

No. 21-1365

IN THE
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., DBA CONNECTICUT
INTERSCHOLASTIC ATHLETIC CONFERENCE, BLOOMFIELD PUBLIC SCHOOLS BOARD
OF EDUCATION, CROMWELL PUBLIC SCHOOLS BOARD OF EDUCATION,
GLASTONBURY PUBLIC SCHOOLS BOARD OF EDUCATION, CANTON PUBLIC SCHOOLS
BOARD OF EDUCATION, DANBURY PUBLIC SCHOOLS BOARD OF EDUCATION,

Defendants-Appellees.

ANDRAYA YEARWOOD, THANIA EDWARDS, ON BEHALF OF HER DAUGHTER T.M.,
COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES,

Intervenor-Appellees.

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

**BRIEF FOR *AMICI CURIAE* NATIONAL WOMEN'S LAW CENTER AND
34 ADDITIONAL CIVIL RIGHTS AND OTHER ORGANIZATIONS IN
SUPPORT OF APPELLEES AND AFFIRMANCE**

October 14, 2021

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- Girls Inc.
- Human Rights Campaign
- LatinoJustice PRLDEF
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- Legal Voice
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- NARAL Pro-Choice Connecticut
- National Association of Social Workers (NASW)
- National Center for Youth Law
- National Crittenton
- National Organization for Women
- Oklahoma Call for Reproductive Justice
- Planned Parenthood of Southern New England
- Reproaction
- Shriver Center on Poverty Law
- Sikh Coalition
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- Women Lawyers Association of Los Angeles
- Women Lawyers On Guard Inc.
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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(a)(4)(A), the undersigned counsel certifies that none of the *amici curiae* are nongovernmental entities with a parent corporation or a publicly held corporation that owns 10% or more of its stock.

/s/ Jessica L. Ellsworth
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STATEMENT OF INTEREST¹

This brief is filed by *Amici* National Women’s Law Center and 34 additional civil rights and other organizations committed to gender justice including LGBTQ rights.

The National Women’s Law Center is a nonprofit legal organization dedicated to the advancement and protection of the legal rights of women and girls, and the right of all persons to be free from sex discrimination. Since its founding in 1972, the Center has focused on issues of key importance to women and their families, including education, reproductive rights and health, economic security, and workplace justice, with particular attention to the needs of low-income women and girls and those who face multiple and intersecting forms of discrimination. The Center has participated as counsel or *amicus curiae* in a range of cases before the Supreme Court, federal courts of appeals, federal district courts, and state courts to secure protections against sex discrimination. The Center has long worked for gender equity in athletics including the full and fair enforcement of Title IX, and seeks to ensure that all individuals, including LGBTQ individuals, enjoy the full

¹ This brief is filed with the consent of all parties. No counsel for any party authored this brief in whole or in part, and no party, party’s counsel, or person, aside from *amici curiae* and their counsel, made any monetary contribution intended to fund the preparation or submission of this brief. NWLC attorneys Shiwali Patel, Cassandra Mensah, Phoebe Wolfe, and Neena Chaudhry also contributed to the brief, along with Kaitlyn Golden, Ray Li, and Jennifer Hill from the law firm Hogan Lovells US LLP.

protection against sex discrimination as promised by our laws. Additional *amici* are listed following the front cover.

Amici have a shared interest in ensuring that protections against sex discrimination include protections against discrimination based on sexual orientation, gender identity, and sex characteristics (including intersex traits), and in protecting women and girls of color from discrimination on the basis of race and sex. The brief sets forth *amici*'s considered understanding that all women and girls should be allowed to participate in sports consistent with their gender identity. The Connecticut Interscholastic Athletic Conference's (CIAC) policy does just that. This valuable policy is critically important to allowing all women and girls to access the benefits afforded by playing sports. Contrary to Appellants' assertions, policies that protect the rights of transgender women and girl student athletes to participate in sports, like CIAC's policy, do not violate Title IX. Indeed, such inclusive policies are *required* under Title IX. While Appellants incorrectly portray CIAC's policy as harmful to cisgender women and girls, women's rights and gender justice organizations firmly recognize that gender equity in schools requires equal access to participation in athletics for women and girls who are transgender.²

² See, e.g., Nat'l Women's L. Ctr. et al., *Statement of Women's Rights and Gender Justice Organizations in Support of Full and Equal Access to Participation in Athletics for Transgender People* (Apr. 9, 2019), available at <https://nwlc.org/wp-content/uploads/2019/04/Womens-Groups-Sign-on-Letter-Trans-Sports-4.9.19.pdf>;

INTRODUCTION

Sex discrimination pervades the history of athletics and continues in various forms in sports today. As one way to help level the playing field, CIAC adopted policies to provide all student athletes with equal opportunities to participate in interscholastic athletics. This effort includes ensuring that transgender and intersex student-athletes have the same opportunities to participate in CIAC athletic programs consistent with their gender identity as cisgender and non-intersex athletes. CIAC correctly concluded that it would be fundamentally unjust and contrary to state and federal law to preclude a student from participating on a gender specific sports team that is consistent with the gender identity of that student. CIAC's policy provides access to opportunities for all women and girls—not just women and girls who are transgender and intersex, consistent with both the text and purpose of Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. § 1681 *et seq.*

Letter from Nat'l Women's L. Ctr. et al. to Senate Judiciary Comm., *Statement of Women's Rights and Gender Justice Organizations in Support of the Equality Act* (Mar. 16, 2021), available at <https://nwlc.org/resources/statement-of-womens-rights-and-gender-justice-organizations-in-support-of-the-equality-act-2/>; Nat'l Coal. for Women and Girls in Educ., *NCWGE Supports Transgender and Nonbinary Students' Full and Equal Participation in All Education Programs and Activities* (Feb. 12, 2021), available at <https://www.newge.org/activities.html>; Letter from Nat'l Women's L. Ctr. et al. to the Honorable Kristi L. Noem, Governor of S.D., *RE: Request to Veto HB 1217 Regarding Transgender Students in Sports* (Mar. 10, 2021), available at <https://nwlc.org/wp-content/uploads/2021/03/SD-HB-1217-sign-on-letter-3.10.21.pdf>.

CIAC's policy allows all women and girls to participate in sports and receive the benefits of such participation. Sports participation enhances women's and girls' physical health and emotional and psychological well-being, improves their educational prospects, and expands their social networks. Importantly, school sports teams provide young women with a valuable sense of community. These benefits are especially important for girls who are transgender and intersex—who are at heightened risk for feelings of isolation, discrimination, harassment, and low self-esteem—and they should not be excluded from these critical opportunities. CIAC's policy allows all women and girls to achieve these goals.

Appellants challenge CIAC's transgender-inclusive policy, alleging that it violates Title IX. The contrary is true. CIAC's policy does not violate Title IX by affording more students the opportunity to compete in athletics consistent with their gender identity; rather, doing so promotes the purpose of Title IX. Additionally, in light of the analysis set out by the Supreme Court's decision in *Bostock v. Clayton County, Georgia* and by other circuit court decisions, excluding transgender women and girls from participating in female sports, as advocated by Appellants, would itself violate Title IX.

Amici have strong concerns about the deleterious impact if CIAC's policy were enjoined. Imposing the ban sought here will cause harm to many women and girls, including those who are transgender as well as Black and brown women and

girls who are cisgender as they would be more intensely impacted, along with women and girls with intersex traits. Appellants wrongly suggest that Title IX requires discrimination against some women and girls in order to ensure equivalent athletic opportunities for other women and girls. *See* Appellants' Br. 12-13. This is not Title IX's mandate.

Appellants' position relies on fundamentally inaccurate and harmful stereotypes regarding athleticism and gender. As detailed herein, the promotion of these stereotypes particularly harms girls who are transgender or intersex, as well as Black and brown girls, who are likely to be additionally targeted because of their race. As a result, Black and brown girls are more often told outright that they are not, in fact, girls. Similar policing of gender has been used to scrutinize, demean, and exclude female athletes who do not conform to sex stereotypes regarding 'femininity,' including women who are transgender or intersex.

In the nearly fifty years since Congress passed Title IX, opportunities for women and girls to participate in athletics has grown in leaps and bounds. CIAC's policy builds on the momentum of these past five decades in order to continue providing equal opportunities for all women to participate in sports. In doing so, CIAC's policy amplifies the important goals of Title IX by echoing legal precedent, dispelling outdated stereotypes, and creating an equal playing field for all women.

The Court should affirm the District Court's dismissal.

ARGUMENT

I. CIAC'S TRANSGENDER-INCLUSIVE POLICY CONFORMS WITH THE REQUIREMENTS OF TITLE IX.

Appellants are incorrect to assert that CIAC's transgender-inclusive policy, which allows elementary and secondary student athletes to compete on sports teams consistent with their gender identity, violates Title IX. The opposite is true. Title IX *requires* that schools and other recipients of federal funds adopt policies that ensure students do not face discrimination on the basis of their sex, including their gender identity. In claiming that CIAC's inclusive athletics policies deprive Appellants of their civil rights under Title IX, Appellants ignore the fundamental purpose of that law: to prohibit sex discrimination and ensure equal opportunities for *all women and girls*, not just women and girls who are cisgender.

Since its enactment nearly fifty years ago, Title IX has dramatically advanced women's and girls' participation in school athletics. Title IX mandates that no person "shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). While Title IX permits separate teams for boys and girls,³ the Supreme Court has confirmed that discrimination based on a person's transgender status is a form of sex discrimination.

³ See 34 C.F.R. § 106.41(b).

Bostock v. Clayton County, 140 S. Ct. 1731, 1747 (2020). Title IX thus prohibits discrimination against transgender students, including prohibiting women and girls who are transgender from participating on women's sports teams.

A. CIAC's Policy Does Not Violate Title IX.

Appellants incorrectly assert that transgender-inclusive policies violate Title IX by depriving certain student athletes who are girls opportunities to participate and succeed in interscholastic athletics. *See, e.g.*, Appellants' Br. 30. That is incorrect. Although Title IX permits the creation of separate men's and women's sports teams, it does not require women and girls who are transgender to be effectively denied participation by excluding them from playing team sports with other women and girls. *See* 34 C.F.R. § 106.41(b).

CIAC acts as the governing body for high school athletics in the state of Connecticut. In this role, CIAC issues policies that promote equal opportunities for students to compete in CIAC athletic programs. One such policy allows students to participate on gender specific sports teams consistent with their gender identity. CIAC defers to the determination of the student and their local school regarding gender identification. Therefore, CIAC determines a student's eligibility for gender specific sports based on the student's gender identification in current school records

and their daily life in school. CIAC crafted the policy with equality of opportunity in mind, which includes complying with Title IX.

Under Title IX, sex discrimination exists where a school subjects someone to “separate or different rules of behavior, sanctions, or other treatment” on the basis of sex. 34 C.F.R. § 106.31(b)(4); *see Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173 (2005). In creating Title IX’s implementing regulations, the Department of Education concluded that sex segregation in athletics can be consistent with Title IX’s nondiscrimination mandate, and thus permitted sex-segregated athletics in limited circumstances. *See* 34 C.F.R. § 106.41(b) (permitting the creating of sex-segregated teams “where selection for such teams is based upon competitive skill or the activity involved is a contact sport”). This limited exception for the maintenance of separate sports teams does not mean that student athletics are more generally exempt from Title IX.

Appellants do not and cannot claim that women will generally be harmed if women and girls who are transgender are allowed to compete on women’s sports teams. *See infra*, at 6-27. Instead, Appellants focus only on the interests of a few cisgender women who object to athletics participation by their transgender female peers. Thus, challengers are left asking the court to read a right into Title IX that goes beyond equal opportunity, and that perpetuates, rather than mitigates,

discrimination. That interpretation is not supported by the text of the statute, regulation, or case law.

In fact, courts have repeatedly rejected any claims that the mere presence of transgender peers or transgender-inclusive policies like CIAC's violate Title IX or other discrimination laws. In *Doe by and through Doe v. Boyertown Area School District*, 897 F.3d 518, 535 (3d Cir. 2018), the Third Circuit addressed a school district's policy that allowed all students to use restrooms and locker rooms consistent with their gender identity. In a similar manner to its treatment of athletics, Title IX's implementing regulations allow for sex-segregated bathrooms and locker rooms. *See* 34 C.F.R. § 106.33. The Third Circuit determined that schools do not violate Title IX by instituting a policy that allows students to use boys' or girls' restrooms based on their gender identity. *See Boyertown*, 897 F.3d at 534-535. The Ninth Circuit followed *Boyertown* in *Parents for Privacy v. Barr*, 949 F.3d 1210, 1239-40 (9th Cir. 2020), and held that a high school's policy of allowing students to use bathrooms and locker rooms that aligned with their gender identity did not violate Title IX. CIAC's policy follows directly within the parameters of these precedents. The policy does not treat students differently on the basis of sex, including on the basis of being transgender. Instead, the policy allows students to participate in gender specific athletics in a manner consistent with their gender identity. In doing so, CIAC's policy affirms students' rights to participate in

interscholastic athletics, free from the burden of sex discrimination. No precedent in this Court supports the unfounded assertion that Title IX *requires* schools to discriminate against transgender girls by excluding them from participation.

B. Denying Women and Girls Who Are Transgender Equal Opportunity to Participate in Sports Violates Title IX.

CIAC's policy does not deny any girl the opportunity to participate in athletics on the basis of sex, but Appellants ask this Court to do just that. Prohibiting women and girls who are transgender from playing on sports teams consistent with their gender identity would violate Title IX.

Appellants define sex discrimination in a manner that conflicts with the weight of precedent. *See, e.g.*, Appellants' Br. 28-31. Relying on this erroneous narrow view of sex discrimination, Appellants argue that Title IX creates a statutory right to the numerous benefits of "women's [athletics] events" that belongs only to cisgender girls, and which is violated whenever schools fail to ban transgender girls. *Id.* at 12.

Those arguments cannot be squared with precedent from the Supreme Court and other circuit courts. For decades, federal courts have affirmed that sex discrimination includes discrimination on the basis of gender identity and transgender status. *See, e.g., Schwenk v. Hartford*, 204 F.3d 1187, 1200-01 (9th Cir. 2000) (interpreting Gender Motivated Violence Act); *Whitaker by Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1048 (7th Cir. 2017)

(Title IX); *M.A.B. v. Bd. of Educ. of Talbot Cnty.*, 286 F. Supp. 3d 704, 719 (D. Md. 2018) (Title IX). The Supreme Court put it succinctly in *Bostock*: discrimination tied to sexual orientation or gender identity “necessarily entails discrimination based on sex; the first cannot happen without the second.” 140 S. Ct. at 1747.

Specifically, in *Harris Funeral Homes*, one of the three underlying cases resolved in *Bostock*, the Supreme Court held that an employer violated Title VII by firing a transgender woman because she sought to wear work uniforms that conformed to her gender identity instead of her sex assigned at birth. *Id.* at 1738. Discrimination on the basis of being transgender and discrimination on the basis of sex, as *Bostock* makes clear, are so inextricably linked as to be one and the same.⁴

The reasoning of *Bostock* and its progeny make clear that prohibiting women and girls who are transgender from competing on women’s sports teams would violate Title IX. Under *Bostock*, rules for school activities may not “discriminate[] against persons with one sex identified at birth and another today.” 140 S.Ct. at 1746. There, the Court addressed the situation of two female employees, one of whom the employer learns is transgender. The Court stated that “an employer who

⁴ See NWLC Br. at 24-27, *Bostock v. Clayton County*, 140 S. Ct. 1731, 1747 (2020); Lisa R. Miller & Eric Anthony Grollman, *The Social Costs of Gender Nonconformity for Transgender Adults: Implications for Discrimination and Health*, 30 SOCIOLOGICAL FORUM 809, 826 (2015) (finding “the more frequently trans people are read as transgender or gender nonconforming by others, the more they are subject to major and day-to-day discriminatory treatment.”).

fires a transgender person who was identified as a male at birth but who now identifies as a female[, but] retains an otherwise identical employee who was identified as female at birth,” discriminates on the basis of sex. *Id.* at 1741. The same would be true if a school district ejected a girl from the girls’ track team solely because she was transgender. Although *Bostock* involved Title VII, both Title VII and Title IX prohibit “discrimination on the basis of sex.” Because of the parallel prohibition, courts—including this one—routinely and consistently follow Title VII precedent when interpreting Title IX as to the scope of sex discrimination. *Murray v. N.Y.U. Coll. of Dentistry*, 57 F.3d 243, 249 (2d Cir. 1995) (“[I]n a Title IX suit for gender discrimination based on sexual harassment of a student, an educational institution may be held liable under standards similar to those applied in cases under Title VII.”).⁵

Additionally, *Bostock* has been applied to Title IX to strike down policies that discriminate against transgender students. In *Grimm v. Gloucester County School Board*, the Fourth Circuit applied *Bostock* to hold that a bathroom policy that prohibited a transgender boy from using the men’s restroom was impermissible sex

⁵ Federal courts around the country follow Title VII when interpreting Title IX. See, e.g., *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 616 n.1 (1999) (“This Court has also looked to its Title VII interpretations of discrimination in illuminating Title IX of the Education Amendments of 1972.”); *O’Connor v. Peru State Coll.*, 781 F.2d 632, 642 n.8 (8th Cir. 1986); *Lipsett v. Univ. of P.R.*, 864 F.2d 881, 896-897 (1st Cir. 1988).

discrimination. 972 F.3d 586, 616 (4th Cir. 2020). The court found that “Grimm was treated worse than students with whom he was similarly situated because he alone could not use the restroom corresponding with his gender.” *Id.* at 618. It rejected the school’s reliance on a Title IX regulation allowing for sex-segregated bathrooms. The regulation stated that sex-segregated restrooms are not per se discriminatory; it did not state that in “applying bathroom policies to students like Grimm, the Board may rely on its own discriminatory notions of what ‘sex’ means.” *Id.*

Additionally, another federal court also has addressed athletics policies related to transgender student athletes. *See Hecox v. Little*, 479 F. Supp. 3d 930 (D. Idaho 2020). In *Hecox*, the district court granted a preliminary injunction against an Idaho law that prohibits women who are transgender from competing on women’s school sports teams based on the likelihood of success of the plaintiffs’ claims that the law unconstitutionally discriminated on the basis of sex. While the plaintiffs in that case also challenged the law on Title IX grounds, the court did not issue an opinion regarding Title IX matters at that stage of litigation. Idaho appealed that case to the Ninth Circuit, and it was remanded on standing grounds. Order, *Hecox v. Little*, No. 20-35813 (9th Cir. June 24, 2021), ECF No. 143.

Under these precedents, denying women and girls who are transgender an equal opportunity to participate in sports is impermissible sex discrimination, which

violates Title IX.⁶ This denial of equal opportunity does not just result in a technical violation of a statutory right; this denial levies real physical and psychological harms on women and girls who are transgender as well as all women and girls as detailed below.

CIAC's policy does nothing more than ensure compliance with Title IX and prevent these serious harms.

II. TARGETING WOMEN AND GIRLS WHO ARE TRANSGENDER FOR DISCRIMINATION THREATENS OPPORTUNITIES FOR ALL GIRLS AND WOMEN.

Ensuring equal educational opportunities for women and girls means expanding opportunities for all women and girls to play school sports—not gatekeeping which women and girls get to play. Girls and women face numerous, actual gender disparities in school sports. High school girls receive over 1 million fewer opportunities than boys to participate in sports, and college women receive almost 60,000 fewer athletic opportunities than men. Women's Sports Found., *Chasing Equity: The Triumphs, Challenges, and Opportunities in Sports for Girls*

⁶ Federal agencies that enforce Title IX also agree that the plain text of Title IX prohibits discrimination based on sexual orientation and gender identity. *See Enforcement of Title IX of the Education Amendments of 1972 with Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of Bostock v. Clayton County*, 86 Fed. Reg. 32637, 32638 (June 22, 2021); Memorandum from Pamela S. Karlan, Principal Deputy Assistant Att'y Gen., U.S. Dep't of Just., to Federal Agency Civil Rights Directors and General Counsels (Mar. 26, 2021), <https://www.justice.gov/crt/page/file/1383026/download>.

and *Women* 14 (Jan. 2020), available at <https://www.womenssportsfoundation.org/wp-content/uploads/2020/01/Chasing-Equity-Executive-Summary.pdf>. Girls' and women's sports teams across the country are treated inequitably by their schools when it comes to facilities, equipment, travel, and other benefits and services, and they have been hit especially hard by the COVID-19 pandemic. Athletic policies that include transgender students do not contribute to or exacerbate any of these urgent problems of sex discrimination. Conversely, however, anti-transgender policies threaten harm to all women.

Appellants' request for this court to replace CIAC's policy with an exclusion of transgender girls rests on harmful and debunked sex stereotypes. Appellants argue that women and girls who are transgender should not be permitted the same rights and dignity as their peers. This kind of policing of who counts as a woman is dangerous and specifically harms Black and brown women and girls, and women and girls born with intersex traits, as well as transgender and gender nonconforming women and girls. And contrary to Appellants' suggestion, when women and girls who are transgender are included in sports, participation for all women either remains steady or increases. Shoshana K. Goldberg, CTR. FOR AM. PROGRESS, *Fair Play: The Importance of Sports Participation for Transgender Youth* 15 (Feb. 8, 2021, 9:01 AM) [hereinafter CAP Report], available at

https://cdn.americanprogress.org/content/uploads/2021/02/09122423/Fair-Play-correction2.pdf?_ga=2.123255949.743665254.1634134462-1322386132.1634134462.

A. Appellants' Position Is Based on Debunked Sex Stereotypes.

Appellants rely heavily on broad and inaccurate sex stereotypes regarding physiological differences between cisgender women and girls and transgender women and girls in opposing the CIAC's policy. They suggest that cisgender girl athletes will be "eliminated from participation" and denied adequate opportunities to compete in sports. *See* Appellants' Br. 28-31 (internal quotation marks omitted). This narrative is false. Appellants cannot point to any evidence that allowing transgender girls to compete will destroy athletic opportunities for non-transgender athletes.

Athletes come in all shapes, sizes, and physiological makeups. These differences may be advantageous or disadvantageous based on the sport. For example, standing 4 feet, 8 inches tall, professional gymnast Simone Biles is significantly shorter than the average American woman. Nat'l Women's L. Ctr., *Facts on Trans Inclusion in Athletics* (Sept. 2019), available at <https://nwlc.org/wp-content/uploads/2019/09/Trans-Athlete-Facts.pdf>. "Meanwhile, at 6 feet, 9 inches tall, professional basketball player Brittney Griner towers over her opponents on the

court.” *Id.* “Both women’s statures are seen as a positive factor in their athletic success—which, for both, has included winning an Olympic Gold Medal.” *Id.*

Transgender athletes likewise have a range of shapes, sizes, and athletic skills. *Id.* The assumption that girls and women who are transgender have categorical athletic advantages over cisgender girls and women is inaccurate. The assumption that transgender girls will be inherently bigger, stronger, and more skilled is “especially inaccurate when applied to youth who are still developing physically and who therefore display a significantly broader range of variation in size, strength, and skill than older youth and adults.” Pat Griffin & Helen J. Carroll, *On the Team: Equal Opportunity for Transgender Student Athletes* 16 (Oct. 4, 2010), available at <https://www.goucher.edu/policies/documents/NCLR-Equal-Opportunity-For-Transgender-Student-Athletes.pdf>. And the notion that a direct causal association exists between winning and testosterone levels for athletes competing in all female sports is based on false stereotypes. Roger Pielke Jr., *Bombshell: World Athletics Admits its Research Underpinning DSD Regulations is “Potentially Misleading,”* HONEST BROKER NEWSLETTER (Aug. 17, 2021), available at https://rogerpielkejr.substack.com/p/bombshell-world-athletics-admits?fbclid=IwAR31S8O0pNilswMqSC9mne7MDHLMzC9e6Knnvnc1vr2V0yJHm5nq1__sMJ3U.

The participation of transgender women and girls in sports is not new, and decades of experience demonstrate there is no categorical dominance. Fifteen states and the District of Columbia have passed laws protecting transgender students' rights to participate in school sports consistent with their gender identity. Nat'l Women's L. Ctr., *Facts on Trans Inclusion in Athletics* (Sept. 5, 2019), <https://nwlc.org/resources/facts-on-trans-inclusion-in-athletics>. Many athletic associations, including the International Olympic Committee (IOC), allow transgender athletes to participate in accordance with their identity and have done so for over a decade. CAP Report, *supra*, at 8, 17.

Since these laws and association policies were adopted, there has been no dominance by transgender athletes or threat to girls' sports in these states—despite hundreds, if not thousands, of transgender girls competing in girls' sports. David Crary & Lindsay Whitehurst, *Lawmakers Can't Cite Local Examples of Trans Girls in Sports*, ASSOCIATED PRESS (Mar. 3, 2021), <https://apnews.com/article/lawmakers-unable-to-cite-local-trans-girlssports-914a982545e943ecc1e265e8c41042e7>; CAP Report, *supra*, at 13. Only one transgender athlete to date has been part of a team that medaled at the Olympics. *Canadian Soccer Player Quinn Becomes the First Out Trans and Nonbinary Gold Medalist*, NPR (Aug. 6, 2021, 11:55 AM ET), available at <https://www.npr.org/2021/08/06/1025442511/canadian-soccer-player-quinn-becomes-first-trans-and-nonbinary-olympic-gold-meda>. And only one

woman who is transgender has qualified to participate at the Olympics in an individual event, and she did not advance toward medal contention. Rachel Axon, *New Zealand's Laurel Hubbard Makes History as First Transgender Woman to Compete at Olympics*, USA TODAY (Aug. 2, 2021, 9:06 AM ET), <https://www.usatoday.com/story/sports/olympics/2021/08/02/laurel-hubbard-becomes-openly-first-trans-woman-compete-olympics/5451329001/>. Thus, as the facts indicate, having transgender inclusive policies has far from “eliminated” cisgender girls and women from participation in sports.

B. Policing Who Is and Isn't a Girl Is Dangerous and Creates Harm for Transgender and Gender Non-Conforming Women and Girls.

Forbidding transgender women and girls from competing on sports teams consistent with their gender identity deprives these athletes of the many benefits available to cisgender athletes. While participation in sports generally provides students with a supportive network and social status that can minimize feelings of difference and isolation, this is especially crucial for transgender student athletes as this can help to foster acceptance and positive peer relationships, which in turn have been shown to be a protective factor for transgender girls' health and well-being. Erin E. Buzuvis, *Transgender Student-Athletes and Sex-Segregated Sport: Developing Policies of Inclusion for Intercollegiate and Interscholastic Athletics*, 21 SETON HALL J. SPORTS & ENT. L. 1, 48 (2011).

CIAC's policy helps make school sports accessible to all women and girls, which is crucial for effectuating Title IX's mandate to protect equal access to education programs and activities. Inclusive and nondiscriminatory sports policies, like the CIAC's, can improve students' educational prospects, which may help mitigate the "variety of barriers to attendance in school" that transgender students often experience. Abbie E. Goldberg, THE WILLIAMS INST., UCLA SCH. OF L., *Transgender Students in Higher Education* 2 (Aug. 2018), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Higher-Ed-Aug-2018.pdf>. Further, participating in sports can contribute to positive self-image. Buzuvis, *supra*, at 48. These benefits are critical for transgender girls, who "face an elevated risk of social isolation" and experience high rates of "verbal and physical abuse and harassment at the hands of their peers." *Id.* Transgender students are "at a higher risk for suicide and other life threatening behaviors" because of this abuse, rejection, and harassment. *Id.* Participating on a sports team that is consistent with one's gender identity can help mitigate these risks and offer an important "'respite' or 'escape' from the stress and turmoil associated with" the discrimination and harassment students who are transgender face. *See id.* at 48-49.

Social science studies also support the critical need for transgender-inclusive policies. A recent survey by the UCLA Williams Institute indicates that, among transgender people who have experienced multiple instances of discrimination or

violence in the past year, 98% have thought about committing suicide, and 51% attempted suicide. As more discriminatory experiences occurred, the prevalence of suicidal thoughts and attempts increased. Jody L. Herman, Taylor N.T. Brown & Ann P. Haas, THE WILLIAMS INST., UCLA SCH. OF L., *Suicide Thoughts and Attempts Among Transgender Adults: Findings from the 2015 U.S. Transgender Survey* 27-28 (Sept. 2019), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Suicidality-Transgender-Sep-2019.pdf>. Among survey respondents who reported being denied equal treatment because they are transgender, 61% had suicidal thoughts and 13% reported suicide attempts because of the discrimination. *Id.* at 21. Another study found anti-transgender discrimination doubled the odds of depression in women and girls who are transgender and increased eightfold the odds of stress caused by suicidal thoughts. Erin C. Wilson et al., *The Impact of Discrimination on the Mental Health of Trans*Female Youth and the Protective Effect of Parental Support*, 20 AIDS BEHAV. 2203, 2208, 2209 (2016). The CDC's 2019 Youth Risk Behavior Survey found transgender students were many times more likely than their cisgender peers to experience any number of violent or harassing incidents, with correspondingly multiplied risks for suicidality and substance abuse. Michelle M. Johns et al., *Transgender Identity and Experiences of Violence Victimization, Substance Use, Suicide Risk, and Sexual Risk Behaviors Among High School Students — 19 States*

and Large Urban School Districts, 2017, 68 CDC MORBIDITY & MORTALITY WKLY. REP. 67, 68 (Jan. 25, 2019), <https://www.cdc.gov/mmwrivolumes/68/wrimm6803a3.htm>.

Given the above risk of harm, inclusive and nondiscriminatory policies are crucial, in school sports as well as other settings, to address these alarming disparities and ensure equal educational opportunities. *See, e.g.*, Joseph G. Kosciw et al., *The 2019 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation's Schools*, GLSEN, xxi-xxv (2020), available at https://www.glsen.org/sites/default/files/2020-10/NSCS-2019-Full-Report_0.pdf (students were less likely to experience harassment, violence, or hear anti-LGBTQ remarks at schools with transgender-inclusive policies and educators).

While inclusion in sports is not a cure-all for the severe and widespread discrimination faced by many transgender girls, their exclusion from school activities replaces a protective factor with an added risk factor for the health of transgender students. CAP Report, *supra*, at 19. “It is well-established that sports benefit all youth, and may have particularly positive effects for transgender youth.” *Id.* at 24. By denying transgender girls access to sports, officials deny them access to all the benefits of sports, including lifesaving benefits that transgender young people need. Inclusive policies already in place have had no negative impacts on

any students, whereas sports participation has had numerous positive impacts on transgender youth. Given the increased risk of suicidality and poor mental health among transgender youth—a risk that studies demonstrate has been repeatedly linked to hostile social and cultural environments—ensuring inclusive athletic opportunities for all students, including transgender student athletes, would not only offer these youth access to school belonging, community connectedness, and self-esteem that otherwise would be lacking, but also may help save lives.

C. Policing Who Is and Isn't a Girl or a Woman Is also Harmful for All Women and Girls, Particularly for Black and Brown Women and Girls.

Exclusion of transgender women and girls has a far-reaching impact and can adversely affect other women and girls as well. Black and brown girls and women—who are routinely targeted for not conforming to society's expectations of white femininity—are particularly vulnerable to harm from the types of exclusionary policies plaintiffs ask the court to impose. When Black women's bodies fall outside of these notions of femininity and expectations perpetuated by a white dominant society, they are subject to policing, discrimination, and harassment. *See, e.g.,* Christopher Clarey, *Russian Official Is Penalized for Williams Sisters Remark*, N.Y. TIMES (Oct. 17, 2014), [https://www.nytimes.com/2014/10/18/sports/tennis/wta-suspends-russian-official-for-comment-about-williams-sisters.html#:~:text=Shamil%20Tarpishev,%20the%20leading%20administrative,](https://www.nytimes.com/2014/10/18/sports/tennis/wta-suspends-russian-official-for-comment-about-williams-sisters.html#:~:text=Shamil%20Tarpishev,%20the%20leading%20administrative)

Russian%20television%20program%20last%20week (discussing Russian tennis official's reference to "the Williams brothers" on a Russian television program). Black and brown women have been a frequent target of "suspicion-based" "sex verification" procedures. Practices of sex verification based on expectations of femininity have led to the policing of Black and brown bodies.

For example, when Tidye Pickett and Louise Stokes became the first Black women to represent the U.S. in the 1936 Olympics, an official proposed that the IOC "should create a special category of competition for them [Pickett and Stokes]—the unfairly advantaged 'hermaphrodites' who regularly defeated 'normal women.'" Milton Kent et al., THE SCH. OF GLOB. JOURNALISM & COMM'NS, MORGAN STATE UNIV., *Beating Opponents, Battling Belittlement: How African-American Female Athletes Use Community to Navigate Negative Images* 9 (June 2018), available at <https://www.documentcloud.org/documents/4528427-The-Image-of-Black-Women-in-Sports2.html#document/>. Offensive beliefs like this pushed the IOC into implementing its sex-verification procedures. The IOC did away with compulsory sex-verification testing in 1999 after overwhelming criticism, but still engaged in case-by-case testing for any competitor found to be "suspicious" until 2010. Lindsay Parks Pieper, *They Qualified for the Olympics. Then They Had to Prove Their Sex*, WASH. POST (Feb. 22, 2018, 6:00 AM EST),

<https://www.washingtonpost.com/news/made-by-history/wp/2018/02/22/first-they-qualified-for-the-olympics-then-they-had-to-prove-their-sex/>.

Black and brown athletes—unsurprisingly—have been frequent targets of suspicion-based sex-verification. Santhi Soundarajan and Dutee Chand of India and Caster Semenya of South Africa were all required to undergo sex-verification testing because competitors and coaches saw their physique as “suspiciously masculine.” Ruth Padawer, *The Humiliating Practice of Sex-Testing Female Athletes*, N.Y. TIMES MAGAZINE (June 28, 2016), available at <https://www.nytimes.com/2016/07/03/magazine/the-humiliating-practice-of-sex-testing-female-athletes.html>.

Serena Williams is perhaps the most prominent woman to experience this policing. Throughout her storied career, Williams has been a consistent target of racism, sexism, and transphobia. Because of her athletic physique and dominance in an elitist and historically racially discriminatory sport, people have said that “[s]he is built like a man” and alleged that “[she] was born a guy, all because of [her] arms, or because [she’s] strong.” Gina Vivinetto, *Serena Williams on How She Struggles with Cruel Remarks About her Body*, TODAY (Sept. 7, 2017, 5:42 PM EDT), <https://on.today.com/3rfwDLQ>; Jason Pham, *Serena Williams Shut Down Body Critics: ‘I Am Strong and Muscular — and Beautiful’*, BUS. INSIDER (May 31, 2018, 2:49 PM), <https://www.businessinsider.com/serena-williams-shut-down-body->

critics-who-said-she-was-born-a-guy-2018-5. These critiques of Williams rest on narrow and sexist notions of femininity that maintain women cannot have a muscular physique.

Because “suspicions” of gender nonconformity are projected more readily on the bodies of Black and brown women and girls, intrusive “sex verification” policies have also tended to be used to target their participation. Exclusionary policies like those plaintiffs seek to impose will invite intensified bullying against girls perceived as gender non-conforming, especially those who are Black or brown.

D. If Women and Girls Who Are Transgender Are Excluded from Female Sports, Participation for All Female Athletes Declines.

Allowing all women and girls, including women and girls who are transgender, to play on teams consistent with their gender identity supports equity in sports. As is underscored by the results in a recent 2021 study, for states with transgender-inclusive athletics policies, girls’ overall participation in high school sports either increased or remained the same after those policies were enacted—even in states where boys’ participation declined during the same period. CAP Report, *supra*, at 15-16.

In Connecticut, where transgender sports inclusion has been allowed since 2013, sports participation among high school girls increased by 2.3 percent during the 2011–2019 seasons, even as sports participation among high school students overall decreased by 1.7 percent and participation for high school boys decreased by

4.8 percent in the same period. *Id.* at 16. And while Appellants claim that Connecticut’s transgender-inclusive policy was disadvantaging cisgender girls, the number of girls participating in outdoor track and field steadily increased every year from the 2011 to 2015 season. *Id.* The number of female outdoor track and field athletes in the 2018–2019 season—the most recent year for which data are available—remained higher than that prior to the implementation of the transgender-inclusive policy. *Id.*

Conversely, when certain women are excluded, a decline in overall participation hurts all women. In states with policies that exclude women and girls who are transgender, girls’ overall participation in high school sports has declined over the past decade. *Id.* at 14-15. In states with outright bans or transgender-exclusive policies (combined) participation among girls has decreased—and, as of 2019, was 48 percent lower than participation among girls in states without bans or with inclusive policies. *Id.* at 15.

Thus, transgender-inclusive policies are not only required under Title IX, but have a positive impact on participation in sports for all women and girls.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court affirm the decision below.

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Respectfully submitted,

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1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 29(a)(5) because it contains 5,951 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the typestyle requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

I certify that 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 appellate CM/ECF system on October 14, 2021. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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