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7 **IN THE UNITED STATES DISTRICT COURT**  
8 **FOR THE EASTERN DISTRICT OF CALIFORNIA**  
9 **FRESNO DIVISION**

9 TAYLOR ANDERS, HENNESSEY  
10 EVANS, ABBIGAYLE ROBERTS,  
MEGAN WALAITIS, and TARA WEIR,  
11 individually and on behalf of all those  
similarly situated

12 *Plaintiffs,*

13 v.

14 CALIFORNIA STATE UNIVERSITY,  
FRESNO; TERRENCE TUMEY, in his  
15 official capacity as Director of Athletics  
at California State University, Fresno;  
16 JOSEPH CASTRO, in his official  
capacity as former President of California  
State University, Fresno; and DR. SAÚL  
17 JIMÉNEZ-SANDOVAL, in his official  
capacity as Interim President of  
18 California State University, Fresno

19 *Defendants.*

Case No. [Case No.]

**MEMORANDUM OF LAW IN  
SUPPORT OF PLAINTIFFS’  
MOTION FOR  
PRELIMINARY  
INJUNCTION**

20  
21 **PLAINTIFFS’ MEMORANDUM OF LAW IN SUPPORT**  
22 **OF THEIR MOTION FOR PRELIMINARY INJUNCTION**  
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1 Fresno State has publicly announced its unwavering intention to eliminate the women’s  
2 varsity lacrosse team. Plaintiffs—a group of five scholarship athletes on that team who have  
3 devoted years to the sport and who now face the unenviable prospect of having to leave Fresno  
4 State to play elsewhere or having to give up their dream of competing in Division I athletics  
5 altogether—seek to enjoin this elimination. In the complaint, Plaintiffs challenge the gender equity  
6 of Fresno State’s entire athletics program—from participation opportunities to equality of financial  
7 aid and treatment of athletes. The question now, however, is simply whether Plaintiffs are entitled  
8 to a preliminary injunction preserving their team while the Court decides the case’s merits.  
9

10 The answer is a resounding “yes.” It has long been the law under Title IX that universities  
11 must provide equal opportunities for men and women to participate in athletics. Nonetheless,  
12 California State University, Fresno, and the other named Defendants (collectively, “Fresno State”)  
13 have opted, consistent with the school’s history, to discriminate against women in violation of  
14 Title IX’s dictates by eliminating the women’s lacrosse team at the end of this academic year and  
15 treating it worse than any other varsity team in the meantime.  
16

17 Even before it announced the proposed cut, Fresno State did not offer substantially  
18 proportionate participation opportunities to female student-athletes, which Title IX requires.  
19 Unsurprisingly, the elimination of the women’s lacrosse team does not solve this glaring problem.  
20 Thus, Plaintiffs are likely to succeed on the merits of their claims, and the other preliminary-  
21 injunction factors flow naturally, if not entirely inevitably, from this fact. It is no exaggeration to  
22 say that this case strikes at the heart of Title IX and implicates one of its central concerns—namely,  
23 whether America’s female students must continue “to expect less than their share of the athletic  
24 opportunities.” *Neal v. Bd. of Trustees of California State Universities*, 198 F.3d 763, 769 (9th Cir.  
25 1999).  
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1 Fresno State’s decision undercuts Plaintiffs’ civil rights and, if permitted to move forward,  
2 will irreparably harm their academic and athletic careers, to say nothing of their mental and  
3 physical well-being. To prevent those harms and ensure the continued existence of the women’s  
4 lacrosse team—and all other women’s teams at Fresno State—the Court should grant Plaintiffs’  
5 motion. Put simply, the Court must prevent Fresno State from eliminating *any* women’s sports  
6 during the case’s pendency. In addition, the Court should require Fresno State to treat the women’s  
7 lacrosse team and its members fairly—the way it treats other varsity teams and student-athletes—  
8 and not as second-class citizens. Specifically, Fresno State should be required to provide a  
9 dedicated locker room and practice space, equip the team for competition, and provide it funding  
10 and benefits on par with existing varsity teams.  
11

12 **BACKGROUND**

13  
14 On October 16, 2020, the members of Fresno State’s women lacrosse team were  
15 unceremoniously notified that the school was eliminating their sport at the end of the 2020-2021  
16 academic year (meaning the team will no longer exist in 2021-2022). *See, e.g.*, Walaitis Decl. ¶¶  
17 17–18; Anders Decl. ¶¶ 11–12; Roberts Decl. ¶¶ 17–18. Shortly thereafter, Fresno State announced  
18 the cut publicly—as well as the elimination of men’s wrestling and tennis—leaving the team little  
19 opportunity to preserve its existence. *See, e.g.*, Anders Decl. ¶¶ 11–12; Roberts Decl. ¶¶ 17–18;  
20 Walaitis Decl. ¶¶ 17–18. This elimination occurred despite Fresno State’s earlier decision to recruit  
21 Plaintiffs to the school specifically to participate in women’s lacrosse—with promises of  
22 scholarships, monthly housing stipends, various benefits, and the opportunity to play their chosen  
23 sport for four years—and despite the fact that these women relied on those promises. Anders Decl.  
24 ¶ 7–8; Walaitis Decl. ¶ 6–8; Roberts Decl. ¶ 8; Evans Decl. ¶ 10; Weir Decl. ¶ 9. Seeing no other  
25 path forward, several team members—Plaintiffs Taylor Anders, Hennessey Evans, Abbigayle  
26  
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1 Roberts, Megan Walaitis, and Tara Weir—scrambled to find representation and halt the school’s  
2 effort to end their collegiate athletic careers.

3           On December 3, 2020, Plaintiffs’ counsel wrote to Fresno State. *See* Bryant Decl. at Ex.  
4 A. That letter informed Fresno State that the school’s elimination of women’s lacrosse was “a  
5 blatant violation of Title IX.” *Id.* It cited a preexisting participation gap of 3.75% based on what  
6 was then the most recent available data. *See id.* To rectify this gap, Fresno State would need to add  
7 fifty-four competitive opportunities for female student-athletes. *See id.* But Fresno State was doing  
8 the exact opposite—*eliminating* female student-athletes’ opportunities, not expanding them.  
9 Counsel’s letter explained that Plaintiffs were prepared to vindicate their rights in court but  
10 “hope[d] that Fresno State w[ould] agree to reinstate the women’s lacrosse team and come into  
11 compliance with Title IX to avoid the need for a lawsuit.” *Id.*  
12

13           In response to this letter, on December 10, 2020, Fresno State’s counsel argued that the  
14 school was complying with Title IX because it “projects” that the three-sport elimination will  
15 generate an “overall proportion of men-to-women in the University’s athletic program” that “is  
16 less than two percent higher than the overall ratio of men to women in the University’s general  
17 student population.” Bryant Decl. at Exh. C. Plaintiffs’ counsel requested the data underlying this  
18 projection, while pointing out that the two percent margin cited by Fresno State’s counsel was  
19 irrelevant under Title IX.  
20

21           On December 22, 2020, after several delays, Fresno State’s counsel provided the  
22 underlying data. *See* Bryant Decl. at Exh. E. It showed the school’s projections were based on  
23 counts conducted under the Equity in Athletics Disclosure Act (“EADA”). *See id.* Because  
24 EADA data tends to overcount women athletes’ participation numbers, Plaintiffs’ counsel  
25 reached out to Donna Lopiano, one of the nation’s foremost experts on gender equity in athletics,  
26  
27

1 to review the figures and assess Fresno State’s female participation gap. On February 9, 2021,  
2 Dr. Lopiano completed her analysis and issued a report. *See* Lopiano Report, Ex. 7.

3 Dr. Lopiano’s report details several ways in which Fresno State’s data *overestimates*  
4 female participation and thus *underestimates* the participation gap. *See id.* at 17–56. To begin,  
5 EADA uses a different counting methodology than Title IX. *See, e.g., id.* at 17–23. In fact, their  
6 different metrics predictably result in the EADA methodology overcounting female participants  
7 (as compared to Title IX’s methodology) in at least one critical and obvious way: EADA allows a  
8 school to count *male* practice players as participants on the women’s team. *See id.* at 20. Because  
9 there are no counterbalancing women’s practice players on men’s teams at Fresno State, EADA’s  
10 methodology necessarily “results in an overcount of female athletes and has the effect of producing  
11 an undercount of the female participation gap.” *Id.* And it appears that Fresno State has, in fact,  
12 counted male practice players as female participants in its EADA count. *See id.* at 22–23.

13  
14  
15 In addition, players who quit or become ineligible after the first day of competition must  
16 be removed from the Title IX count, but *not* the EADA count. *See id.* at 24–25. While this  
17 methodological quirk would theoretically apply equally to both men’s and women’s sports, Fresno  
18 State’s data suggest a far larger overcount for female participation. *See id.* at 25–26 (Table 4 and  
19 discussion). Indeed, the data suggest that Fresno State’s overcount cannot be attributed solely to  
20 EADA’s methodology. *See id.* at 26. Instead, Fresno State is consistently overcounting female  
21 participation in several other ways. *See id.* at 26–56.

22  
23 For example, Fresno State appears to be inflating female participation on its women’s  
24 equestrian team. *See id.* at 27. In 2019-2020 (*i.e.*, the only year for which actual competition  
25 participation statistics are currently available), Fresno State listed thirty-eight participants on its  
26 EADA report (and thirty-five on its web roster). *See id.* But only twenty-five individuals actually  
27

1 participated in competition; the remaining “participants” never competed in any event. This fact,  
2 particularly when coupled with the Equestrian team’s recent growth (*i.e.*, such that it is three riders  
3 above the NCAA average and six riders above the number permitted to travel for competition),  
4 suggests the roster is being inflated. *See id.* at 27–28.

5  
6 Likewise, Fresno State appears to be inflating women’s cross-country counts, listing as  
7 many as thirteen “ghost” participants (*i.e.*, individuals who appear on the roster but who never  
8 competed in any event). *See id.* at 29–31. A similar, but perhaps more egregious, pattern appears  
9 for women’s indoor track, which involved as many as 24 roster “participants” who never  
10 participated in a meet. *See id.* at 33–34. The same theme appears for women’s outdoor track—  
11 namely, “an extraordinary number of female participants . . . participated in 1 or 0 meets compared  
12 to the same data for male participants.” *Id.* at 34–36; *see also id.* at 36–37 (providing further  
13 analysis suggesting that the counts for women’s cross country, indoor track, and outdoor track  
14 were inflated).

15  
16 Because of EADA’s methodological differences and the apparently inflated counts, “the  
17 true female participation gap that will exist” if Fresno State is permitted to move forward with its  
18 plan to eliminate women’s lacrosse “is *much* larger” than the figure included in Fresno State’s  
19 counsel’s December 22, 2020, letter. *Id.* at 53. Indeed, Fresno State’s flawed assessment will likely  
20 require at least three adjustments—removing male practice players from the count (which likely  
21 brings the female participation gap to 21 women), correcting the inflated Equestrian team count  
22 (which likely brings the participation gap to 27 women), and eliminating the inflated counts that  
23 permeate women’s cross country, indoor track, and outdoor track (which likely brings the  
24 participation gap to 40 women). *See id.* at 53–56. Any one of these more realistic assessments—  
25 let alone all three corrections combined—demonstrate that the participation gap is large enough to  
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1 sustain the women’s lacrosse team.

2         Sadly, this participation gap and Fresno State’s efforts to minimize it should come as no  
3 surprise, given the school’s long history of noncompliance with Title IX. For nearly 25 years—  
4 from 1992 to 2016—Fresno State was under active investigation by the United States Office of  
5 Civil Rights (“OCR”) for violating Title IX. *See* Exh. 6 (Feb. 9, 2016, OCR Letter to D.  
6 Milutinovich). The OCR closed its investigation in 2016 only after Fresno State finally  
7 consummated 45 remedial actions to bring the University closer to Title IX compliance. *See id.*  
8 Importantly, the OCR explained that the conclusion of its decades-long investigation did not mean  
9 that Fresno State complied or was complying with Title IX, just that the University had taken steps  
10 in the right direction. *See id.* Now, just four years later, Fresno State’s elimination of the women’s  
11 lacrosse team, as well as the program-wide inequities discussed in Dr. Lopiano’s report, reveal an  
12 unfortunate return to Fresno State’s historical norm—discriminating against women in its  
13 intercollegiate athletic program.  
14  
15

16         Fresno State’s treatment of the women’s lacrosse team after announcing the cut drives  
17 home the point. While the team nominally exists for the 2020-2021 academic year, Fresno State  
18 has largely written it off. For example, when the school announced the team’s elimination, it gave  
19 the men’s football team the women’s lacrosse locker room. *See* Evans Decl. ¶ 22; Walaitis Decl.  
20 ¶ 20. The women’s equipment and personal belongings were dumped into the showers; the women  
21 were not allowed to retrieve it. *See* Evans Decl. ¶ 22; Walaitis Decl. ¶ 20. The women’s lacrosse  
22 team was unable to train or practice during its off-season in the fall because it never received a  
23 “COVID return to play” plan, even though other teams received a plan and had the opportunity to  
24 practice in the off season. *See* Walaitis Decl. ¶ 22.  
25

26         Moreover, by Fresno State policy, when a varsity athlete tests positive for COVID, the  
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1 entire team must quarantine. *See id.* ¶ 20. When other teams had to quarantine, the entire team was  
2 housed in dorms and provided three meals a day. *See id.* In stark contrast, when the women’s  
3 lacrosse team had to quarantine, they were not provided alternative housing and were told to order  
4 food at their own expense. *See id.* And when these women could finally play again, they found  
5 themselves without proper equipment and uniforms, while other in-season teams were fully  
6 equipped. *See id.* ¶¶ 23–25. In short, even as the team plays what could be its last season, its  
7 members are treated as if they are already gone.  
8

### 9 STANDARD

10 For the entry of a preliminary injunction, Plaintiffs must show (1) “that [they are] likely to  
11 succeed on the merits,” (2) “that [they are] likely to suffer irreparable harm in the absence of  
12 preliminary relief,” (3) “that the balance of equities tips in [their] favor,” and (4) “that an injunction  
13 is in the public interest.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Federal  
14 courts have discretion to balance these sometimes-competing claims of injury and burden, as well  
15 as the potential adverse impacts granting or denying an injunction would have on the public  
16 generally. *See id.* at 24.  
17

18 In this case, success on the merits—the first element of the preliminary-injunction  
19 standard—will hinge on the three-part test for compliance with Title IX’s athletic participation  
20 requirements. Under that test, a school can demonstrate such compliance under the following  
21 criteria:  
22

23 (1) whether intercollegiate level participation opportunities for male and female  
24 students are provided in numbers *substantially proportionate* to their respective  
enrollments; or

25 (2) where the members of one sex have been and are under-represented among  
26 intercollegiate athletes, whether the institution can show *a history and continuing*  
27 *practice of program expansion* which is demonstrably responsive to the developing  
interest and abilities of the members of that sex; or  
28

1  
2 (3) where the members of one sex are under-represented among intercollegiate  
3 athletes and the institution cannot show a continuing practice of program expansion  
4 such as that cited above, whether it can be demonstrated that the interests and  
abilities of the members of that sex have been *fully and effectively accommodated*  
by the present program.

5 Policy Interpretation, Section VII.C.5.a., 44 Fed. Reg. 71,418 (emphases added); *see also* Office  
6 of Civil Rights, U.S. DOE, *Clarification of Intercollegiate Athletics Policy Guidance: The Three-*  
7 *Part Test* (Jan. 16, 1996) (“[T]he three-part test furnishes an institution with three individual  
8 avenues to choose from when determining how it will provide individuals of each sex with  
9 nondiscriminatory opportunities to participate in intercollegiate athletics. If an institution has met  
10 any part of the three-part test, . . . the institution is meeting this requirement.”).<sup>1</sup>

11  
12 **ARGUMENT**

13 Each element required for the entry of a preliminary injunction is met by Plaintiffs’ motion.

14 *First*, Plaintiffs are likely to succeed on the merits because Fresno State cannot satisfy any  
15 part of the three-part test for Title IX compliance. Opportunities for athletic participation are not  
16 “substantially proportionate” to enrollment realities at Fresno State. Indeed, a fair assessment of  
17 the numbers—one that eliminates Fresno State’s overcounts of female participants—reveals a  
18 substantial participation gap. The gap is *larger* than the size of the women’s lacrosse team.  
19 Likewise, Fresno State cannot establish a “history and continuing practice of program expansion”  
20 for female student-athletes. The school is *contracting*, not expanding, opportunities for women.  
21 And Fresno State cannot hope to show that its current program—which would eliminate an entire  
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23  
24 <sup>1</sup> Courts across the country—including the Ninth Circuit—have adopted this three-part test as the  
25 appropriate standard for measuring equal opportunities to participate under Title IX. *See, e.g.,*  
26 *Equity in Athletics, Inc. v. Dep’t of Educ.*, 639 F.3d 102–05 (4th Cir. 2011); *Neal v. Bd. of Trustees*  
27 *of California State Universities*, 198 F.3d 763, 767–68 (9th Cir. 1999); *Homer v. Ky. High Sch.*  
*Athletic Ass’n.*, 43 F.3d 265, 275 (6th Cir. 1994); *Cohen Roberts v. Colo. State Bd. of Agric.*, 998  
F.2d 824, 828 (10th Cir. 1993); *v. Brown Univ.*, 991 F.2d 888, 898 (1st Cir. 1993).

1 team of Division I women athletes deeply interested and obviously capable of competing at the  
2 highest level—will somehow “fully and effectively accommodate[]” their interests and abilities.

3         *Second*, without a preliminary injunction, Plaintiffs will suffer irreparable harm. Indeed, a  
4 strong likelihood of success on a Title IX claim *necessarily* demonstrates the existence of an  
5 irreparable injury (*i.e.*, a violation of Plaintiffs’ civil rights). But, even setting aside that reality,  
6 Plaintiffs will suffer irreparable harm if Fresno State is permitted to eliminate their sport. In  
7 particular, they will be forced to forgo at least a year of competition, when they likely have only  
8 four years to play; they will likely suffer an erosion of their skills and conditioning, as they will be  
9 unable to train, practice, or receive coaching while their sport is sidelined; some may have to  
10 transfer to a different institution to regain similar, though perhaps less fulfilling, opportunities to  
11 play competitive lacrosse, leaving behind their friends and community and potentially affecting  
12 their academic progress; and others may be unable to transfer, meaning the decision will end their  
13 competitive careers entirely. These results will impact Plaintiffs’ mental and physical well-being,  
14 not just for the next season or year, but likely forever.

17         *Third*, given the harms outlined above, which are to be balanced against nothing more than  
18 a mundane—and almost certainly temporary—budgetary constraint, the equities weigh in favor of  
19 granting the preliminary injunction.

20         *Fourth*, Title IX itself establishes that there is a strong public interest in ensuring that  
21 female student-athletes have proportional and fair opportunities to participate in college sports.  
22 That broad interest, with protections enshrined in federal law for more than forty years, must take  
23 primacy over any competing, and far narrower, interest in financial autonomy for Fresno State.

24         Because all four factors weigh in favor of granting relief, Plaintiffs’ motion for  
25 preliminary injunction should be granted.  
26  
27

1           **I.     PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS BECAUSE**  
2           **FRESNO STATE IS VIOLATING TITLE IX’s THREE-PART TEST.**

3           To comply with Title IX’s dictates, Fresno State must satisfy at least one part of the three-  
4 part test for offering equal opportunities to participate under Title IX—(1) “substantially  
5 proportionate” participation by female student-athletes (in keeping with their numbers in the  
6 general student body), (2) “a history and continuing practice of program expansion” for female  
7 student-athletes that is “demonstrably responsive” to their interests and abilities, or (3) a program  
8 that “fully and effectively accommodate[s]” female student-athletes’ interests and abilities. 44 Fed.  
9 Reg. 71,418. Fresno State cannot satisfy any part of this test, so it violating Title IX.  
10

11           **A. Female Student-Athletes Participation Numbers Are Not “Substantially**  
12           **Proportionate” to their Undergraduate Enrollment Numbers at Fresno State.**

13           The first prong of the analysis—the only one Fresno State has ever addressed directly in  
14 correspondence with Plaintiffs—is perhaps the most straightforward. Fresno State admits, as it  
15 must, that participation opportunities at the university are not strictly proportionate to student-body  
16 representation. *See* Bryant Decl. at Exh. E. Indeed, it projects a shortfall of eight opportunities for  
17 female student-athletes. *See id.* But even this self-serving projection is fatally flawed. To begin, it  
18 concerns projected *future* compliance with Title IX (in 2021-2022)—not *present* compliance (in  
19 2020-2021)—and it does so on the unlikely assumption that, after the school eliminates three sports  
20 (*i.e.*, women’s lacrosse and men’s wrestling and tennis), all other sports’ participation figures will  
21 remain the same as they were back in 2019-2020.  
22

23           Even setting aside this highly questionable assumption and the faulty belief that Fresno  
24 State can rely on “projected” future compliance in this manner, the underlying data suggests that  
25 Fresno State is grossly overcounting female participation and thus undercounting the participation  
26 gap. The real gap the teams’ eliminations would create is not eight female participants; it is at least  
27

1 forty. *See* Lopiano Report at 56. This figure—which strips away errors attributable to the EADA’s  
2 methodology (*e.g.*, counting male practice players as members of a female team) and Fresno  
3 State’s inflation of various team counts (*e.g.*, the equestrian team, as well as women’s cross  
4 country, indoor track, and outdoor track)—violates Title IX because it is easily large enough to  
5 field a viable athletic team. *See, e.g., Ohlensehlen v. Univ. of Iowa*, No. 3:20-cv-80, 2020 WL  
6 7651974, at \*8–10 (S.D. Iowa Dec. 24, 2020) (holding that plaintiffs’ expert’s [Dr. Lopiano]  
7 minimum estimated participation gap of 47 for the current year that increases with additional team  
8 cuts in subsequent years is enough to show that plaintiffs possess a fair chance of succeeding on  
9 their Title IX claim for inequitable participation opportunities); *Biediger v. Quinnipiac Univ.*, 728  
10 F. Supp. 2d 62, 111–12 (D. Conn. 2010), *aff’d*, 691 F.3d 85 (2d Cir. 2012) (finding the university  
11 out of compliance with Title IX based upon a gap of 3.62 percent or 38 women). Indeed, this forty-  
12 woman participation gap would easily support the women’s lacrosse team, the very team Fresno  
13 State has decided to disband.

14  
15  
16 The forty-woman participation gap is also consistent with Fresno State’s recent history. In  
17 particular, as shown below in Table 2 of Dr. Lopiano’s report, Fresno State’s EADA reports have  
18 consistently shown women are not receiving equal opportunities to participate (even though  
19 EADA overcounts women’s participation numbers)—and have not been receiving them since *at*  
20 *least* the 2013-2014 academic year.  
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TABLE 2. Prong One Proportionality Analysis Based on Annual EADA Reports  
 CSUF Athletic Participation 2003-04 to 2019-20  
 and Female Participation Gaps

Survey Year	Male Under Grad	Percent Male Under Grad	Female Under Grad	Percent Female Under Grad	Total Under grads	Male Athletes	Percent Male Athletes	Female Athletes	Percent Female Athletes	Total Athletes	Female Particip. Gap - # of Athletes to be added*	Percent Shortfall Female Opport.
2003-04	5886	40.8%	8528	59.2%	14414	249	43.8%	319	56.2%	568	42	3.0%
2004-05	5859	41.1%	8402	58.9%	14261	258	40.7%	376	59.3%	634	-6	-0.4%
2005-06	6136	41.3%	8721	58.7%	14857	240	41.2%	343	58.8%	583	-2	-0.1%
2006-07	6330	41.7%	8848	58.3%	15178	221	40.6%	323	59.4%	544	-14	-1.1%
2007-08	6478	41.6%	9103	58.4%	15581	218	39.4%	336	60.6%	554	-30	-2.2%
2008-09	6715	42.7%	9002	57.3%	15717	238	42.9%	317	57.1%	555	2	0.2%
2009-10	6561	42.4%	8902	57.6%	15463	222	41.9%	308	58.1%	530	-7	-0.5%
2010-11	6631	42.7%	8907	57.3%	15538	225	42.1%	309	57.9%	534	-7	-0.5%
2011-12	7086	42.9%	9434	57.1%	16520	220	41.9%	305	58.1%	525	-12	-1.0%
2012-13	7310	42.6%	9830	57.4%	17140	208	41.7%	291	58.3%	499	-11	-1.0%
2013-14	7461	42.5%	10089	57.5%	17550	217	43.1%	287	56.9%	504	6	0.5%
2014-15	7401	41.8%	10317	58.2%	17718	223	43.0%	296	57.0%	519	15	1.2%
2015-16	7768	41.7%	10875	58.3%	18643	219	44.0%	279	56.0%	498	28	2.3%
2016-17	7865	41.8%	10963	58.2%	18828	224	43.5%	291	56.5%	515	21	1.7%
2017-18	8030	41.4%	11382	58.6%	19412	237	44.9%	291	55.1%	528	45	3.5%
2018-19	7828	40.5%	11518	59.5%	19346	256	44.2%	323	55.8%	579	54	3.8%
2019-20**	7627	40.4%	11251	59.6%	18878	251	43.1%	332	56.9%	583	38	2.7%

\* The female participation gap represents the number of female participation opportunities that would need to be added if male participation remained constant AND was equal to the percent males in the undergraduate student body.

\*\*Enrollment data and participation counts were provided by CSUF via December 22, 2020 letter from Hamm to Bryant

Lopiano Report at 21, Table 2. Using the EADA count, which *understates* the gap, the trend is unmistakable. And Fresno State is not even attempting to reverse it. Instead, it is further eroding participation opportunities for female students. In this respect, Fresno State falls dramatically short of satisfying part one of the three-part test.

**B. Fresno State Cannot Rely on the “Escape Routes” of Parts Two or Three Because It Has Chosen to Eliminate a Women’s Team, Despite Interest and Ability to Field It.**

Even when a school—like Fresno State—is not providing actual equity, it may comply with Title IX if it can demonstrate “an ongoing effort to meet the needs of the underrepresented gender” or that “it has fully and effectively accommodated the interests and abilities of the

1 underrepresented sex.” *Biediger v. Quinnipiac Univ.*, 616 F. Supp. 2d 277, 294 (D. Conn. 2009)  
2 (citation omitted); *see also Cohen v. Brown Univ.*, 991 F.2d 888, 898 (1st Cir. 1993) (“The second  
3 and third parts of the accommodation test recognize that there are circumstances under which, as  
4 a practical matter, something short of this proportionality is a satisfactory proxy for gender  
5 balance.”).

6  
7 But, as is perhaps obvious, Fresno State cannot meet its burden to show a continuing  
8 practice of expansion or full accommodation of women’s interests because it is eliminating a fully  
9 rostered women’s lacrosse team. As one court has explained:

10 There is no question that, if [the school] fails to meet prong one of Title IX  
11 compliance, it will be out of compliance with Title IX. That is because, by  
12 eliminating a women’s team while there is sufficient interest to field one, the  
13 University will have failed to demonstrate that it is committed to expanding  
14 opportunities for the underrepresented gender—women—or that it has fully and  
effectively accommodated the interests and abilities of that underrepresented  
gender.

15 *Biediger*, 616 F. Supp. 2d at 294. Indeed, as to the second part of the three-part test, *any* elimination  
16 of a women’s team—even if not independently dispositive—makes it “exponentially harder” to  
17 establish a history and practice of program expansion. *Portz v. St. Cloud State Univ.*, 401 F. Supp.  
18 3d 834, 860 (D. Minn. 2019). As relevant here, Fresno State eliminated women’s gymnastics in  
19 1982 and women’s swimming and diving in 2004. In addition, it added no new women’s sports  
20 for the thirteen years between 1982 and 1995. These teams’ eliminations and this lengthy gap  
21 would disqualify Fresno State from seeking safe harbor under the second prong even if the present  
22 elimination did not.

23  
24 Just as importantly, Fresno State cannot demonstrate any historical growth in female  
25 participation. At best, as shown in Table 1 to Dr. Lopiano’s report, those opportunities are stagnant,  
26 if not contracting slightly. *See* Lopiano Report at 11, Table 1. Indeed, while the numbers have  
27

1 fluctuated over time, female participation is lower today than it was in 2003-2004. *See id.* The  
2 EADA reports show 292 female student-athletes in 2003-2004 and 274 in 2019-20. And, of course,  
3 Fresno State is now trying to eliminate an entire women's team.

4           Analysis under the third part of the three-part test is similar. There, as the *Portz* court put  
5 it:

6           Where an institution has recently eliminated a viable team for the underrepresented  
7 sex from its intercollegiate athletics program, the Court will find that sufficient  
8 interest, ability, and available competition [exists] to sustain an intercollegiate  
9 team in that sport. This creates a presumption that the institution is not in  
10 compliance with Prong Three that the institution can rebut through strong evidence  
that interest, ability, or competition no longer exists.

11 401 F. Supp. 3d 834, 858 (D. Minn. 2019) (citation omitted). Fresno State cannot overcome such  
12 a presumption here. In short, the school cannot hope to establish either of the “escape route” prongs  
13 precisely because it has opted to eliminate a thriving women's sport.

14           Because Fresno State cannot establish Title IX compliance under any part of the three-part  
15 test, Plaintiffs are likely to succeed on the merits.

16           **II. WITHOUT PRELIMINARY RELIEF, PLAINTIFFS WILL SUFFER**  
17 **IRREPARABLE HARM.**

18           “In general, courts have found that the elimination of a women's team creates irreparable  
19 harm when the plaintiffs have demonstrated a strong likelihood of success on the merits of their  
20 Title IX claim.” *Mayerova v. E. Michigan Univ.*, 346 F. Supp. 3d 983, 997 (E.D. Mich.  
21 2018), *appeal dismissed*, No. 18-2238, 2020 WL 1970535 (6th Cir. Apr. 20, 2020); *Cohen v.*  
22 *Brown Univ.*, 809 F. Supp. 978 (D. R.I. 1992), *aff'd* 991 F.2d 888 (1st Cir. 1993). These holdings  
23 are consistent with the more general presumption that cases involving the enforcement of civil  
24 rights necessarily implicate irreparable harm. *See, e.g., Elrod v. Burns*, 427 U.S. 347, 373 (1976)  
25 (holding the loss of freedom of speech “unquestionably constitutes irreparable injury”); *Gresham*  
26

1 *v. Windrush Partners, Ltd.*, 730 F.2d 1417, 1424 (11th Cir. 1984) (housing discrimination “almost  
 2 always results in irreparable injury”); *Bd. of Educ. of the Highland Local Sch. Dist. v. United States*  
 3 *Dep’t of Educ.*, 208 F. Supp. 3d 850, 877–78 (S.D. Ohio 2016) (finding irreparable injury for  
 4 school’s violation of Title IX and constitution); *Vietnamese Fishermen’s Ass’n v. Knights of the*  
 5 *Ku Klux Klan*, 543 F. Supp. 198, 218 (S.D. Tex. 1982) (“Victims of discrimination suffer  
 6 irreparable injury, regardless of pecuniary damage.”).

8 This understanding also aligns with the fleeting nature of collegiate athletics—namely,  
 9 student-athletes are generally eligible to compete in a narrow four-year window. *See Biediger*, 616  
 10 F. Supp. 2d at 291 (“Courts have consistently held that, given the fleeting nature of college  
 11 athletics, plaintiffs will suffer irreparable harm by losing the opportunity to participate in their  
 12 sport of choice on a continuous and uninterrupted basis.”); *Ohlensehlen*, 2020 WL 7651974, at  
 13 \*12 (“Stated plainly, the harm to Plaintiffs should Defendants be allowed to eliminate the women’s  
 14 and diving team before a full trial is held is not only irreparable—it is existential.”); *Barrett*, 2003  
 15 WL 22803477, at \*14 (“Plaintiffs have a finite period of time in which to compete.”). Denial of  
 16 even one year’s participation will permanently disenfranchise all the named Plaintiffs and similarly  
 17 situated athletes by depriving them of a significant aspect of their expected collegiate experience.

19 And Plaintiffs will suffer irreparable harm in several other concrete ways. For example,  
 20 because they will be unable to train, practice, or receive coaching during the pendency of the case,  
 21 they will likely suffer an erosion of their skills and conditioning. They will then be forced to play  
 22 “catch up” to the extent they resecure an opportunity to play lacrosse competitively.

24 Moreover, some may be unwilling or unable to wait to see whether Fresno State eventually  
 25 reinstates the team. Such individuals may have to transfer to a different institution to pursue their  
 26 dreams. Of course, there is no guarantee that such students will find the new opportunity equally  
 27

1 fulfilling, or that they would be able to establish the robust and supportive community they  
2 discovered at Fresno State, particularly because they will arrive as transfers with limited eligibility,  
3 not as four-year members of any team. In addition, such transfers may affect Plaintiffs' academic  
4 progress, depending on whether credits transfer, the new school has their chosen major, the same  
5 quality of teaching, and myriad other factors. And there is no guarantee that there will be transfer  
6 opportunities for all who want them. Fresno State's elimination of the women's lacrosse team may  
7 signal the end of Plaintiffs' athletics careers. These results will impact Plaintiffs' mental and  
8 physical well-being, not just for the next season or year, but likely forever.

9  
10 As a final point, Plaintiffs also face less tangible—but equally irreparable—harms, such as  
11 the competitive harms associated with the already-existing unequal treatment they receive as  
12 members of a soon-to-be-eliminated team. Unlike members of other varsity teams, they have been  
13 denied basic equipment, a locker room, training space, and similar benefits afforded to Fresno  
14 State's other student-athletes. This treatment predictably affects their ability to compete and their  
15 overall well-being. In short, being treated as afterthoughts by their school and its athletics  
16 department is an ongoing and irreparable harm. And this treatment, like Fresno State's other  
17 discriminatory conduct, will have lasting impacts.

18  
19 These irreparable harms justify a preliminary injunction.

20  
21 **III. WEIGHING THIS IRREPARABLE HARM AGAINST A NORMAL AND**  
22 **TEMPORARY BUDGETARY CONSTRAINT, THE EQUITIES ARE**  
23 **STRONGLY IN PLAINTIFF'S FAVOR.**

24 Some cases require difficult balances of competing equities. This is not such a case. Fresno  
25 State has advanced nothing more than financial constraints to justify the decision to eliminate  
26 women's lacrosse. But financial considerations cannot justify an institution's failure to comply  
27 with Title IX. *See, e.g., Horner v. Kentucky High Sch. Athletic Ass'n*, 43 F.3d 265, 275 (6th Cir.

1 1994) (“Thus, a recipient may not simply plead limited resources to excuse the fact that there are  
2 fewer opportunities for girls than for boys.”); *Ohlensehlen*, 2020 WL 7651974, at \*12  
3 (“Ultimately, ‘financial hardship is not a defense to a [probable] Title IX violation.’” (citation  
4 omitted)); *Roberts v. Colorado State Univ.*, 814 F. Supp. 1507, 1518 (D. Colo. 1993), *aff’d in part*,  
5 *rev’d in part sub nom. Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824 (10th Cir. 1993)  
6 (“[Defendant’s Witness] testified at trial that the primary reason the women’s softball team was  
7 eliminated was to reduce a budget shortfall in CSU’s athletic department. However, a financial  
8 crisis cannot justify gender discrimination.”); *Haffer v. Temple Univ. of the Com. Sys. of Higher*  
9 *Educ.*, 678 F. Supp. 517, 530 (E.D. Pa. 1987), *on reconsideration sub nom. Haffer v. Temple Univ.*  
10 *of Com. Sys. of Higher Educ.*, No. CIV.A. 80-1362, 1988 WL 3845 (E.D. Pa. Jan. 19, 1988)  
11 (“Moreover, it is clear that financial concerns alone cannot justify gender discrimination.” (citation  
12 omitted)).  
13  
14

15 Indeed, a contrary rule would likely obliterate the law precisely because universities face  
16 financial issues with such frequency. Because the equities strongly weigh in Plaintiffs’ favor, a  
17 preliminary injunction is warranted here.

18 **IV. A PRELIMINARY INJUNCTION IS IN THE PUBLIC INTEREST TO**  
19 **VINDICATE CIVIL RIGHTS PROTECTED BY CONGRESS.**

20 The public interest would best be served by upholding Title IX’s salutary goals. *See, e.g.*,  
21 *Mayerova*, 346 F. Supp. 3d at 999 (“[T]he court finds that the public interest is best served by  
22 upholding the goals of Title IX.”); *Ohlensehlen*, 2020 WL 7651974, at \*13 (“Especially  
23 considering that Plaintiffs have established a fair chance of succeeding on the merits of their Title  
24 IX complaint for equal participation in intercollegiate athletics, the public interest weighs in favor  
25 of a preliminary injunction.”); *Barrett v. W. Chester Univ. of Pennsylvania of State Sys. of Higher*  
26 *Educ.*, No. CIV.A. 03-CV-4978, 2003 WL 22803477, at \*15 (E.D. Pa. Nov. 12, 2003) (“Promoting  
27

1 compliance with Title IX serves the public interest.”); *Cohen I*, 809 F. Supp. 978 at 1001 (“[T]he  
2 public interest will be served by vindicating a legal interest that Congress has determined to be an  
3 important one.”); *Favia v. Indiana Univ. of Pennsylvania*, 812 F. Supp. 578, 585 (W.D. Pa.), aff’d,  
4 7 F.3d 332 (3d Cir. 1993) (“The public has a strong interest in prevention of any violation of  
5 constitutional rights.”).

6  
7 Thus, to the extent Fresno State’s financial autonomy is implicated at all, it must give way  
8 to Title IX’s mandates. *See, e.g., Cohen II*, 991 F.2d at 905. (“Title IX does not purport to override  
9 financial necessity. Yet, the pruning of athletic budgets cannot take place solely in comptrollers’  
10 offices, isolated from the legislative and regulatory imperatives that Title IX imposes.”).

11 This element favors granting a preliminary injunction as well.

12  
13 **V. PRELIMINARY INJUNCTION HEARING.**

14 Plaintiffs respectfully request oral argument on this matter and estimate that, depending on  
15 whether the Court wishes to receive testimony, the hearing will take one to two days.

16 **CONCLUSION**

17 For the foregoing reasons, Plaintiffs’ motion for preliminary injunction should be  
18 granted. The Court should enjoin Fresno State from eliminating the women’s lacrosse team and  
19 from eliminating any other women’s sport during the pendency of this case. And it should  
20 require Fresno State to treat members of the women’s lacrosse team and its members fairly—the  
21 way it treats other student-athletes on other varsity teams.  
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Respectfully submitted,

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