

Nos. 24-38, 24-43

In the Supreme Court of the United States

BRADY LITTLE GOVERNOR OF IDAHO, ET AL.,
Petitioners,

v.

LINDSAY HECOX, ET AL.,
Respondents.

WEST VIRGINIA, ET AL.,
Petitioners,

v.

B.P.J., BY HER NEXT FRIEND AND MOTHER, HEATHER
JACKSON,
Respondent.

On Petitions for Writs of Certiorari to the United
States Court of Appeals for the Ninth Circuit and the
United States Court of Appeals for the Fourth Circuit

**BRIEF OF BUSINESS LEADERS AS *AMICI*
CURIAE IN SUPPORT OF PETITIONERS**

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34 C.F.R. § 106.41(c)(1), (10) 8, 10

INTEREST OF *AMICI CURIAE*¹

The *amici* are 20 current or retired business executives and leaders, 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 same level of fairness for men and women. Your *amici* believe the position of the petitioners in *Little, et al., v. Hecox, et*

¹ Pursuant to Rule 37.6, counsel for *amici curiae* certifies that no counsel for a party authored the brief in whole or in part. No person other than the *amici curiae* or their counsel made a monetary contribution to fund the preparation or submission of this brief. Pursuant to Rule 37.2, all parties of record below received notice of intention to file this brief more than ten days in advance.

al., No. 24-38, and *West Virginia, et al., v. B.P.J.*, No. 24-43, secures this fundamental fairness for female athletes. Thus, they respectfully encourage the Court to grant the petitions for writ of certiorari to the Ninth Circuit and Fourth Circuit, respectively.

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. Petitioners' position ensures that men and women's sports are equally subject to social concerns about transgender athlete participation.

ARGUMENT

I. SCHOOL ATHLETIC PARTICIPATION IS HIGHLY CORRELATED 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 managers who hire employees 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 often 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 (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’s protection of equal opportunity plays an important part in ensuring women receive these benefits. Betsey Stevenson’s groundbreaking 2010 analysis of the effect 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 2011.² 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

² See <https://fordschool.umich.edu/faculty/betsey-stevenson>, last accessed Aug. 9, 2024.

Stevenson, *Beyond the Classroom: Using Title IX to Measure the Return to High School Sports*, 92 Rev. Econ. & Stat., at 284-301 (2010).³

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 the experience of these executives, 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, 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

³ Available at <https://www.nber.org/papers/w15728>, last accessed Aug. 9, 2024.

better labor market outcomes using statistical surveys. But a smaller number of studies reveal that *records* of higher achievement or participation at higher levels within athletics also affects labor market outcomes.⁴ So not only does it matter that a student participates in athletics, the student athlete receives some market benefits from a record of 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 3.⁵ 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

⁴ "Records" in this brief refers to the publicly available records of wins, losses, rankings, and other achievements and honors given to athletes, reflecting their success and dedication.

⁵ Available at <https://www.gallup.com/file/education/312941/NCAA%20Student-Athlete%20Outcomes.pdf>, last accessed Aug. 9, 2024.

2012, at 2-23.⁶ 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 2020.⁷ 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.

⁶ Available at <https://eric.ed.gov/?id=EJ1098405>, last accessed Aug. 9, 2024.

⁷ Available at https://www.ey.com/en_bg/women-fast-forward/how-can-winning-on-the-playing-field-prepare-you-for-success-in-the-boardroom, last accessed Aug. 9, 2024.

III. PETITIONERS' 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; 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, an Olympic gold medal, 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," not 'mere' participation.

This Court does not have to decide whether participation or victory is the higher aspiration; it need not pick between Coubertin and Lombardi. But it should enforce the text of Title IX and its regulations, which require women to have opportunities for both participation and victory, as compared to men.

Title IX's focus on bona fide equal opportunity includes athletic participation *and* competitive recognition. See West Virginia's Petition in 24-43, at 6 ("Women have been pushed out of podium spots, championship bids, and other chances at fair competition."); accord, *Hecox* Petition in 24-38 at 3 ("Countless female student-athletes – including Olympic Swimmers at the NCAA championships, high school sprinters in Connecticut, and Ivy League swimmers – have been shoved aside by male athletes benefiting from obvious physiological advantages.")

So "nondiscrimination" in this area is not satisfied merely by letting everyone participate. And nondiscrimination is not satisfied merely by teams labeled "men's" and "women's." Having identified a legitimate government interest in sex-differentiated athletics, Title IX is not satisfied when women are denied fair competition, recognition, and public acclaim. Once a

government decides to offer sex-differentiated athletics, the offerings to each sex must allow that sex an opportunity to participate in competitions that accommodate their “interests and abilities,” in a way that lets them earn victories and be publicly 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 letting men compete in them. The male sex would (on average) benefit from participation *and* the rewards of success in a men’s activity open to women, in a way that women could not share if the women’s activity is open to men. The male anatomical, hormonal, and neurological structures create a difference that will, on average, give the advantage to men unless the sports are sex-differentiated. This was the very basis for Title IX’s allowance of sex-differentiated athletics. Failing to offer competitions that accommodate the interests and abilities of the female sex is a differential treatment on the basis of sex. It violates Title IX.

Your *amici* are concerned that the clear signals sent by records of athletic participation and success will be less reliable. Only Petitioners’ positions ensure fair treatment under Title IX, and send 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. Only the position of the petitioners in *Little, et al., v. Hecox, et al.*, No. 24-38, and *West Virginia, et al., v. B.P.J.*, No. 24-43, secures this fundamental fairness for female athletes. Thus, they respectfully encourage the Court to grant the petitions for writ of certiorari to the Ninth Circuit and Fourth Circuit, respectively.

Respectfully submitted,

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August 12, 2024

APPENDIX

Appx. 1

TABLE OF APPENDICES

Appendix A – List of Individual *Amici**Appx 2*

Appendix A – List of Individual *Amici*

List of individual *Amici Curiae*, including relevant experience and company:¹

1. **Gary Archer**

President, CEO
Let's Play Sports, Inc.

2. **Ken Auer**

CEO, Marketing Director and
Competition Program Manager
Rock Solid Warrior

3. **Reese Boyd**

Attorney
Davis Boyd Law Firm

4. **David Brenneman**

Executive Director
Stuarts Draft Retirement Community

5. **Brad DeSandro**

Patent Attorney
DeSandro Law Group

¹ Institutions of individual *Amici Curiae* are listed for identification purposes only. The opinions expressed are those of the individual *amici*, and not necessarily of their affiliated institutions.

Appx. 3

6. **Patrick Flaherty**

Attorney
Flaherty Gallardo Law

7. **Herb Grey**

Attorney
Grey Law

8. **Joe Hurt**

President, CEO
PBP Fabrication

9. **Steven Keist**

Attorney
KTO Law Firm

10. **David Llewellyn**

Civil Rights Attorney
Llewellyn Law Office

11. **Raymond Marcin**

Professor Emeritus
Catholic University of America

12. **Gheorghe Rosca**

Pastor
New Hope Christian Ministries

Appx. 4

13. Nicole Sdao

Founder and CEO
Altruize

14. Karen Sloat

Owner, Attorney
Law Office of Karen J Sloat, APC

15. Stephen Smith

Owner & Attorney
Steve Smith Law PLLC

16. John Stewart

Attorney at Law
Law Offices of John Stewart

17. Sam Thevanayagam

President CEO
Parts Life Inc.

18. Jessica Whittet

Interim Executive Director
My True ID

19. Jeff Wolfe

Senior Counsel
Schell Bray Law Firm

Appx. 5

20. Lynne Marie Kohm

Professor and John Brown McCarty
Professor of Family Law
Regent University School of Law