance with Title IX proportionality requirements should preliminary relief be granted. Therefore, the district court erred in crediting that harm in favor of MSHSL on the balance-of-harms prong.

In contrast, the district court recognized that the harm to D.M. and Z.G. is irreparable if preliminary relief is not granted. D.M. and Z.G. have already lost two years of dance, and denial of preliminary relief assuredly will cause them to lose a third year. Therefore, the balance of harms weighs decidedly in favor of granting D.M. and Z.G. preliminary relief.

CONCLUSION

For the foregoing reasons, the Court should reverse the district court's holdings that D.M. and Z.G. are not likely to succeed on the merits of their claims, that preliminary relief is not in the public interest, and that despite the balance of harms weighing in D.M.'s and Z.G.'s favor preliminary relief is not warranted. In turn, the Court should remand to the district court with instructions to grant D.M.'s and Z.G.'s Motion for a Preliminary Injunction.

DATED: October 22, 2018.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 22, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Caleb R. Trotter
CALEB R. TROTTER

FORM 6.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

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CALEB R. TROTTER

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