

No. 21-1365

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Selina Soule, a minor, by Bianca Stanescu, her mother; Chelsea Mitchell, a minor, by Christina Mitchell, her mother; Alanna Smith, a minor, by Cheryl Radachowsky, her mother; Ashley Nicoletti, a minor, by Jennifer Nicoletti, her mother,

Plaintiffs-Appellants,

v.

Connecticut Association of Schools, Inc., d/b/a Connecticut Interscholastic Athletic Conference; Broomfield Public Schools of Board of Education; Cromwell Public Schools Board of Education; Glastonbury Public Schools Board of Education; Canton Public Schools Board of Education; Danbury public board of education,

Defendants-Appellees

and

Andray Yearwood; Thania Edwards on behalf of her daughter, T.M.; Commission on Human Rights and Opportunities.

Intervenors-Appellees

On Appeal from the United States District Court for the
District of Connecticut
Case No. 3:20-cv-00201 (RNC)

**Brief of *Amici Curiae* 21 Athletic Officials and Coaches of
Female Athletes in Support of Plaintiff-Appellants**

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INTEREST OF *AMICI CURIAE*¹

Amici curiae consist of twenty-one coaches and officials from eighteen states, writing on behalf of the girls and women they have coached, and whose futures hang in the balance between objective and subjective notions of “sex.” *Amici* have dedicated significant parts of their lives to the world of sport and ensuring its safe, fair, and ethical bases are maintained. It is *amici*’s job to oversee the rules of competition, to develop athletes, and to defend athletes in the event of ethical compromises.

Fundamentally, the job of an athlete’s coach—at every level, from youth sports to Olympic competitions—is to help the athlete reach his or her full potential in their chosen athletic endeavors, while keeping them as safe as possible and, ideally, increasing their love for the sport.² Competing in and excelling at sports can produce virtually incalculable benefits—physically, mentally, relationally, and socially—and coaches

¹ Pursuant to Federal Rules of Appellate Procedure 29(a)(2) and (a)(4)(E), all parties consented in writing to the filing of this brief, no party’s counsel authored this brief in part or in whole, and no person other than *amici* and their counsel made any monetary contribution to fund its preparation or submission.

² A complete list of the *amici* coaches and officials is included in the addendum.

have the unique opportunity and responsibility to facilitate such opportunities.

Ensuring that female athletes are not forced to compete against biological males who self-identify as females is critical to each of those elements of a coach's role. Given the scientifically indisputable and biological differences between males and females, female athletes cannot reach their full competitive and athletic potential if they are required to compete against biological males. In many—perhaps most—sports, it is inherently less safe for female athletes to compete against biological males; and the competitive disadvantage female athletes face if forced to compete against biological males often has a deleterious effect on the joy, self-worth, and confidence that female athletes derive from their athletic participation. As such, *amici* have an interest in ensuring that the playing field for female athletes is as even as possible.

SUMMARY OF THE ARGUMENT

It is well-settled that participation in sports provides significant and comprehensive benefits to both males and females, but particularly to females—especially after Title IX was passed in 1972. *See* 20 U.S.C. § 1681; Sarah Parshall Perry, *Fox in the Henhouse: Biden’s New Title IX Rule Puts Women in Danger*, HERITAGE (July 5, 2022)³ (“The rate of female participation in high school athletics is now 10 times what it was in 1972.”).

Participation in sports is linked not only to improved physical health, but also to improved mental health; improved academic achievement; higher levels of body esteem; and increases in social skills, confidence, and job performance. *See* Kavitha A. Davidson, *Study shows positive correlation between playing sports, better self-image among girls*, ESPN (Mar. 30, 2018)⁴ (“Girls who play sports are 11 percent more likely to say they’re ‘happy the way they are.’”). Girls who participate in sports report spending less time on social media and—perhaps not so

³ <https://www.heritage.org/gender/commentary/fox-the-henhouse-bidens-new-title-ix-rule-puts-women-danger-0>

⁴ https://www.espn.com/espnw/sports/story/_/id/22968430/study-shows-positive-correlation-playing-sports-better-self-image-girls

coincidentally—report less feelings of sadness and depression. *Id.* (“[A] higher percentage of non-athlete girls spend more hours on social media.”). There is simply no question that athletic participation is a beneficial and critical opportunity to developing positive self-esteem and self-worth in female athletes of all ages.

These wide-ranging benefits depend on competitions being fair and safe, which means acknowledging an *objective* definition of sex that does not encompass subjective notions of gender. Fairness does not mean everyone gets a medal—it does mean, however, that females are not forced to compete against biological males.

It is precisely for this reason that *amici* have been advocating against the perversion of Title IX’s term “sex” to mean subjective notions of gender identity. The entirety of Title IX would be superfluous if “sex” does not mean biological sex. *See B.P.J. v. W. Va. St. Bd. of Educ.*, No. 2:21-cv-00316, 2022 WL 111875, at *9 (S.D. W. Va. Jan. 5, 2023) (“As other courts that have considered Title IX have recognized, although the regulation applies equally to boys as well as girls, it would require blinders to ignore that the motivation for the promulgation of the regulation was to increase opportunities for women and girls in

athletics.”) (internal quotations and citations omitted). Forcing female athletes to compete against male athletes creates an impossible obstacle to the goal of equal opportunity and fair competition to female athletes. Biological differences between the sexes mean that males have distinct—and often significant—advantages in virtually all sports.

Additionally, results and records need to be amended to reflect the accomplishments of the young women who were harmed when biological males were allowed to dominate their sports. In *Soule v. Connecticut Association of Schools, Inc.*, 57 F.4th 43 (2d Cir. 2022), male athletes were allowed to compete against female athletes, taking roster spots, racing opportunities, advancement, recognition, and even state titles. The record *must* be corrected to reflect what would have happened had the competition been fair—had biological males not been permitted to compete against biologically female athletes.

Correcting the record after a participant is retroactively disqualified is not abnormal. Corrected records have resolved many discrepancies; from doping Olympic athletes to Kentucky Derby thoroughbreds. To some, it may seem a small thing to finish sixth rather than fifth—or even to finish second rather than first. But *amici*

respectfully submit that such a mentality is atypical in competitive sports. Athletes devote hours, days, weeks, and years—foregoing other interests and activities—precisely so that they can finish first instead of second. Lawyers and academics can debate and quibble *ad infinitum* whether an inaccurate record caused by an unfair competition causes actual harm—but in the real world of athletic competitions, the answer is obvious.

It is for these reasons that *amici* ask this Court to reverse the holding of its prior panel.

ARGUMENT

I. The wide-ranging benefits for female athletes beyond the field, court, or locker room can only be realized if “sex” means biological sex.

Athletic participation provides significant and comprehensive benefits to female athletes in physical health, mental health, academic achievement, body esteem, social skills, confidence, job performance, and numerous other areas. This is based not only on *amici*'s experience, but also is demonstrated by empirical evidence.

Studies have shown that, even after the close of an athletic career, female athletes have higher labor force participation and earn higher wages. See Betsey Stevenson, *Beyond the Classroom: Using Title IX to Measure the Return to High School Sports*, NATIONAL BUREAU OF ECONOMIC RESEARCH 1, 4 (2010)⁵. Participating in sports in high school “may have a positive influence on achievement in science, especially for young women[,]” and positively impacts academic performance generally. See Sandra L. Hanson & Rebecca S. Kraus, *Women, Sports, and Science: Do Female Athletes Have an Advantage?*, in 71 SOCIOLOGY OF EDUCATION 93 (1998); Philip Veliz, & Sohaila Shakib, *Gender, Academics, and*

⁵ https://www.nber.org/system/files/working_papers/w15728/w15728.pdf

Interscholastic Sports Participation at the School Level: A Gender-specific Analysis of the Relationship between Interscholastic Sports Participation and AP Enrollment, in 47 SOCIOLOGICAL FOCUS (2014). Athletic participation is also linked to improved mental health and a decrease in substance use. See Kimberly H. McManama et al., *Psychological Resilience in Young Female Athletes*, NATIONAL LIBRARY OF MEDICINE (Aug. 17, 2021)⁶. Additionally, athletic participation has even been linked to a decreased chance of breast cancer. See *Physical activity in adolescence and young adulthood and breast cancer risk: a quantitative review*, NATIONAL LIBRARY OF MEDICINE (Feb. 2004)⁷. For athletic participation to continue to provide innumerable benefits to female athletes, however, the meaning of “sex” under Title IX cannot be desecrated.

The key directive of Title IX of the Education Amendments of 1972 is contained in 37 simple words: “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the

⁶ <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8392459/>

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https://journals.lww.com/eurjcancerprev/Abstract/2004/02000/Physical_activity_in_adolescence_and_young.2.aspx

benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance[.]” 20 U.S.C. § 1681(a).

Title IX disallows recipients of federal funds—like schools—from discriminating on the basis of sex, and treats sex as limited to the binary categories of male and female, both objective and fixed. *See Adams v. Sch. Bd. of St. Johns Cty.*, No. 18-13592, 2022 WL 18003879, at *15 (11th Cir. Dec. 30, 2022) (*en banc*) (“[R]eading in ambiguity to the term ‘sex’ ignores the overall statutory scheme and purpose of Title IX, along with the vast majority of dictionaries defining ‘sex’ based on biology and reproductive function.”); *see also Neese v. Becerra*, No. 2:21-cv-163-z, 2022 WL 1265925, at *12 (N.D. Tex. Apr. 26, 2022) (“Title IX presumes sexual dimorphism in section after section, requiring equal treatment for each ‘sex.’”); *see also* 20 U.S.C. § 1681(a)(2) (“[T]his section shall not apply . . . in the case of an educational institution which has begun the process of changing from being an institution which admits only students of *one sex* to being an institution which admits students of *both sexes*[.]”) (emphasis added); *see also* 20 U.S.C. § 1681(a)(8) (“[T]his section shall not preclude father-son or mother-daughter activities at an educational

institution, but if such activities are provided for students of *one sex*, opportunities for reasonably comparable activities shall be provided for students of *the other sex*.[.]” (emphasis added).

The Connecticut Interscholastic Athletic Conference blatantly ignored Title IX’s directive and claims, by announcing that “for purposes of sports participation, the CIAC shall *defer to the determination of the student and his or her local school regarding gender identification.*” *CIAC 2022–2023 Handbook*, CONNECTICUT INTERSCHOLASTIC ATHLETIC CONFERENCE 54 (2023)⁸ (emphasis added). Allowing students to choose their gender contradicts the longstanding meaning and purpose of Title IX, which was to prevent sex discrimination and protect educational opportunities.

To facilitate the benefits that participation in sports can have on female athletes, it is imperative for competitions to be fair.⁹ Fairness is

⁸ https://www.casciac.org/pdfs/ciachandbook_2223.pdf

⁹ The lasting benefits—even outside the grade school and high school context—are entirely demolished when women are put in categories of competition with men, especially in contact sports. *See, e.g.,* Bhavesha Purohit, *When transgender fighter Fallon Fox broke her opponent’s skull in MMA fight*, SPORTSKEEDA (Sept. 30, 2021), <https://www.sportskeeda.com/mma/news-when-transgender-fighter-fallon-fox-broke-opponent-s-skull-mma-fight>; Ariel Zilber, *It’s not*

completely absent when biological men compete against biological women.

Biological differences due to sex are encoded permanently during the earliest stages of the human development process. These advantages are clearly demonstrated by childhood assessments and, of course, validated by the differences between male and female records at every level of high school, collegiate, Olympic and professional sport. *See Ashe Schow, Even The New York Times Admits Biological Men Have a Huge Advantage Over Women In Sports, DAILY WIRE (May 31, 2022)*¹⁰ (“Beginning in the womb, men are bathed in testosterone and puberty accelerates that. Men on average have broader shoulders, bigger hands and longer torsos, and greater lung and heart capacity. Muscles are denser[.] . . . [R]ecords for elite adult male swimmers are on average 10

progress’: Social media erupts in outrage after transgender MMA fighter who transitioned after serving in US Army Special Forces defeats French woman, DAILY MAIL (Sept. 13, 2021), <https://www.dailymail.co.uk/news/article-9983177/Outrage-transgender-MMA-fighter-defeats-French-woman.html>; Richard Moorhead, Brutal ‘Transgender’ Hockey Hit Leaves Woman with Concussion, Muscle Strains, THE WESTERN JOURNAL (Dec. 15, 2022), <https://www.westernjournal.com/brutal-transgender-hockey-hit-leaves-woman-concussion-muscle-strains/>.

¹⁰ <https://www.dailywire.com/news/even-the-new-york-times-admits-biological-men-have-a-huge-advantage-over-women-in-sports>

percent to 12 percent faster than the records of elite female swimmers, an advantage that has held for decades.”) (internal quotation and citation omitted). A male athlete, regardless of gender identity or hormone treatments, retains biological and genetic advantages conferred by sex. In fact, “testosterone reduction or suppression does not negate all the physiological advantages of having developed testosterone driven strength, stamina and physique.” Mary Margaret Olohan, *Biologically male athletes have unfair advantage over women, major review finds*, ALPHA NEWS (Oct. 2, 2021)¹¹ (internal quotation and citation omitted). Sex remains the most important factor to creating fair and safe competitions, as well as sports opportunities, for female athletes.

One of the aims of Title IX was to protect the integrity of sports for women—which is undermined if a competition designed to determine the best female athlete permits biological males who merely self-identify as female to participate. A sport that allows unfair results ceases to meaningfully be a sport at all. And in *amicus*’s experience, undermining the integrity of a competition, in turn, undermines the sense of

¹¹ <https://alphanews.org/biologically-male-athletes-have-unfair-advantage-over-women-major-review-finds/>

community and camaraderie between female competitors; leads to chaos and undermines the joy female athletes derive from competitive sports; has a negative impact on women's self-esteem and confidence; is unsafe; and decreases the likelihood or opportunities for women's athletic scholarships, job opportunities, and future earnings. Interpreting "sex" to encompass the vacillating, subjective idea of gender identity will permanently sideline biological women, and prevent them from fully achieving the fruits of their labor that Title IX attempted to protect.

II. Retroactively correcting the record of an unfair competition is a typical and usual practice.

Retroactive corrections occur in virtually all major sports despite the panel's statement that "Plaintiffs have not shown there is a proper legal framework for invalidating or altering records[.]" *Soule*, 57 F.4th at 51. Indeed, this practice is far from uncommon. Retroactively correcting records occurs for a whole host of reasons, including awarding biological females their proper title after competing against biological males that identify as women.

Just in the Olympics, 22 gold medals, 23 silver medals, and 14 bronze medals have been stripped from Olympic athletes for doping, as of 2020. *Number of Olympic medals stripped in athletics as of 2020, by*

type, STATISTICA (Feb. 9, 2022)¹². Cyclist Floyd Landis was stripped of his 2006 Tour de France title for doping, and the second-place finisher, Oscar Pereiro, was retroactively declared the winner.¹³ After testing positive for performance-enhancing drugs, one of the most accomplished female athletes ever, Marion Jones, was stripped of five medals from the 2000 Sydney Olympics, and only “‘clean’ athletes [would] be moved up in the medals.”¹⁴

Such corrections to historical records are done in other contexts as well. Dancer’s Image appeared to have won the 1968 Kentucky Derby but, after a lab report revealed phenylbutazone in his system, the title was revoked and officials declared Forward Pass the ultimate winner of the race.¹⁵ Weeks after a Bronx, New York team finished third at the

¹² <https://www.statista.com/statistics/1288758/stripped-olympic-athletics-medals/>

¹³ *Landis stripped of Tour title; appeal uncertain*, VELONEWS, <https://www.velonews.com/events/tour-de-france/landis-stripped-of-tour-title-appeal-uncertain/> (last visited Mar. 29, 2023).

¹⁴ *Marion Jones Stripped Of Records, Medals*, CBS NEWS (Nov. 23, 2007), <https://www.cbsnews.com/news/marion-jones-stripped-of-records-medals/>.

¹⁵ *Kentucky Derby 1968: 1st winner disqualification in history*, 6ABC (May 4, 2019), <https://6abc.com/kentucky-derby-1968-disqualification-churchill-downs/3432683/#:~:text=Dancer's%20Image's%20handlers%20were%20certain,ultimate%20winner%20of%20the%20race.>

Little League World Series, it was discovered that one of its players, Danny Almonte, was actually 14 years old, not 12.¹⁶ As such, the record was corrected to reflect that the Willemstad, Curacao team finished in third place. *Id.* After Rosie Ruiz appeared to have won the 1980 Boston Marathon, it was later discovered she had run only approximately *one mile* of the 26.2-mile course.¹⁷ Her title was therefore vacated, and Jacqueline Gareau was named the victor. *Id.*

To the point raised by the panel opinion, biological men who compete and identify as women have also been stripped of their titles. See Kristine Solomon, *Transgender powerlifting champion stripped of women's division titles for being 'actually a male' during competitions*, YAHOO!LIFE (May 14, 2019)¹⁸. (“A transgender powerlifter who won multiple record-breaking world championships in the women’s division

¹⁶ *Almonte, Bronx team records wiped away*, ESPN, <https://www.espn.com/moresports/llws01/s/2001/0831/1246234.html> (last visited Mar. 29, 2023).

¹⁷ Scott Leitch, *Jacqueline Gareau: The Boston Marathon, the Rosie Ruiz scandal and a lifetime of running*, CANADIAN RUNNING (Apr. 29, 2015), <https://runningmagazine.ca/sections/jacqueline-gareau-the-boston-marathon-rosie-ruiz-and-a-lifetime-of-running/>.

¹⁸ <https://www.yahoo.com/lifestyle/transgender-powerlifting-champion-stripped-womens-division-titles-actually-male-competitions-120833027.html>

while transitioning from male to female has been stripped of her titles after sports authorities ruled she was biologically male while competing.”). USA Cycling recently stripped “a male-born cyclist of a silver medal won in a women’s race last week at the national championships.” Valerie Richardson, *Transgender cyclist blasts USA Cycling for revoking silver medal*, THE WASHINGTON TIMES (Aug. 1, 2022)¹⁹.

Amici, such as 5x Olympic coach Dennis Pursley, believe if the records do not reflect “reality and accurate history[,]” “it could have a lifelong impact on morale and even post-athletic opportunities. . . . When the recognition and honors are unfairly denied, so are the rewards.” Bronwyn Sims, a youth gymnastics coach, believes that “[w]omen do not give up their lives for sports to not have their achievements recorded accurately[.]” Accordingly, there exists a “proper legal framework for invalidating or altering records[.]” *Soule*, 57 F.4th at 51. If Olympic athletes—performing on the world’s highest stage—can be stripped of

¹⁹ <https://www.washingtontimes.com/news/2022/aug/1/usa-cycling-accused-transphobia-stripping-trans-cy/>

their medals, rightfully returning medals to high school students should be an eminently reasonable remedy.

CONCLUSION

Title IX was passed in 1972 with the understanding that “sex” is based on biology. Any interpretation of the statute that views sex as subjective does great violence to the statute—completely rendering much of the text that Congress wrote in Title IX indecipherable or nonsensical.

Title IX is a success story. It has allowed for immense achievement for women in sports—beyond the locker room and into the boardroom. But by forcing women to compete against men, and relegating women back to 1971, these benefits are eviscerated. Competition cannot be said to truly be competition when the deck is stacked. The only way to right the wrongs of violating Title IX, and allowing biological men to decimate women’s sports in Connecticut, is to remove men from women’s sports and retroactively and rightly honor women’s achievements amongst other biological women.

It is for these reasons this Court should reverse its prior panel decision.

Respectfully submitted this 30th day of March, 2023.

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March 30, 2023

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**Motion for admission pro hac vice filed*

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing *Brief for Amici Curiae* complies with the type-volume limit of Local Rule 29.1(c) and Local Rule 32.1(a)(4)(A) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 2,937 words.

This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point font.

DATED this the 30th day of March 2023.

/s/ Kaitlyn D. Schiraldi

Kaitlyn D. Schiraldi

MOUNTAIN STATES LEGAL FOUNDATION

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the Court's appellate CM/ECF system.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished through the appellate CM/ECF system.

DATED this the 30th day of March 2023.

/s/ Kaitlyn D. Schiraldi

Kaitlyn D. Schiraldi

MOUNTAIN STATES LEGAL FOUNDATION

ADDENDUM
Athletic Officials and Coaches of Female Athletes

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8x NCAA Champion in Track and Cross-Country

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