No. 25-2899

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

FEMALE ATHLETES UNITED,
Plaintiff-Appellant,

v.

KEITH ELLISON, in his official capacity as Attorney General of Minnesota; REBECCA LUCERO, in her official capacity as Commissioner of the Minnesota Commission on Civil Rights; ERICH MARTENS, in his official capacity as Executive Director of the Minnesota State High School League; WILLIE JETT, in his official capacity as the Minnesota Commissioner of Education; INDEPENDENT SCHOOL DISTRICT NO. 11 SCHOOL BOARD; INDEPENDENT SCHOOL DISTRICT NO. 192 SCHOOL BOARD; AND INDEPENDENT SCHOOL DISTRICT NO. 279 SCHOOL BOARD,
Defendants-Appellees.

On Appeal from the United States District Court
for the District of Minnesota
Case No. 0:25-cv-02151-ECT-DLM

REPLY IN SUPPORT OF APPELLANT'S EMERGENCY MOTION FOR AN INJUNCTION PENDING APPEAL

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INTRODUCTION

As Female Athletes United ("FAU") pointed out, Defendants claim the power to abolish women-only sports throughout Minnesota and leave female athletes with no Title IX recourse. Defendants don't deny this consequence of their argument. Instead, they misconstrue Title IX's text and regulations, misapprehend the relevant standards, and minimize the irreparable harm suffered by FAU's female athletes. The Court should reject this evisceration of Title IX and issue an injunction that protects FAU members' equal opportunity to compete, win, and earn a scholarship before it's too late, ICONS.Amicus.Br.7, as 19 States and a bevy of sports physiology experts confirm, States.Amicus.Br.1–14; Sports.Physiology.Experts.Amicus.Br.7–22.

BACKGROUND

Defendants assert that FAU's motion comes out of left field. State.Resp.3; ISD11.Resp.2–8. That's false. FAU consistently sought injunctive relief at the earliest possible opportunity.

Though FAU's members have played against Athlete Doe for years, they learned only recently that Doe is male. Doc. 48-2 ¶¶ 19–20; Doc. 48-3 ¶¶ 23–28; Doc. 48-4 ¶¶ 14–17. President Trump issued two Title IX-related executive orders in early 2025. Doc. 1 ¶¶ 91–94. Shortly before the 2025 softball season began, Minnesota refused to abide by the President's orders. *Id.* ¶¶ 166–69. FAU sued *less than two weeks* after one of its members was harmed by that decision, *i.e.*, after FAU

Athlete 1's all-female team lost to Doe's mixed-sex team. *Id.* ¶¶ 20, 148. The next day, FAU requested a preliminary injunction. Doc. 6.

Defendants sought to delay matters—and risk mooting FAU's request for injunctive relief after Athlete Doe's last softball season—by (1) asking to consolidate a preliminary-injunction hearing with a trial on the merits, (2) demanding extensive discovery, and (3) requesting a months-long extension to obtain expert reports. The district court denied consolidation and granted discovery only as to FAU's members' names. FAU consented "to a brief extension" for Defendants to obtain experts. Doc. 25 at 3. But when the court laid down elongated parameters for a hearing, the resulting schedule precluded injunctive relief for the 2025 season. Docs. 36, 37.

Obtaining injunctive relief before the start of the 2026 season is vital lest FAU's athletes be deprived of their right to safely play—and win—girls' sports competitions, again. Mot. at 21–23. FAU accurately predicted that Defendants' delay tactics would continue after the district court denied a preliminary injunction. *E.g.*, Mot. to Stay (Oct. 23, 2025). So FAU sought an injunction pending appeal, a surefire method of forestalling mootness. *Minn. Humane Soc'y v. Clark*, 184 F.3d 795, 797 (8th Cir. 1999).

ARGUMENT

I. No elevated standard applies to Rule 8 motions.

Defendants contend that an elevated standard applies to Rule 8 motions. State.Resp.7. But the rule's text doesn't say that. Nor does this Court's precedent, which prescribes "the same inquiry" that applies to the "denial of a preliminary injunction." *Missouri v. Biden*, 112 F.4th 531, 536 (8th Cir. 2024) (per curiam) (quotations omitted).

This Court should decide this motion based on that proven standard, giving the "losing party" adequate time to seek relief from the Supreme Court before the 2026 season begins. *Trump v. CASA, Inc.*, 606 U.S. 831, 869–70 (2025) (Kavanaugh, J., concurring). Doing so comports with "the equities of this case," *Nebraska v. Biden*, 52 F.4th 1044, 1048 (8th Cir. 2022) (quotation omitted), and the Supreme Court's recent practice, *e.g.*, *Libby v. Fecteau*, 145 S. Ct. 1378, 1378 (2025); *Tandon v. Newsom*, 593 U.S. 61, 64 (2021) (per curiam).

II. Granting FAU's Rule 8 motion is appropriate and causes Defendants no prejudice.

Defendants raise a litany of non-merits-based objections. State.Resp.4 n.2, 14 n.8; ISD11.Resp.12–13. Each fails.

First, FAU's motion raises "purely legal questions" about Title IX, which this Court reviews "de novo" with "no special deference to the district court." *St. Louis Effort for AIDS v. Huff*, 782 F.3d 1016, 1021 (8th Cir. 2015) (citation modified). The district court accepted—and

Defendants can't seriously dispute—the basic science of male athletic advantage and its application to Athlete Doe. Doc. 134 at 30–33. This appeal is about how Title IX applies in light of that advantage.

Second, this Court considers the same trial court record on a Rule 8 motion as a merits appeal—it's not abridged.

Third, FAU couldn't have introduced the federal government's *subsequent* finding that Minnesota violated Title IX in the trial court. But that's no obstacle: the finding is subject to judicial notice on appeal as a public record. *United States v. Love*, 20 F.4th 407, 412 (8th Cir. 2021); *United States v. Eagleboy*, 200 F.3d 1137, 1140 (8th Cir. 1999).

Last, there's no reason for certification because Title IX and its regulations preempt whatever state law requires. *Hillsborough Cnty. v. Automated Med. Lab'ys, Inc.*, 471 U.S. 707, 713 (1985); *accord* Doc. 112 at 32. Nor does the Minnesota Supreme Court's recent decision address any related school-athletics questions. Doc. 134 at 36 n.13. And most critically, the substantial delay attending certification would likely moot FAU's claim for injunctive relief and ensure continuing harm.

III. FAU has standing.

Defendants question FAU's standing. State.Resp.8–9. Their challenge is baseless. Doc. 134 at 32–34.

In "set-aside programs"—like boys' baseball and girls' softball—the "injury in fact" is the League's "discriminatory" bylaws, which

effectively create all-male competition for boys and mixed-sex competition for girls. *Pederson v. La. State Univ.*, 213 F.3d 858, 871 (5th Cir. 2000) (quotations omitted). That "creates a barrier" to fair and safe athletic competition "for female[s]" that males don't face. *Id.*; *accord Becker v. N.D. Univ. Sys.*, 112 F.4th 592, 596–97 (8th Cir. 2024) (citing *Pederson*). Because FAU's members are eligible for varsity softball and "'able and ready' to play," their Title IX injuries are ongoing *now*. *Becker*, 112 F.4th at 596 (quoting *Pederson*, 213 F.3d at 871).

Those injuries will become even more concrete in the *future*. FAU Athlete 1's all-female team is now scheduled to play Athlete Doe's mixed-sex team in late April—*three weeks earlier* than originally scheduled. Nw. Suburban Conf., Girls Varsity Softball 2026 Schedule, perma.cc/4JSD-RP3C. That acceleration highlights the need for an injunction pending appeal.

FAU members' lopsided defeats in the face of Doe's pitching *last season* are a "launching pad for a showing of imminent future injury" *this season*. *Murthy v. Missouri*, 603 U.S. 43, 59 (2024). The same crushing defeats will "*likely* occur" again, *id.* at 69 (quotation omitted), assuming FAU's "allegations are true and view[ing] them most favorably to" its members, *Iowa Migrant Movement for Just. v. Bird*, No. 24-2263, 2025 WL 2984379, at *2 (8th Cir. Oct. 23, 2025). That's enough: Article III doesn't require certainty.

IV. FAU has a fair chance, and is likely to prevail, on the merits.

Defendants' failure to rebut most of FAU's legal arguments shows that FAU prevails no matter the standard. Regardless, the fair-chance-of-prevailing standard is the right test. Doc. 7 at 13. The Attorney General can't avoid it by citing *his own* opinion that the MHRA requires the League's bylaws, State.Resp.10 n.6, especially after raising doubts and suggesting state-court certification to resolve them, *id.* at 4 n.2. The bylaws didn't result from "'the full play of the democratic process.'" *Planned Parenthood of Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 732 n.6 (8th Cir. 2008) (en banc) (quotation omitted). But Title IX did. This case is about *enforcing* Minnesota's "promise," in exchange for federal funds, "not to discriminate" based on sex, *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 286 (1998), not *enjoining* state law.

A. FAU may sue based on Title IX's athletic regulations.

Defendants embrace the district court's no-individual-right-to-sue theory, ignoring the myriad cases that reject it and inviting a circuit split. State.Resp.10–13. That gambit fails for four reasons.

First, dividing athletes into *boys'* baseball and *girls'* softball teams is sex "conscious," not "facially neutral." State.Resp.13. So is Minnesota's bylaws change to effectively preserve all-male boys' baseball but destroy all-female girls' softball. *Neal v. Bd. of Trs. of Cal. State Univs.*, 198 F.3d 763, 772 n.8 (9th Cir. 1999) (noting that varsity

"athletics require a [sex] conscious allocation of opportunities"). The eligibility bylaws don't operate in a vacuum—they're designed for *sex-designated* teams. Any paper equality is irrelevant: Title IX requires "real opportunities [for females], not illusory ones." *Williams v. Sch. Dist. of Bethlehem*, 998 F.2d 168, 175 (3d Cir. 1993); *accord Horner v. Ky. High Sch. Athletic Ass'n*, 43 F.3d 265, 274 (6th Cir. 1994).

Second, Defendants inaccurately assert that FAU didn't "disclaim reliance on a disparate-impact theory." State.Resp.12. FAU clarified that its Title IX claims are grounded in the athletic regulations approved by Congress and sound in disparate *treatment*. Mot. at 15–16.

Third, Defendants never contest that deliberate indifference *is* intentional discrimination, as the Supreme Court has stressed in the Title IX context time and again. *E.g.*, *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173–82 (2005); *Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 641–46 (1999). And FAU's verified complaint shows Defendants' deliberate indifference. Mot. at 15.

Finally, the issue in *Alexander v. Sandoval*, 532 U.S. 275 (2001), wasn't that § 602 "authorize[d] federal agencies to 'effectuate' [Title VI] rights." State.Resp.11. It was that the Title VI "regulations [did] not simply apply § 601." *Sandoval*, 532 U.S. at 285. But here, the athletic regulations merely "apply § 1681(a)'s ban on intentional discrimination" to sports. *Parker v. Franklin Cnty. Cmty. Sch. Corp.*, 667 F.3d 910, 920 (7th Cir. 2012); *accord* Mot. at 14–16.

B. The bylaws violate Title IX.

Defendants' merits defense fails for six reasons. State.Resp.14–16.

First, if Defendants wished to "dispute" the federal government's Title-IX-violation finding, they had to do so in their opposition brief—they didn't. State.Resp.14 n.8.

Second, Defendants ignore the policy interpretation's "general principles" or overall-compliance factors, which apply "when appropriate" in the K-12 context. A Policy Interpretation: Title IX and Intercollegiate Athletics at III, U.S. Dep't of Educ. (Dec. 11, 1979), perma.cc/FVR6-RATY ("Interpretation"). Instead, they treat the Interpretation's three-part test and laundry list as binding. But this Court rejected a similar argument at the university level, where the policy interpretation applies in full force. *Berndsen v. N.D. Univ. Sys.*, 7 F.4th 782, 787–89 (8th Cir. 2021).

Third, the Interpretation's overall-compliance factors clarify that "disparities … in *individual segments* of the program" may be "substantial enough" to violate Title IX. Interpretation.VII.B.5 & C.6 (emphasis added). The inquiry isn't limited to the "athletic program as a whole." State.Resp.14. And here, Minnesota has removed an entire sport—softball—from the girls category.

Fourth, the League *chose* sex-separated teams as the sole bulwark of equal-athletic opportunity decades ago. The same is true today. That the League *could have* tried something else is beside the point. Having

made its choice, the League must provide sex-separated teams that *actually provide* equal athletic opportunity.

Fifth, case law establishes that boys' baseball and girls' softball are equivalent sports. *E.g.*, *Ollier v. Sweetwater Union High Sch. Dist.*, 858 F. Supp. 2d 1093, 1100–1115 (S.D. Cal. 2012); *Landow v. Sch. Bd. of Brevard Cnty.*, 132 F. Supp. 2d 958, 958–67 (M.D. Fla. 2000); *Daniels v. Sch. Bd. of Brevard Cnty.*, 985 F. Supp. 1458, 1459–62 (M.D. Fla. 1997). Softball's discrete rules aren't happenstance: they "effectively accommodate" females' athletic abilities. 34 C.F.R. § 106.41(c)(1).

Last, the Title IX problem here is macro—not micro like "inadequate equipment." State.Resp.16. "[W]hile male sports maintain fair and safe competition, females are forced to participate in unfair and unsafe competition, where female athletes risk injuries, are displaced from podiums …, lose opportunities for advancement …, and miss out on critical visibility for college scholarships and recognition." Minn. Noncompliance Finding at 17, U.S. Dep'ts of Educ. & Health & Human Servs. (Sept. 30, 2025), perma.cc/BBC6-VXN7 ("Finding").

C. Clear notice isn't a barrier.

Defendants say clear notice precludes an injunction. State.Resp.17–19. That's wrong.

Defendants had clear notice without Congress "specifically identif[ying] … each condition" of equal-athletic opportunity. *Jackson*,

544 U.S. at 183 (citation modified). The athletic regulations "have been on the books for nearly [50] years," the Supreme Court has "consistently" said that Title IX bars "diverse forms of intentional sex discrimination" that treat female students unequally, and official policies like the bylaws are "always—by definition—intentional." *Id.*; *accord* Mot. at 20–21. Plus, the bylaws run headlong into the policy interpretation's clear requirement of a *female-only* equivalent to baseball. Mot. at 4, 17–18.

Also, Defendants recognize that the district court merely applied the clear-notice requirement originating from *Pennhurst State School & Hospital v. Halderman*, 451 U.S. 1 (1981), to injunctions that impose substantial financial costs. State.Resp.Br.19; *accord* Doc. 134 at 62. This Court hasn't even gone that far. Mot.19–20. But even taking the lower court's ruling at face value, Defendants haven't shown that an injunction would impose any significant costs—the League's physical form *already records* sex and gender identity. MSHSL Sports Physical Form at 2, perma.cc/Q7K7-NS33. And FAU doesn't request more.

V. FAU's members face irreparable harm.

Defendants deny irreparable harm by redefining Title IX's requirements. State.Resp.21–22; ISD11.23. It's not sufficient that FAU's members are "able to play." State.Resp.20. They must have "equal athletic opportunity." 34 C.F.R. § 106.41(c). *They don't.*

"While [males] get sex-separated teams where they are competing against their physical equals, [females] get teams where they are facing unfair and unsafe competition from [males] with a physical advantage." Finding.17. Unless this Court acts, males will continue to "defeat[ ] female students in their own sports." *Id.* at 48; *accord id.* at 41–42 (listing other male participants). And as FAU's members experienced last year, that harm is irreparable—there's no "do-overs."

VI. Defendants' remaining arguments lack merit.

Defendants' remaining arguments fail. State.Resp.21–24; ISD11.Resp.17–18, 23.

Regarding the other injunction factors, "the public's *true* interest lies in the correct application of [Title IX]," *Tennessee v. Dep't of Educ.*, 104 F. 4th 577, 614 (6th Cir. 2024) (quotation omitted), which Minnesota agreed to in exchange for federal funds. The balance of harms also favors FAU's members who seek the level and safe playing field that males *already have*.

As for the status quo, Title IX and the athletic regulations "have been unchanged for approximately 50 years." *Tennessee v. Cardona*, 737 F. Supp. 3d 510, 569 (E.D. Ky. 2024). They established sex-designated sports as the equal-opportunity benchmark for decades, regardless of Minnesota's brief success in hiding Doe's participation in girls' sports.

When it comes to tailoring, FAU's requested injunction is as narrow as it gets. Males are prohibited from playing with or against FAU members in certain sports, but not with or against non-FAU members. Anything less would deny FAU complete relief.

Ordering a $10 million bond would transform FAU's merits success into a Pyrrhic victory, placing an injunction beyond reach. Many states reserve girls' sports for females. None require "sex testing." States.Resp.23. And FAU seeks *only* use of the League's existing physical form. Because FAU is a nonprofit with limited financial means, the Court should waive the bond requirement.

CONCLUSION

One season of high-school girls' crushing defeats, depressed records, lost opportunities, and reduced publicity is too much. The Court should issue an injunction pending appeal, without delay.

Dated: October 30, 2025

Respectfully submitted,

s/Rory T. Gray

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CERTIFICATE OF COMPLIANCE

This reply complies with the word limit of Fed. R. App. P. 27(d)(2)(A) because it contains 2,525 words, excluding parts exempted by Fed. R. App. P. 32(f).

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Dated: October 30, 2025

s/Rory T. Gray
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CERTIFICATE OF SERVICE

I hereby certify that on October 30, 2025, I electronically filed the foregoing reply with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit 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 that system.

s/Rory T. Gray
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