21-1365

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SELINA SOULE, a minor, by Bianca Stanescu, her mother, *et al.*,
Appellants,
v.
Connecticut Association of Schools, Inc. d/b/a Connecticut Interscholastic Athletic Conference, *et al.*,
Appellees.

On Appeal from the United States District Court
for the District of Connecticut Civil Case No. 3:20-cv-00201
(Hon. Robert N. Chatigny)

EN BANC BRIEF *AMICUS CURIAE* OF 40 BUSINESS EXECUTIVES IN SUPPORT OF APPELLANTS

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Corporate Disclosure Statement

Pursuant to Fed. R. App. P. 26.1, this brief represents the interests of the named individuals, and does not necessarily represent the interests of their past or present employers, which are named for identification and to show relevant experience. *Amici*, as individuals, do not have parent companies, subsidiaries, or affiliates, and the *amici* do not issue shares to the public.

Table of Contents

TABLE OF AUTHORITIES

Cases

Other Authorities

Regulations

INTERESTS OF THE *AMICI CURIAE*[1]

The *amici* are 40 current or retired business executives, listed at Addendum A. They have significant experience in American business leadership and hiring practices. As executives, they represent a wide range of experience and industries. They are each familiar with the hiring practices of their employers and their industries, and with the skills and acumen necessary to succeed in competitive business.

These *amici* are also familiar with the role that records of athletic participation and accomplishment play in hiring decisions. Records of athletic participation and accomplishment predict labor market success. Achievement under a fair Title IX standard is a remarkably strong indicator of the skills necessary to lead teams. Therefore, your *amici* have an interest in making sure that athletic records of men and women continue to provide relevant hiring information, and in making sure that the records are set and retained using the

[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), no party's counsel authored this brief in whole or in part; no party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person other than the *amici* and their counsel contributed money that was intended to fund preparing or submitting the brief. Pursuant to Fed. R. App. P. 29(a)(3), these parties were granted leave to file as *amici* by order of the Court on August 31, 2022.

same level of fairness for men and women. Your *amici* believe the position of the female athletes secures this fundamental fairness.

The *amici* appear here as individuals. While present or past employers are noted to show the *amici*'s relevant experience, the statements here are not made on behalf of persons or businesses other than the *amici*.

Summary of Argument

1. Athletic participation is highly correlated with labor market success and gender equality.
2. Records of athletic accomplishment are also correlated with labor market success.
3. Standing is conferred by evidence of a predictable effect, created by government action, on the decisions of third-parties in a way that injures plaintiffs; it is not defeated by hypothesizing a third-party with different reasoning. Appellants have shown a predictable effect and have Article III standing.
4. Appellants' position ensures that men and women's sports are equally subject to social concerns about transgender athlete participation.

Argument

I. School athletic *particpation* is highly corelated with success in the labor market.

Academic study after academic study confirms what your *amici* know through experience: participation in high school athletics is correlated with career success. A 2015 study showed that hiring managers associate participation in athletics with higher leadership, self-confidence and self-respect compared to students that participate in non-athletic extracurricular activities. *See* Kevin Kniffin, Brian Wansink, & Mitsuru Shimizu, *Sports at Work: Anticipated and Persistent Correlates of Participation in High School Athletics*, J. Leadership & Organizational Stud., May 2015 at 217–230 (2015). The same study also used biodata to show that male varsity athletes continued to have higher-status careers *sixty years* after high school. *Id.* Varsity athletes also showed more pro-social behaviors, like frequently volunteering their time. *Id*.

In 2000, three scholars found evidence that athletic participation directly increases wages and educational attainment. *See* John M. Barron, Bradley T. Ewing & Glen R. Waddell, *The Effects of High School Athletic*

Participation on Education and Labor Market Outcomes, 82 Rev. Econ. & Stat., at 409-421.

In 1998, Bradley T. Ewing, now a professor at Texas Tech University, published a seminal analysis showing former high school athletes are more likely to be in jobs associated with better labor market outcomes than non-athletes. Bradley T. Ewing, *Athletes and Work*, Econ. Letters, Apr. 1998, at 113.

In another study by Professor Ewing, in 2007, high school athletes were found to fare better in terms of compensation structure (*i.e.*, wages and fringe benefits) than their non-athlete counterparts. *See* Bradley T. Ewing, *The Labor Market Effects of High School Athletic Participation: Evidence from Wage and Fringe Benefit Differentials*, J. Sports Econ., Jun. 2007, at 255–265.

Title IX plays an important part in ensuring women receive these benefits. Betsey Stevenson's groundbreaking 2010 analysis of the impact of Title IX is widely cited by scholars. Professor Stevenson currently teaches at the University of Michigan, and she was the chief economist of the U.S. Department of Labor from 2010 to 2011. *See* https://fordschool.umich.edu/faculty/betsey-stevenson, last accessed July 7, 2021). The study "reveal[ed] that a 10-percentage point rise in state-level

female sports participation generates a 1 percentage point increase in female college attendance and a 1 to 2 percentage point rise in female labor force participation. Furthermore, greater opportunities to play sports leads to greater female participation in previously male-dominated occupations, particularly in high-skill occupations." Betsey Stevenson, *Beyond the Classroom: Using Title IX to Measure the Return to High School Sports*, 92 Rev. Econ. & Stat., at 284-301 (2010) (full text available at https://www.nber.org/papers/w15728, last accessed July 7, 2021).

II. Records of athletic *accomplishment* are also correlated with labor market success.

Your *amici* also observe that records of athletic accomplishment are predictably important to hiring decisions. In their experience, participation in high school athletics involves certain skills that predict career success. There is an intuitive, corresponding increase in those skills as athletes compete and succeed at higher levels. Successful records at elite levels in high school lead to higher levels of competition in college — and can lead to professional or Olympic competition. These higher levels of competition are good markers of business leadership and executive talent. Especially for elite athletes like

Appellants, correct records of their accomplishments will predictably open opportunities for higher level jobs.

Amici's personal experiences are supported by academic and professional studies. It has been easier to show that athletic participation is correlated with better labor market outcomes using statistical surveys. But a smaller number of studies indicate that records of *higher achievement* or participation at *higher levels* within athletics also affects labor market outcomes. So, not only does it matter that a student participates in athletics, the student athlete receives some market benefits from showing athletic wins at higher levels.

For example, a 2020 study conducted by Gallup for the NCAA showed that collegiate athletes fared better on several important outcomes after college. *See* Gallup, Inc., A Study of NCAA Student-Athletes: Undergraduate Experiences and Post-College Outcomes (2020), at 3 (available at https://www.gallup.com/file/education/312941/NCAA%20Student-Athlete%20Outcomes.pdf, last accessed July 7, 2021). College athletes were more likely to earn advanced degrees than non-athlete students. And college athletes were slightly more likely to have a good job waiting for them after graduation. *Id.*

A 2012 study by Daniel Bowen and Jay Greene explored the relationship between academic success and a high school's success in sports. Daniel Bowen & Jay Greene, *Does Athletic Success Come at the Expense of Academic Success?,* J. Res. in Educ., Fall 2012, at 2-23 (full text available at https://eric.ed.gov/?id=EJ1098405) (last accessed July 7, 2021). High Schools with more wins are correlated positively with academic achievement for students in the school, even after controlling for demographics. So, far from detracting students from academics, students in a school focused on athletic achievement can also expect higher performance academically.

Thus, elite success opens doors to elite jobs. These effects are particularly strong for women athletes, who can use the fair playing field of school athletics to show competitive success. From 2013 to 2016, corporate services firm Ernst & Young worked with male and female corporate leaders to study the effects of participation and success on the careers of women athletes. *See* Ernst & Young, *How can winning on the playing field prepare you for success in the boardroom?* March 2020 (available at https://www.ey.com/en_us/women-fast-forward/how-can-winning-on-the-playing-field-prepare-you-for-success-in-the-boardroom, last accessed July 7, 2021). They report an "undeniable correlation between athletic and business success." In their survey, 94% of

women executives had some background in sports, and over half had participated at university levels. 80% of women Fortune 500 executives had played competitive sports. 74% of all executives believed playing sports helped a woman progress faster. *Id.* The records of achievement are predictably, undeniably linked to corporate success.

III. The predictable effect of the records on the athletes' academic and labor market value strongly supports article III standing.

As shown above, there is overwhelming consensus that records of athletic acheivement predict success in academics and the labor market. Depriving Plaintiffs of correct records of athletic achievement will predictly harm them.

Your *amici* believe these predictable harms confer standing. To have standing, a plaintiff must "present an injury that is concrete, particularized, and actual or imminent; fairly traceable to the defendant's challenged behavior; and likely to be redressed by a favorable ruling." *Davis* v. *Federal Election Comm'n*, 554 U.S. 724, 733 (2008).

The Supreme Court has recently addressed the standard for "concrete" and "immanent" injuries, in *Department of Commerce* v. *New York*, 139 S.Ct.

2551, 2565 (2019). The case concerned the government's decision to add a question about citizenship to the US Census. States sued. They showed that, more likely than not, adding a question about citizenship would depress responses, and even small reductions would cause harm. A mere 2% reduction in responses would cause some of the states to lose some federal funds.

The Ssates established Article III standing by showing that predictible changes in responses rates would cause a loss of funds. According to the Court, "that is a sufficiently concrete and imminent injury to satisfy Article III," *Id*. at 2565.

The Supreme Court rejected the idea that this causation was "speculation." An injury-in-fact is not speculative where the Plaintiff shows a "predictable effect of the Government Action on third parties." *Id*. As demonstrated above, the athletes in this case have alleged that a government action has produced incorrect records, and that those incorrect records will have a predictible negative effect on these athlete's academic and labor market acheivements. They, too, have met their burden.

The Supreme Court carefully distinghised between "speculative" outcomes and arguments about the outcome's rationality. In the census case, the government argued that laws prohibited them from taking the feared

actions, and that it would be irrational to speculate about the government acting unlawfully. But the Supreme Court said plaintiffs can be injured when government predictbly causes others to react with imperfect logic. The NAACP had standing to challenge Alabama's order to disclose its membership rolls, precisely because it would result in predictible, if irrational, animus by some members of the public. *NAACP* v. *Alabama*, 357 U.S. 449, 463 (1958). And bookstores and libraries had standing to challenge a government list designating them "purveyors of foreign political propaganda," even though the government said any public overration was the subject of speculation. *Block* v. *Meese*, 793 F.2d 1303, 1308 (D.C. Cir. 1986)(Scalia, J.), *cited approvingly* in *Dep't of Commerce* v. *New York*, 139 S.Ct. 2551, 2565 (2019). Thus, "concrete" and "immanent" injuries are shown by predictible effects, and cannot be disproven by attacking the *reasonableness* of the third-party's still-predictible response.

Here, the government's actions will change the records of athletes; Appellants Mitchell, Soule, Nicoletti and Smith. Mitchell, for example, would have won four more first-place finishes in elite events. *Soule,* et al., v. *Connecticut Ass'n of Sch., Inc.*, No. 3:20-CV-00201 (RNC), 2021 WL 1617206, at *7 (D. Conn. Apr. 25, 2021). But then the lower court concluded that the

changes in the records "might well have no bearing on [] employment prospects … [and] requires guesswork" about independent decision-makers. *Id.*

"Might well have no bearing" is an example of attacking the reasonableness of the public's response, not contrary evidence about the public's predictable action. Hypothetically, the lower court suggests, a future employer might find that someone else "won" a race before the records are corrected, and this might neutralize the effect of the remedy. *Id.* But this is the kind of argument rejected by the Supreme Court in the census case. An injury is not speculative just because a court can think of another reasonable response by an employer. Rather, the question is the predictible public response to the records. A faster man can always be found to put in a women's race, if the employer is looking for the fastest human. But studies do not show that employers are merely picking faster humans. The predictible effect is that employers choose women with proven records of success in women's athletics.

The lower court also tried to distinguish between erroneous sports records and erroneous discipline records. The court suggested "a student's disciplinary record is always relevant to college recruiters and prospective

employers," and questioned the relevance of athletic records. *Soule*, 221 WL 16117206 at *7. But the mere possibility of an employer who disregards athletics records does not render athletic records less important than disciplinary records. In fact, there is a strong possibility that some employer will ignore disciplinary records, too; the "Ban the Box" movement has led the Department of Education and others to encourage schools and employers to ignore many student disciplinary records because the records allegedly reflect racial or other disparities. *See* U.S. Dep't of Ed.*, Beyond the Box: Increasing Access to Higher Education for Justice-Involved Individuals* (2016) (available at *https://www2.ed.gov/documents/beyond-the-box/guidance.pdf*, last accessed March 30, 2021). So, standing in disciplinary records cases does not depend on 100% of employers caring about disciplinary records in the same way. Likewise, standing in this case does not disappear by imagining a contrarian employer with a different measure of succeess. In both situations, standing is created because of the predictible response of employers to the records. The interest of the student in correcting a record is not guesswork, because the response by the employers is predictible.

Perhaps a closer, more applicable analogy is the long line of cases where students seek to challenge decisions about athletic eligiblity decisions.

Students have been able to challenge those decisions, especially where the student alleges more than the mere desire to participate, but can point to future benefits. *See Boyd* v. *Bd. of Directors of McGehee Sch. Dist. No. 17*, 612 F. Supp. 86, 93 (E.D. Ark. 1985); *Hall* v. *Univ. of Minn.*, 530 F. Supp. 104 (D. Minn. 1982) (applications for admission into a degree program had been denied, and whose athletic eligibility had been lost as a result, damaging prospects of basketball career). *See also Nat'l Collegiate Athletic Ass'n* v. *Lasege*, 53 S.W.3d 77, 83 (Ky. 2001)(vacating injunction but determining athletes should have access to courts to challenge eligibility decisions). Most of these cases arise under arbitrary and capricious review, and so are difficult to win, but courts mostly agree eligibility decisions are amenable to litigation.

Here, Appellants have standing to ask for corrected records that show their achievements when the proper criteria are used.

IV. Appellants' position ensures that men and women's sports are treated equally with respect to participation and accomplishment.

Title IX is not a law to ensure that women can *participate* in athletics, as beneficial as participation in athletics can be. Title IX prohibits discrimination on the basis of sex in school activities, and its enabling regulations require

equal athletic opportunity for fair *competition* and *public recognition*. *See* 34 C.F.R. § 106.41(c)(1), (10).

A pair of seemingly contradictory aphorisms describes a long, philosophical debate about the meaning of athletic competition. Pierre de Coubertin, founder of the modern Olympic Games, once said "the most important thing in the Olympic Games is not to win but to take part, just as the most important thing in life is not the triumph but the struggle." On the other hand, Vince Lombardi is popularly credited with saying, "Winning isn't everything. Men, it's the only thing." But these maxims are not contradictory; they capture two different ideas. There is something universal about the benefits of striving and personal improvement that comes from 'taking part.' But it is also true that winning and success inspires humanity, too, and that benefits careers. *See Chang* v. *Univ. of Rhode Island*, 606 F. Supp. 1161, 1256 (D.R.I. 1985)("…there is an objective evaluation scheme in the coaching domain: the won-lost record.") True, there is something universally pleasant about watching (or playing) basketball or football, but there is another feeling altogether to win an NCAA Championship or the Super Bowl (where the winner takes home the Lombardi Trophy). And in no small irony, even

when trying to say winning isn't everything, Coubertin resorted to giving top honors to "the struggle."

This Court does not have to decide whether participation or victory is the higher aspiration; it need not pick between Coubertin and Lombardi. But Appellants correctly point out that Title IX requires both participation and competitive recognition. "Nondiscrimination" in this area is not satisfied by letting everyone participate. And nondiscrimination is not satisfied merely by teams labeled "men's" and "women's." Title IX is not satisfied when women are denied fair competition, recognition, and public acclaim. The athletic offerings to each sex must allow that sex an opportunity to participate in competitions that accommodate their abilities, in a way that lets them earn victories and be recognized for their achievements. *See* 34 C.F.R. § 106.41(c)(1), (10).

Your *amici* note that *only women's competitions* have been disadvantaged by CIAC's participation policy. Cisgender males can benefit from participation and pursue the glories of success in a men's activity. But CIAC suggests females should be satisfied with the joys of participation and personal betterment, by failing to offer competitions that accommodate the abilities of women. This differential treatment on the basis of sex violates Title IX.

Your *amici* are concerned that the clear signals sent by records of athletic participation and success will be less reliable in the future. Only Appellants' position ensures fair treatment under Title IX, and continues the clear signals that have allowed high-achieving female athletes to have successful careers.

Conclusion

Participation in sports, and the records related to participation, predict career success. The correlation between athletic records and career success is not "guesswork." There are clear, rigorous studies detailing the labor market benefits of athletic records to athletes like Appellants. Only the Appellants' position will continue to ensure this fairness to female athletes. Your *amici* respectfully urge the Court to preserve the accuracy of these records, which are important to career success for women.

Respectfully submitted,

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Addendum A – List of Individual *Amici*

List of individual *amici,* including relevant experience and company:[2]

1. Gary Archer, President, Let's Play Sports, Texas
2. Ken Auer, Founder & Owner of RoleModel Software, Inc. and Owner & CEO of Rock Solid Warrior LLC, North Carolina
3. Shannon Badger, Managing Partner, Badger CPA
4. Scott Barr, Steward of Southwest Exteriors in Texas
5. James Benton, Enterprise Service Delivery Manager, California
6. Robert Bortins, CEO, Classical Conversations
7. Lewis Brazelton, President/Founder, Brazelton Auto, Texas
8. Scotty Carroll, President/Owner, Trammel Creek Management, Inc., Tennessee
9. Stephen Casey, CEO, Datapoint Media Group
10. Jeff Davidson, co-CEO, Camp Gladiator, Texas
11. Ally Davidson, co-CEO, Camp Gladiator, Texas

[2] Institutions of individual *amici* are listed for identification purposes only. The opinions expressed are those of the individual *amici*, and not necessarily of their affiliated institutions.

12. Peter Demos, President and Attorney with Demos' Restaurants in Tennessee

13. Lisa A Fullerton – President/CEO A Novel Idea, LLC, Texas

14. Anthony, Hahn, President/CEO, Conestoga Wood Specialties Corporation, Pennsylvania

15. Jay Harris, CEO, Harris Beverages, LLC, North Carolina

16. Al Hartman, President & CEO, Hartman Income REIT Management, Inc., Texas

17. Douglas Hunter, CEO, Doug Hunter, LLC, South Carolina

18. Joseph Hurt, President of PBP Fabrication, Inc., Odessa, TX

19. Simon Lee. CEO. EIS Office Solutions, Inc., TX

20. John Lochner, Partner, Legacy Group of America Foundation, Wisconsin

21. Salvatore LoDico, CEO, Trinity HR Consulting, Inc, New Jersey

22. Michael R. Manzie, President, Code 3 Protective Services, California

23. Joelle Marquis, Managing Partner, Legacy In Action Companies, Residential & Commercial Construction, Florida

24. Ken Marquis, Partner, Legacy In Action Companies, Residential & Commercial Construction, Florida

25. Nathan Meyer President/Owner Glasco & Co. Landscaping, Inc. Texas

26. Thomas Okarma, Tom Okarma Consulting, Arizona

27. Joe A. Patterson, Jr., Vice President, Crockett National Bank, Texas

28. John T. Rogers, President, Performance Pulsation Control, Inc., Texas

29. James Ruder, President/Owner, L&R Pallet Service Inc., Denver, Colorado

30. Sam Rust, Manager, Life Bridge Capital, Colorado

31. Nicole Sdao, Founder/CEO - LetsTHRIVE360, Wisconsin

32. Brian Searcy, Founder - President, Paratus Group, Texas

33. Dennis Sledge, Owner, Specified Industrial Products, Texas

34. Dan Stege, Founder / CEO, Distinct Defense, LLC

35. Suzanne Tacconelly, Founder & CEO of Blessings in the Breeze, Texas

36. Samuel P Thevanayagam, CEO, Parts Life Inc., New Jersey

37. Jeff Thomas, Founder/CEO, Archetype Wealth Partners, Texas

38. Jay Toslma, Managing Partner, ELO CPAs & Advisors, South Dakota

39. Debra Van Essen, owner of Van Essen Insurance Agency, Manteca, California

40. Richard Williams, CEO, Lineage

Addendum B - Certificates

Certificate of Compliance with Rule 32(G)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7) because this brief contains 4,225 words, even without excluding the parts of the motion exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spac,ed, roman typeface with serifs (Equity) using Microsoft Word, set in 14 points.

Date: March 30, 2023
s/Jonathan R. Whitehead
Attorney for *Amici*

Certificate of Service

I hereby certify that on March 30, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

Date: March 30, 2023
s/Jonathan R. Whitehead
Attorney for *Amici*