20-02194

United States Court of Appeals
For the Second Circuit

NORIANA RADWAN,
Plaintiff-Appellant,

v.

UNIVERSITY OF CONNECTICUT BOARD OF TRUSTEES, WARDE MANUEL, LEONARD TSANTIRIS, AND MONA LUCAS, individually,
Defendants-Appellees.

On Appeal from the United States District Court
for the District of Connecticut

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION FOUNDATION; AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF CONNECTICUT; NATIONAL WOMEN'S LAW CENTER; EQUAL RIGHTS ADVOCATES; WOMEN'S LAW PROJECT; CALIFORNIA WOMEN'S LAW CENTER; LEGAL AID AT WORK; AND SOUTHWEST WOMEN'S LAW CENTER IN SUPPORT OF PLAINTIFF-APPELLANT NORIANA RADWAN

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel of record certifies that none of the *amici curiae* is a nongovernmental entity with a parent corporation or a publicly held corporation that owns 10% or more of its stock. This representation is made in order that the judges of this Court may evaluate possibile disqualification or recusal.

Dated: December 8, 2020

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TABLE OF CONTENTS

Page

CORPORATE DISCLOSURE STATEMENT i

TABLE OF AUTHORITIES iv

INTERESTS OF AMICI CURIAE 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 5

I. Title IX Does Not Impose a Rigid Same-Decisionmaker Requirement, Which Would Subvert its Purpose if Applied to Single-Sex Activities 5

II. This Court Should Not Adopt a Rigid Standard for Proving Discriminatory Intent Under Title IX That Is Inconsistent With the Flexible McDonnell Douglas Test 11

A. Title IX Does Not Require that Ms. Radwan Identify a Specific Male Comparator to Prove Discrimination 14

B. Plaintiff Has Shown Substantial Evidence of Disparate Discipline by the University That Establishes Genuine Issues of Fact Supporting an Inference of Discriminatory Intent Based on Gender Stereotypes 17

III. Fraser Does Not Justify the University's Punishment of College Athlete Speech 21

A. Fraser Does Not Apply to College Students 21

B. K-12 Caselaw Provides a Floor, Not a Ceiling, for College Student Speech 24

C. That Ms. Radwan's Gesture Was Broadcast Is Irrelevant to Her First Amendment Claim 25

CONCLUSION 26

CERTIFICATE OF COMPLIANCE 29

CERTIFICATE OF SERVICE FOR ELECTRONIC FILINGS 30

APPENDIX: INTERESTS OF AMICI CURIAE..... A-1

TABLE OF AUTHORITIES

Page(s)

Cases

Adams v. Sch. Bd. of St. Johns Cty. Florida,
968 F.3d 1286 (11th Cir. 2020) 6, 11

Back v. Hastings On Hudson Union Free Sch. Dist.,
365 F.3d 107 (2d Cir. 2004) 15, 17, 18

Berube v. Great Atl. & Pac. Tea. Co.,
348 F. App'x 684 (2d Cir. 2009) 5

Bethel Sch. Dist. v. Fraser,
478 U.S. 675 (1986).....*passim*

Bostock v. Clayton County, Georgia,
140 S. Ct. 1731 (2020).....11, 12

California Federal Savings & Loan Ass'n v. Guerra,
479 U.S. 272 (1987).....5

Chambers v. TRM Copy Ctrs. Corp.,
43 F.3d 29 (2d Cir.1994) 14, 15

Cohen v. Brown Univ.,
101 F.3d 155 (1st Cir. 1996).....7, 8

Collins v. Putt,
979 F.3d 128 (2d Cir. 2020) 25

Dall v. St. Catherine of Siena Med. Ctr.,
966 F. Supp. 2d 167 (E.D.N.Y. 2013) 6

DeJohn v. Temple Univ.,
537 F.3d 301 (3d Cir. 2008) 25

Doe v. Colgate Univ.,
457 F. Supp. 3d 164 (N.D.N.Y. 2020).....7, 11

Doe ex rel. Doe v. Vermilion Par. Sch. Bd.,
421 F. App'x 366 (5th Cir. 2011) 10

Doe v. Wood Cty. Bd. of Educ.,
888 F. Supp. 2d 771 (S.D.W. Va. 2012).....10

F.C.C. v. Pacifica Found.,
438 U.S. 726 (1978).....26

Garcia v. SUNY Health Scis. Ctr. of Brooklyn,
280 F.3d 98 (2d Cir. 2001) 23

Grimm v. Gloucester Cty.,
972 F.3d 586 (4th Cir. 2020) 6, 11

Harris v. Forklift Systems,
510 U.S. 17 (1993).....5

Hazelwood School District v. Kuhlmeier,
484 U.S. 260 (1988).....23, 25

Healy v. James,
408 U.S. 169 (1972).....21, 24, 25

International Union, UAW v. Johnson Controls,
499 U.S. 187 (1991).....5

Jackson v. Birmingham Bd. of Educ.,
544 U.S. 167 (2005).....6, 9, 12

Julian v. Securitas Sec. Servs. United States, Inc.,
No. 3:08-CV-1715 (MRK), 2010 WL 1553778 (D. Conn. Apr. 19,
2010) 5

Kassman v. KPMG, LLP,
No. 18-3728, 2019 WL 2498769 (2d Cir. Mar. 19, 2019) 5

Littlejohn v. City of New York,
795 F.3d 297 (2d Cir. 2015) 12, 14

McCauley v. Univ. of the Virgin Islands,
618 F.3d 232 (3d Cir. 2010) 24

McDonnell Douglas Corporation v. Green,
411 U.S. 792 (1973).....*passim*

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477 U.S. 57 (1986).....5

National Railroad Passenger Corp. v. Morgan,
536 U.S. 101 (2002).....5

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768 F.3d 843 (9th Cir. 2014).....5

Powell v. Saint Joseph's Univ.,
No. CV 17-4438, 2018 WL 994478 (E.D. Pa. Feb. 20, 2018).....15

Price Waterhouse v. Hopkins,
490 U.S. 228 (1989).....18, 5

Rexach v. Univ. of Conn., Dep't of Dining Servs.,
313 F. Supp. 2d 100 (D. Conn. 2004).....15

Sassaman v. Gamache,
566 F.3d 307 (2d Cir. 2009).....14, 15

Shamloo v. Miss. State Bd. of Trs. of Insts. of Higher Learning,
620 F.2d 516 (5th Cir. 1980).....25

Tinker v. Des Moines,
393 U.S. 503 (1969).....24, 25

U.S. Airways, Inc. v. Barnett,
535 U.S. 391 (2002).....5

U.S. v. Virginia,
518 U.S. 515 (1996).....5

Wiseley v. Harrah's Entm't, Inc.,
No. 03-1540 (JBS), 2004 U.S. Dist. LEXIS 14963 (D.N.J. Aug. 4, 2004).....16

Statutes

20 U.S.C. § 1681.....7

Other Authorities

34 C.F.R. § 106.2(h), (i).....7

34 C.F.R. §106.31(b)(4).....9

Fed. R. App. P. 29(a)(4)(e).....1

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2014 and 2015 NCAA Men's and Women's Soccer Rules, A.R. 12.5.4, http://ncaapublications.com/productdownloads/SO14.pdf.....16

Black Girls Matter: Pushed out, Overpoliced and Underprotected (2015), https:// http://static1.squarespace.com/static/53f20d90e4b0b80451158d8c/t/54d2d22ae4b00c506cffe978/1423102506084/BlackGirlsMatter_Report.pdf.....19

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Let Her Learn: A Toolkit to Stop School Pushout for Girls of Color (Nov. 2016).....19

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Preliminary Findings of ACLU "Teach Kids, Not Stereotypes" Campaign (2012), https://www.aclu.org/sites/default/files/field_document/doe_ocr_report2_0.pdf;.....10

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Tracking Deliberate Sex Segregation in U.S. K-12 Public Schools (2018), https://feminist.org/wp-content/uploads/2020/06/SexSegReport2018.pdf.....10

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INTERESTS OF *AMICI CURIAE*[1]

Amici are a coalition of civil rights groups and public interest organizations committed to preventing, combating, and redressing sex discrimination and protecting the equal rights of women in the United States. More detailed statements of interest are contained in the accompanying appendix.

Amici have a vital interest in ensuring that Title IX's promise of equal treatment and broad prohibition of discrimination effectively protects all people from invidious discrimination "because of sex" and have filed this brief to address multiple issues of importance in this case in order to ensure the proper legal standard is applied to 1) Title IX sex discrimination claims; and 2) First Amendment claims in the collegiate context. *Amici* take no position on any other issues presented by this appeal.

[1] Pursuant to Rule 29(a)(4)(e) of the Federal Rules of Appellate Procedure and Local Rule 29.1, counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part, and that no person other than *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. This brief is filed with the consent of all parties.

SUMMARY OF THE ARGUMENT

Noriana Radwan, an athlete on the women's soccer team at the University of Connecticut ("UConn" or "University"), was thrown off her team and lost her scholarship—and thus her ability to attend UConn—as a result of raising her middle finger in an exuberant, celebratory gesture following the team's victory in a tournament championship. The record in this case showed that male athletes at UConn have engaged in far worse conduct, including criminal conduct, with virtually no disciplinary consequences. Yet the court below found that there was not even a genuine issue of fact as to whether UConn's treatment of Ms. Radwan constituted sex discrimination under Title IX. It then went on to apply qualified immunity to Ms. Radwan's First Amendment claim, finding that speech restrictions appropriate for children in a K-12 setting could also apply to an adult in a university environment. These are both clear legal errors. Amici urge this Court to correct these errors, which, if left undisturbed, would threaten both the Title IX and First Amendment rights of college athletes across the country.

In its ruling dismissing Ms. Radwan's Title IX claim, the district court erroneously presumed that the only way for Ms. Radwan to prove that she was discriminated against because of her sex was through a showing that a specific male comparator was subjected to less severe discipline by the same decisionmaker for virtually identical conduct. Title IX does not impose such an onerous burden. To

the contrary, the controlling fact-specific test is to determine, from all the evidence presented, whether, if Ms. Radwan had been a male athlete who engaged in similar conduct, she would have received the same level of discipline from her university. Given the record evidence showing that several male athletes at UConn received mere slaps on the wrist for engaging in equally or far more serious misconduct, there is a genuine issue of fact as to whether Ms. Radwan was subjected to disparate disciplinary enforcement that she would not have suffered had she been male, and thus, as to whether UConn violated Title IX. This evidence should have been presented to a jury.

This Court should decline to adopt the district court's rigid requirement that a Title IX plaintiff challenging the imposition of discipline must always provide evidence of a specific male comparator, disciplined for virtually the same conduct, by the same decisionmaker. Such a rule would eviscerate Title IX's congressionally mandated protections in the specific context of collegiate sports, where male and female athletes typically have different coaches (*i.e.*, decisionmakers). It could also have broader adverse consequences in other contexts that would allow educational institutions to insulate themselves from Title IX liability by separating the supervision of female and male students. This would be particularly troubling in the K-12 environment, in which students enjoy the same broad Title IX protections as college students, and where sex segregation is common in academics as well as

athletics. Further, it is highly unlikely that a female student would be able to identify a male comparator who has engaged in *precisely* the same conduct for which the female athlete was punished, nor is this required by the law. Nothing in the language of Title IX compels such an inflexible approach. Rather, courts are obligated to consider all the evidence submitted in support of a discrimination claim to determine whether genuine issues of material fact require a jury determination. Under the burden-shifting formula of *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973), all that is required is for Ms. Radwan to come forward with circumstantial evidence capable of supporting an inference of discriminatory intent—a burden she more than carried below.

On the First Amendment claim, the district court correctly concluded that the First Amendment protects Ms. Radwan's expressive gesture and that the University retaliated against her for it. However, the court erred in its application of qualified immunity by finding that K-12 speech standards—and *Bethel School District v. Fraser* in particular—apply in a university setting. In *Fraser*, the Supreme Court considered a school's ability to punish a student for delivering a sexually explicit speech to a captive audience of children at a school assembly, and the Court explicitly cabined its holding and analysis to schoolchildren. The court below was incorrect to hold that such precedent could apply to adult students speaking in an

adult environment, where they enjoy the full First Amendment freedoms of adults in the community at large. *See Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986).

ARGUMENT

I. Title IX Does Not Impose a Rigid Same-Decisionmaker Requirement, Which Would Subvert its Purpose if Applied to Single-Sex Activities

The district court erred in holding, that "no reasonable jury could find" that Ms. Radwan was similarly situated to the multiple male comparators she identified because they were "disciplined by different supervisors . . . ." *See* JA1005-06.

As a threshold matter, the district court misapplied Title VII in concluding that the imposition of discipline by the "same decisionmaker" is a necessary pre-requisite for proving a prima facie case. Specifically, while having the same decisionmaker can be relevant to the Title VII determination of whether a comparator is "similarly situated," it has not been viewed in this Circuit as a mandatory requirement for proving discriminatory treatment, even under Title VII. *See Berube v. Great Atl. & Pac. Tea. Co.*, 348 F. App'x 684, 686-87 (2d Cir. 2009) ("The fact that [the plaintiff] had a different supervisor from the employees he cites as comparators does not appear sufficient in itself to preclude [the plaintiff] from showing that he was subject to the same workplace standards and disciplinary procedures."). Rather, the existence of different decisionmakers for comparator and plaintiff is simply a part of the overall factual inquiry—not a dispositive requirement to establish Title VII lability. *See e.g.*, *Julian v. Securitas Sec. Servs. United States,*

Inc., No. 3:08-CV-1715 (MRK), 2010 WL 1553778, at *9 (D. Conn. Apr. 19, 2010) ("[T]he fact that different employees were supervised and disciplined by different supervisors . . . does not as a matter of law preclude the fact finder from making a comparison if . . . comparison is appropriate"); *Dall v. St. Catherine of Siena Med. Ctr.*, 966 F. Supp. 2d 167, 184 (E.D.N.Y. 2013) ("Similarly situated employees do not necessarily need to share the same position, nor do they necessarily need to report to the same supervisor") (collecting cases). The entire premise for the district court's imposition of such a rigid requirement, based on Title VII precedent, was thus in error.

Moreover, even if such a "same-decisionmaker" standard was mandatory under Title VII (it is not), applying that standard in the context of college athletics finds no authority in this Circuit, and is contrary to the text and purpose of Title IX.[2] *See* JA1005-06. While imposition of disparate discipline by the same decisionmaker to female and male athletes may be sufficient to show discriminatory enforcement under Title IX, it is not a *requirement*. Rather, courts that have addressed Title IX

[2] Courts look to Title VII jurisprudence for guidance as to the scope of Title IX's prohibition on discrimination on the basis of sex. *See*, *e.g. Grimm v. Gloucester Cty.*, 972 F.3d 586, 616 (4th Cir. 2020); *Adams v. Sch. Bd. of St. Johns Cty. Florida*, 968 F.3d 1286, 1304-05 (11th Cir. 2020). However, they have also acknowledged the need to depart from Title VII standards when the statutory text or factual context for a Title IX claim so requires. *See Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005).

selective enforcement claims with respect to discipline have focused on the *institution's* disciplinary actions, not on the actions of individual decisionmakers. *See*, *e.g.*, *Doe v. Colgate Univ.*, 457 F. Supp. 3d 164, 172 (N.D.N.Y. 2020) (male plaintiff required to show that the University's actions, rather than the actions of an individual decisionmaker, against him were "motivated by his gender and that a similarly situated woman would not have been subject to the same disciplinary proceedings"). This focus on the institution rather than the individual decisionmaker flows directly from the text of Title IX and its implementing regulations, which apply to any "education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681; *see also* 34 C.F.R. § 106.2(h), (i) (defining "education program or activity" and "recipient" respectively).

Indeed, there would be no principled basis for reflexively imposing a same-decisionmaker requirement under Title IX. As the First Circuit has recognized, in the context of collegiate athletics, "Title IX was designed to address the reality that sports teams, unlike the vast majority of jobs[,] *do* have official gender requirements, and th[e] statute accordingly approaches the concept of discrimination differently from Title VII." *Cohen v. Brown Univ.*, 101 F.3d 155, 176 (1st Cir. 1996) (emphasis in original). The *Cohen* court went on to explain that "[i]t is imperative to recognize that athletics presents a distinctly different situation from admissions and

employment and requires a different analysis in order to determine the existence *vel non* of discrimination." *Id.* at 177.

As the facts here drive home, imposing a "same-decisionmaker" requirement in the context of university athletics would be contrary to the purpose of Title IX. The discipline UConn imposed on Ms. Radwan was determined by her coach, and after agreement from the team's assigned sports administrator, was ultimately raised to and approved by the Athletic Director. JA987-88. By contrast, the following year, a men's football player committed more egregious misconduct when, during the game, he kicked the ball into the crowd, garnering a 15-yard penalty for his team, and endangering spectators. JA997. In response, the men's football coach barely imposed any discipline at all. He did not dismiss the player from the team and he did not seek to revoke his scholarship. Further, the coach never instituted formal disciplinary proceedings against the player with the Athletic Director. JA702-03. On these facts, the district court concluded that Ms. Radwan had not met her burden of proof for this male comparator, who received far more lenient treatment, simply because he was not disciplined by the same decisionmaker. JA1006-09. Taken to its logical conclusion, the district court's erroneous application of a rigid same-decisionmaker requirement means that, no matter how egregious the differences in disciplinary consequences for female and male athletes at the same university, a plaintiff could never use those differences to support a Title IX claim—as long as

the male athletes' coach never formally elevated the misconduct to university administrators overseeing the entire athletic department.

In other words, the same-decisionmaker rule adopted by the district court allows for wildly different disciplinary consequences to be applied to male and female athletes within the same university, without any liability under Title IX. That is simply not the law. *See* 34 C.F.R. §106.31(b)(4) (prohibiting recipient educational institutions from "[s]ubject[ing] any person to separate or different rules of behavior, sanctions, or other treatment" based on sex). Approving such a requirement in the Title IX context would insulate single-sex college athletic teams from virtually any selective enforcement claims, and would run counter to Congress' purpose that Title IX operate as a "general prohibition on discrimination" with only "specific, narrow exceptions to that broad prohibition." *Jackson*, 544 U.S. at 175.

Further, application of such an inflexible same-decisionmaker requirement would have implications far beyond the context of sex-segregated collegiate sports, potentially impacting the ability of plaintiffs to bring Title IX claims in numerous other single-sex contexts. This would be particularly troubling in the K-12 environment, where segregation by sex is common in academics as well as athletics.[3]

[3] *See* American Civil Liberties Union, *Preliminary Findings of ACLU "Teach Kids, Not Stereotypes" Campaign* (2012), https://www.aclu.org/sites/default/files/field_

For example, it could result in significantly eroding or eliminating protections against selective disciplinary enforcement for students at single-sex public schools or "dual academies," which may be operated by the same recipient of federal funds but have different administrators or principals responsible for imposing student discipline, and in single-sex classrooms, which frequently have different teachers. Such a result would be especially damaging in light of the mounting evidence that such single-sex K-12 environments can in fact lead to the imposition of different behavioral standards for boy and girl students based on gender stereotypes. *See Doe ex rel. Doe v. Vermilion Par. Sch. Bd.*, 421 F. App'x 366, 374 (5th Cir. 2011); *Doe v. Wood Cty. Bd. of Educ.*, 888 F. Supp. 2d 771, 779 (S.D.W. Va. 2012).[4] There is no legal basis to apply such a rigid single-decisionmaker requirement to segregated university environments, such as sports teams, where the consequence would be to render Title IX nugatory in virtually all disciplinary cases.

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document/doe_ocr_report2_0.pdf; Feminist Majority Foundation, *Tracking Deliberate Sex Segregation in U.S. K-12 Public Schools* (2018), https://feminist.org/wp-content/uploads/2020/06/SexSegReport2018.pdf

[4] American Civil Liberties Union, *Preliminary Findings of ACLU "Teach Kids, Not Stereotypes" Campaign* (2012); National Coalition for Women and Girls in Education, *Title IX at 45* (2017), https://www.ncwge.org/TitleIX45/Title%20IX%20at%2045-Advancing%20Opportunity%20through%20Equity%20in%20Education.pdf

II. This Court Should Not Adopt a Rigid Standard for Proving Discriminatory Intent Under Title IX That Is Inconsistent With the Flexible *McDonnell Douglas* Test

The controlling inquiry in a discriminatory enforcement claim under Title IX is whether a plaintiff was subjected to different discipline because of their sex, so that a similarly situated individual of another sex would not have been subject to equally severe punishment by the same university. *See Colgate Univ.*, 457 F. Supp. 3d. at 172 (N.D.N.Y. 2020) ("[t]he male plaintiff must show that 'the University's actions against [the male plaintiff] were motivated by his gender and that a similarly situated woman would not have been subjected to the same disciplinary proceedings"); *Cf. Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731, 1741 (2020) ("[I]f changing the [plaintiff's] sex would have yielded a different choice by the employer—a statutory violation has occurred").[5]

Here, the district court correctly articulated the broad Title IX prohibition on "the imposition of university discipline where gender is a motivating factor in the decision to discipline."[6] However, in its application of the Title VII *McDonnell*

[5] *See also Grimm*, 972 F.3d at 618; *Adams*, 968 F.3d at 1304-05.

[6] JA 1002 (citing *Doe v. Columbia Univ.,* 831 F.3d 46, 53 (2d Cir. 2016)). The Supreme Court reiterated in its recent *Bostock v. Clayton County, Georgia* decision the continuing relevance of both the "motivating factor test" and the "but-for causation standard" tests under which a plaintiff can prove a Title VII violation. 140 S. Ct. 1731, 1739-40 (2020). The Court emphasized the "forgiving" and "sweeping" breadth of these standards, respectively, in providing protections to plaintiffs for sex

Douglas burden-shifting framework, it applied a rigid set of requirements for proving such a claim that are not required by law under either Title IX or Title VII, and indeed, are virtually impossible to satisfy in the context of sex-segregated college athletics.[7] Specifically, in addition to its error in imposing a same-decisionmaker requirement (*see supra* Section I), the district court went astray in concluding that a female Title IX plaintiff could only meet her evidentiary burden on discriminatory intent with a comparison to a specific male comparator who had engaged in identical conduct. No such inflexible requirements are mandatory for an "inference of discrimination" to be proven from circumstantial evidence under the *McDonnell Douglas* framework.

Indeed, because most collegiate sports are segregated by sex, male and female athletes are on different teams and usually have different immediate "supervisors"

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discrimination in a manner consistent with Title VII's broad remedial purpose. *Id.* at 1739-41 ("Title VII's message is 'simple but momentous.'"). Title IX's "general prohibition on discrimination" is even more robust. *Jackson,* 544 U.S. at 175.

[7] As is permitted under this Court's precedent, the District Court invoked the four-factor *McDonnell Douglas* burden-shifting framework that courts apply in Title VII discrimination cases to allow plaintiffs to show discriminatory intent through circumstantial evidence if they are members of a protected class. JA1002-03. The first three prongs, two of which do not apply in the Title IX context, were uncontested below. The focus here, and where the District Court went wrong, is on the fourth prong requiring a showing of "circumstances giving rise to an inference of discrimination." *Littlejohn v. City of New York*, 795 F.3d 297, 312 (2d Cir. 2015).

(*i.e.* coaches).[8] For this reason, it will be a rare situation in which the female and male athletes are disciplined by the same individual, and it may be difficult or impossible to identify a woman or man who engaged in precisely the same conduct. But this does not mean that Title IX does not apply. To the contrary, under the *McDonnell Douglas* test, all of the circumstantial evidence presented by plaintiff must be considered by the court to determine if a reasonable inference of discrimination can be shown. Otherwise, the protections of Title IX against sex discrimination in the collegiate setting will become wholly illusory. The precedents of this Court and others applying a more flexible evidentiary standard for evaluating

[8] For example, at Yale, Queens College CUNY, Syracuse University, University of Vermont, Hofstra, and Cornell, all universities within the Second Circuit, a total of 26% of the schools' sports teams share the same head coach for their men's and women's teams. *Staff Directory*, Yale, https://yalebulldogs.com/staff-directory (last accessed Dec. 7, 2020); *Staff Directory*, Queens College, https://queensknights.com/staff-directory (last accessed Dec. 7, 2020); *Staff Directory*, Syracuse, https://cuse.com/staff-directory (last accessed Dec. 7 2020); *Staff Directory*, University of Vermont, https://uvmathletics.com/staff-directory (last accessed Dec. 7, 2020); *Staff Directory*, Hofstra, https://gohofstra.com/staff-directory (last accessed Dec. 7, 2020); *Staff Directory*, Cornell, https://cornellbigred.com/staff-directory (last accessed Dec. 7, 2020). At Queens College CUNY and Syracuse University, of the fourteen (14) and eighteen (18) total sports teams each school has respectively, only the Women's and Men's Cross Country and Track and Field teams share a coach. Queens College, *supra*; Syracuse, *supra*. Of Yale's thirty-four (34) teams, only nine (9) share a coach. Yale, *supra*. And of Cornell's thirty-five (35) only eight (8) teams share a coach. Cornell, *supra*. Of Hofstra's seventeen (17) teams, only four (4) share a coach. Hofstra, *supra*. At the University of Vermont, of the sixteen (16) teams, only six (6) share a coach. University of Vermont, *supra*.

claims of discrimination under the *McDonnell Douglas* test do not countenance such a result.

A. Title IX Does Not Require that Ms. Radwan Identify a Specific Male Comparator to Prove Discrimination

The district court focused its summary judgment determination on whether Ms. Radwan proved discriminatory intent "by showing that similarly situated individuals outside the plaintiff's protected group are treated more favorably." JA1004. But there is no such rigid requirement in Title IX (or Title VII) jurisprudence mandating the specific type of evidence a plaintiff must invariably produce to meet their "minimal" burden on coming forward with sufficient evidence from which a fact finder can infer discriminatory intent. *Littlejohn*, 795 F.3d at 313. Thus, while the required inference of discriminatory intent *can* be shown in Title IX selective enforcement cases by offering evidence that a comparator of the opposite sex was treated more favorably than the plaintiff for engaging in the same conduct, that is by no means the *only* way to prove discriminatory intent. *See e.g.*, *Chambers v. TRM Copy Ctrs. Corp.*, 43 F.3d 29, 37 (2d Cir.1994); *Littlejohn*, 795 F.3d at 312-13; *Sassaman v. Gamache*, 566 F.3d 307, 312-13 (2d Cir. 2009).

Indeed, in Title VII discrimination cases, from which the use of the *McDonnell Douglas* framework in the Title IX context is imported, courts in the Second Circuit have routinely drawn an inference of discriminatory intent based on

facts that do not involve evidence of a specific comparator, including "the sequence of events" or "the employer's . . . comments about others in the employee's protected group." *Chambers*, 43 F.3d at 37; *Sassaman* 566 F.3d at 312 (male plaintiff met his burden with evidence that his boss told him "you probably did what [a colleague] said you did because you're male"); *Rexach v. Univ. of Conn., Dep't of Dining Servs.*, 313 F. Supp. 2d 100, 106 (D. Conn. 2004) (Puerto Rican plaintiff met burden with evidence that supervisor made comments tending to support racial stereotypes about Latinos); *cf. Powell v. Saint Joseph's Univ.*, No. CV 17-4438, 2018 WL 994478, at *6 (E.D. Pa. Feb. 20, 2018) (in Title IX case "[i]nferences of gender bias may also be inferred from allegations that similarly situated individuals were treated differently or that university administrators faced outside pressure to discriminate against one sex or gender"); *Back v. Hastings On Hudson Union Free Sch. Dist.*, 365 F.3d 107, 121-22 (2d Cir. 2004) (in Equal Protection case, comments made about a woman's inability to combine work and motherhood were direct evidence of gender discrimination because "stereotyping of women . . . can by itself and without more be evidence of an impermissible, sex-based motive").

Here, Ms. Radwan presented evidence that UConn coaches repeatedly failed materially to discipline male athletes' violations of the university's conduct policies and never formally escalated their discipline to the Athletic Director (as occurred here for Ms. Radwan merely because she made a middle finger gesture during the

post-game celebration of a championship). JA996-98. Significantly, had Ms. Radwan extended her finger in a similar manner during the game, she would have merely received a warning and her team would not have been penalized.[9] Yet, UConn decided that in the case of this female athlete, it would revoke her scholarship and throw her off the team for making this gesture during the post-game celebration. And, the record further contains evidence that the University did not follow its own procedures either in assessing the discipline imposed in the first instance or in permitting Ms. Radwan to challenge the consequences. Pl.'s Br., Dkt. No. 64, at 39-44.

Moreover, Ms. Radwan presented evidence that the Athletic Director, at least in some of these cases involving male athletes, either was personally involved in or approved the determination to impose only mild discipline. JA at 700-03, 837. Such evidence alone should have been found sufficient to support a reasonable inference of discriminatory intent under the *McDonnell Douglas* test, without the need to identify any specific male comparator engaging in the same conduct as Ms. Radwan. *Wiseley v. Harrah's Entm't, Inc.*, No. 03-1540 (JBS), 2004 U.S. Dist. LEXIS 14963, at *19-20 (D.N.J. Aug. 4, 2004) (the fact that "the policy was never enforced against

[9] 2014 and 2015 NCAA Men's and Women's Soccer Rules, A.R. 12.5.4, http://ncaapublications.com/productdownloads/SO14.pdf. These NCAA rules apply equally to both male and female soccer players.

the female employees was certainly relevant to the Plaintiff's whole Title VII claim" and could give rise to an inference of discriminatory intent); *cf. Back*, 365 F.3d at 122 (stereotyping of women was by itself evidence of an impermissible, sex-based motive).

Under the *McDonnell Douglas* test, Ms. Radwan was entitled to reach a jury based on the extensive circumstantial evidence of discriminatory intent that she presented. Indeed, as discussed below, this circumstantial evidence strongly supported the conclusion that the reason Ms. Radwan suffered such severe and disparate discipline was because of the stereotype that female athletes—unlike their male peers—should not be permitted to engage in such "un-ladylike" behavior.

B. Plaintiff Has Shown Substantial Evidence of Disparate Discipline by the University That Establishes Genuine Issues of Fact Supporting an Inference of Discriminatory Intent Based on Gender Stereotypes

The evidence presented by the plaintiff to the district court showed that male athletes had engaged in various forms of conduct violations that were either equally or more egregious than that of Ms. Radwan without suffering anything close to the same severe disciplinary consequences. The conduct by male athletes who escaped any significant discipline included:1) kicking a ball into the crowd during a game, which threatened serious physical injury to spectators; 2) engaging in criminal behavior including theft and, in the case of one athlete, third-degree assault and

second-degree breach of the peace; and 3) missing curfew during a tournament in Puerto Rico. JA31, 996-98. Despite the fact that this conduct by male athletes was at least as serious as Ms. Radwan lawfully raising her middle finger in a post-victory celebration, the majority of these male athletes did not receive *any* University discipline at all, with the most significant penalty being one where a male athlete arrested for theft was required to participate in a "Living Your Values" workshop. JA996-98. This evidence of disparate disciplinary treatment of male athletes, in comparison to the extreme discipline imposed on Ms. Radwan for equally or less egregious conduct, was sufficient to raise an inference of discriminatory intent because of sex.

Indeed, the evidence of disparate treatment presented gives rise to at least a genuine issue of fact supporting an inference of discriminatory intent based on underlying gender stereotypes—and specifically, stereotypes regarding proper comportment or "ladylike" behavior that should be observed by female athletes, as compared to male athletes who are permitted to "act out" their aggressions. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989) ("In the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender"); *Back*, 365 F.3d at 121-22 (evidence that employer imposed stereotypes that mothers would be less devoted to their work than fathers was sufficient basis to defeat summary

judgment). The district court should have denied the defendants' motions for summary judgment on this factual basis alone.

Despite the major gains for women and girls in education that have resulted from the enactment of Title IX, gender stereotypes still exist, and routinely influence school decisionmakers in numerous contexts. This can (and does) result in disparate discipline for girls who do not act in a manner that conforms to gender specific stereotypes. *See* National Women's Law Center, *Let Her Learn: A Toolkit to Stop School Pushout for Girls of Color* (Nov. 2016), https://nwlc.org/wp-content/uploads/2016/11/final_nwlc_NOVO2016Toolkit.pdf; Neena Chaudhry & Jasmine Tucker, National Women's Law Center, *Let Her Learn: Stopping School Pushout* (April 2017), https://nwlc.org/wp-content/uploads/2017/04/final_nwlc_Gates_OverviewKeyFindings.pdf; Alexandra Brodsky et al., National Women's Law Center, *Dress Coded: Black Girls, Bodies, and Bias in D.C. Schools* (April 2018), https://nwlc.org/wp-content/uploads/2018/04/5.1web_Final_nwlc_DressCodeReport.pdf. Such disparate discipline can be particularly harsh for girls of color, who are often subjected to an even more stringent mandate to suppress any displays of emotion. *Id.*; Kimberle Williams Crenshaw et al., African American Policy Forum, *Black Girls Matter: Pushed out, Overpoliced and Underprotected* (2015), http://static1.squarespace.com/static/53f20d90e4b0b80451158d8c/t/54d2d22ae4b00c506cffe978/1423102506084/BlackGirlsMatter_Report.pdf.

Ultimately, the controlling Title IX issue here was not, as the district court implied, whether the plaintiff lost her scholarship for violating team rules. JA1010 ("Sufficient evidence exists in the record to support [the] contention . . . [that] defendants [] removed Ms. Radwan from the soccer team and cancelled her scholarship because her [gesture] constituted misconduct."). Rather, the Title IX issue was whether a male athlete would have received comparable discipline for engaging in similar conduct, without regard to gender stereotypes. *Id.* at 1003 ("In a selective enforcement case, the plaintiff 'asserts that, regardless of the student's guilt or innocence, the severity of the penalty and/or the decision to initiate the proceeding was affected by the student's gender.'") (citing *Yusuf v. Vassar Coll.*, 35 F.3d 709, 715 (2d Cir. 1994)). Here, the evidence presented was more than sufficient to raise a genuine issue of material fact that the discipline imposed on Ms. Radwan was more severe because of her gender—*i.e.*, the "expectation" that female athletes should not engage in displays of emotional behavior that male athletes exhibit—and thus a Title IX violation. A female college athlete should not receive any greater discipline for making a gesture in the heat of competition (or joy of celebration) that some might find offensive than would a male athlete. But that is exactly what appears to have happened in this case. This Court should reverse the district court's erroneous summary judgment determination and remand for trial.

III. *Fraser* Does Not Justify the University's Punishment of College Athlete Speech

The district court also erred in its application of the First Amendment to Ms. Radwan's claims. While it correctly concluded that the First Amendment protected Ms. Radwan's expressive gesture, and that the University retaliated against her for engaging in such an expression, it erred in its application of qualified immunity for the Defendants by applying K-12 speech standards—and *Bethel School District v. Fraser* in particular—in a university setting where it is adults, not juveniles, engaging in the expressive activity. 478 U.S. 675 (1986). The greater latitude given to elementary and high schools to regulate certain kinds of speech, does not apply in the adult setting of a university.

A. *Fraser* Does Not Apply to College Students

Nearly five decades ago, the Supreme Court announced that its precedents "leave no room for the view that […] First Amendment protections should apply with less force on college campuses than in the community at large." *Healy v. James*, 408 U.S. 169, 180 (1972). College students "are adults," and they enjoy the same First Amendment freedoms as other adults. *Id*. at 197 (Douglas, J., concurring). Because college students' speech cannot be regulated in the same manner as juvenile primary and secondary school students' speech, precedents from the K-12 context should not be applied to cases involving college students.

The precedent the district court applied here, *Fraser*, is particularly ill-suited for this action. In *Fraser*, the Supreme Court considered the narrow question of whether school officials can punish a minor for delivering a "sexually explicit monologue . . . to[] an unsuspecting audience of teenage students." 478 U.S. at 685. In holding that such punishment does not violate the First Amendment, the Court's ruling expressly applied to "children in [] public school[s]," not adults. *Id*. at 682. The Court reaffirmed that the "First Amendment guarantees wide freedom in matters of adult public discourse," and granted regulatory latitude only to "school officials acting *in loco parentis*, to protect children—especially in a captive audience—from exposure to sexually explicit, indecent, or lewd speech." *Id.* at 682, 684. The Court thus made clear that the standard it set forth in *Fraser* is not appropriate for regulating the speech of adults.

Indeed, in *Papish v. Board of Curators of University of Missouri*, the Supreme Court held that, in the university setting, the First Amendment prohibits administrators from punishing a student for vulgar speech—specifically, in that case, for distributing a newspaper on campus that referred to policemen as "motherfuckers" and depicted them raping the Statue of Liberty. 410 U.S. 667, 667 (1973). The difference in the Court's treatment of vulgar speech by a high school student in *Fraser* and a graduate student in *Papish* demonstrates that different standards govern in the two contexts.

This difference is also exemplified by the Supreme Court's treatment of a high school student newspaper in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988). In contrast to *Papish*, in *Hazelwood*, the Court held that a high school could discipline a student without violating her First Amendment rights for discussing subjects in the paper that the principal viewed as objectionable. The Court explicitly noted that it was not deciding to extend the "substantial deference" it showed to high school administrators to "school-sponsored expressive activities at the college or university level." 484 U.S. at 273, n.7.

Similarly, in *Amidon v. Student Association of SUNY Albany*, this Court refused to grant public university officials the "substantial deference shown to high school administrators" in cases like *Fraser* and *Hazelwood*. 508 F.3d 94, 105 (2d. Cir. 2007). Instead, this Court relied on less deferential university-specific standards, requiring colleges to use viewpoint-neutral criteria when allocating student activity fees. *Id.* at 99 (citing *Bd. of Regents of Univ. of Wisconsin v. Southworth*, 529 U.S. 217 (2000)).[10]

[10] This Court has also held that the precedents governing public employee speech do not apply to college students. *See Garcia v. SUNY Health Scis. Ctr. of Brooklyn*, 280 F.3d 98, 106 (2d Cir. 2001) (refusing to apply the relaxed First Amendment protections for government employee speech to college students). Instead, as the Supreme Court did in *Healy*, this Court made clear that "[u]niversity students' speech deserves the same degree of protection that is afforded generally to citizens in the community." *Id.* Even if this Court determines that a university has greater

B. K-12 Caselaw Provides a Floor, Not a Ceiling, for College Student Speech

As the Third Circuit has already recognized, K-12 cases cannot constitute the ceiling of protection for college student speech for many of the reasons discussed above, including "the differing pedagogical goals of each institution," "the special needs of school discipline in public elementary and high schools," and "the maturity of the students," among others. *McCauley v. Univ. of the Virgin Islands*, 618 F.3d 232, 242–43 (3d Cir. 2010). While some courts, including the Supreme Court, have sometimes cited K-12 caselaw in cases that concern the speech of college students, such courts typically only do so to hold that the government action at issue fails to satisfy even the more deferential standards established for limiting the speech of K-

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leeway in disciplining students for extracurricular speech, as compared to purely private speech, the district court erred in holding that *Fraser* or any other K-12 caselaw provides the correct standard. Students' First Amendment rights must always be "applied in light of the special characteristics of the school environment." *Tinker v. Des Moines*, 393 U.S. 503, 506 (1969). The special characteristics of college sports—where adults are on a field of play—are clearly distinguishable from a high school assembly. For example, the often vulgar and confrontational style adopted by generations of college sports coaches including UConn's own Geno Auriemma, would hardly be appropriate in a grade school assembly. *See* Sporting News, *UConn's Geno Auriemma calls fans 'stupid' on podcast* (October 1, 2015), https://www.sportingnews.com/us/ncaa-basketball/news/geno-auriemma-calls-fans-stupid-zach-lowe-podcast-uconn-womensbaskeball/1kviymisouey41o8xr2oxc0wl7. Whatever the scope of speech that might properly be proscribed on the college field, it cannot be determined—as the district court suggested—by the standard set forth in *Fraser*.

12 schoolchildren (as compared to college students)—and to emphasize that no students, including college students, "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker,* 393 U.S. at 506; *see, e.g.*, *Papish*, 410 U.S. at 670 n.6; *Healy*, 408 U.S. at 180; *see also DeJohn v. Temple Univ.*, 537 F.3d 301, 317–20 (3d Cir. 2008) (holding that a college sexual harassment policy failed to satisfy even K-12 standards); *Shamloo v. Miss. State Bd. of Trs. of Insts. of Higher Learning*, 620 F.2d 516, 522 (5th Cir. 1980) (refusing to hold, even under K-12 standards, that a demonstration by Iranian students on college campus was not protected by the First Amendment).[11]

C. That Ms. Radwan's Gesture Was Broadcast Is Irrelevant to Her First Amendment Claim

The district court's decision to grant qualified immunity on Ms. Radwan's First Amendment claim seems to hinge on "the specific facts in this case, involving expressive conduct widely and publicly broadcast on national television." JA1032. While recognizing that *Fraser* is generally not applicable to college student speech, the district court erroneously concluded that school officials could reasonably have

[11] Recently, this Court applied *Hazelwood* to a college student's class assignment "[b]ecause neither party argue[d] that *Hazelwood* applies with less force in the university setting." *Collins v. Putt*, 979 F.3d 128, 134, n.3 (2d Cir. 2020). Here, Ms. Radwan has, by contrast, specifically raised and preserved the argument that K-12 caselaw, and *Fraser* in particular, do not apply to college students. Pl.'s Br., Dkt. No. 64, at 15, 27-30.

believed it might apply to a college sports event "broadcast on national television for all to see." JA1031.

To the extent that the broadcast of vulgar or lewd content might be regulated without violating the First Amendment, the operative relationship is between the television channel and the Federal Communications Commission, not between the student-athlete and the athletics department. *See F.C.C. v. Pacifica Found.*, 438 U.S. 726 (1978). The Supreme Court recognized this distinction in *Fraser* itself, noting that *Pacifica* "dealt with the power of the [FCC] to regulate [indecent] broadcast[s]" in order to protect minors. *Fraser*, 478 U.S. at 684. The Court did not suggest that *Pacifica* bears on a public school's authority to punish a student, let alone a college student, whose indecent speech in a university setting happens to appear in a third-party's broadcast.

CONCLUSION

For all the reasons stated above, the decision below should be reversed. Ms. Radwan, as a female college athlete, should not be subjected to greater discipline than the mild or non-existent discipline that the University dispenses to male athletes for engaging in equal or more egregious conduct. The clear factual inference is that this discriminatory treatment was the product of gender stereotypes; at a minimum, the record creates a genuine issue of material fact on the question of discriminatory intent requiring a trial of Plaintiff's Title IX claims. Nor should Ms. Radwan, an

adult attending a university, have her First Amendment rights limited by the more expansive authority of K-12 schools to restrict the offensive speech of minors. Most importantly, the legal errors committed by the district court which led to its erroneous decision to grant summary judgment would, if not overturned, threaten the Title IX and First Amendment rights of students throughout the Circuit. This Court should not permit such a result to stand.

Dated: December 8, 2020

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CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit of Local Rules 29.1(c) and 32.1(a)(4)(A) because it contains 6,214 words, excluding the parts of the document exempted by Fed. R. App. P. 32(f).

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CERTIFICATE OF SERVICE FOR ELECTRONIC FILINGS

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed electronically on December 8, 2020 and will, therefore, be served electronically upon all counsel.

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APPENDIX: INTERESTS OF *AMICI CURIAE*

The **American Civil Liberties Union** ("ACLU") is a nationwide, nonprofit, nonpartisan organization with nearly 2 million members dedicated to the principles of liberty and equality embodied in the U.S. Constitution. Since its founding in 1920, the ACLU has frequently participated in free speech cases, both as direct counsel and as *amicus curiae*, including many cases involving speech by students. Through its Women's Rights Project, co-founded in 1972 by Ruth Bader Ginsburg, the ACLU has for many years advocated and litigated on behalf of students subjected to gender discrimination at every level of education.

The **American Civil Liberties Union Foundation of Connecticut** is the litigation arm of the ACLU of Connecticut. The ACLU of Connecticut, an affiliate of the national ACLU, is a non-partisan, non-profit organization that defends and promotes the civil liberties guaranteed by Connecticut and United States law.

The **California Women's Law Center** ("CWLC") is a statewide non-profit law and policy center whose mission is to create a more just and equitable society by breaking down barriers and advancing the potential of women and girls through transformative litigation, policy advocacy, and education. For more than 30 years, CWLC has placed particular focus on addressing the rights of female students under Title IX to receive the same athletic opportunities, treatment, and benefits as their male counterparts. CWLC has successfully represented many female students in

class action litigation across the state, we develop educational resources and we regularly conduct trainings for attorneys and members of the public on the rights of women and girls under Title IX.

Equal Rights Advocates ("ERA") is a national civil rights advocacy organization dedicated to protecting and expanding economic and educational access and opportunities for women and girls and gender expansive individuals. In service of its mission, ERA litigates class actions and other high-impact cases on issues of gender discrimination in employment and education. ERA has a long history of pursuing equality and justice for women and girls under Title IX through advocacy, legislative efforts, and litigation. ERA has served as counsel in numerous class and individual cases involving the interpretation of Title IX in the athletics and sexual harassment contexts. ERA also provides advice and counseling to hundreds of individuals each year through a telephone advice and counseling helpline, and has participated as amicus curiae in scores of state and federal cases involving the interpretation and application of procedural and substantive laws affecting the ability of students to obtain and enforce their equal rights under Title IX.

Legal Aid at Work ("LAAW") is a non-profit public interest law firm whose mission is to protect, preserve, and advance the employment and education rights of individuals from traditionally under-represented communities. LAAW has represented plaintiffs in cases of special import to communities of color, women, recent

immigrants, individuals with disabilities, the LGBTQ community, and the working poor. LAAW has litigated a number of cases under Title IX of the Education Amendments of 1972 as well as Title VII of the Civil Rights Act of 1964. LAAW has appeared in discrimination cases on numerous occasions both as counsel for plaintiffs, *see, e.g., National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002); *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391 (2002); *California Federal Savings & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987) (counsel for real party in interest); and *Ollier v. Sweetwater*, 768 F.3d 843 (9th Cir. 2014), as well as in an *amicus curiae* capacity. *See, e.g., U.S. v. Virginia*, 518 U.S. 515 (1996); *Harris v. Forklift Systems*, 510 U.S. 17 (1993); *International Union, UAW v. Johnson Controls*, 499 U.S. 187 (1991); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), and *Kassman v. KPMG, LLP*, No. 18-3728, 2019 WL 2498769, at *1 (2d Cir. Mar. 19, 2019). LAAW's interest in preserving the protections afforded to employees and students by this country's antidiscrimination laws is longstanding.

The **National Women's Law Center** (NWLC) 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 the full and fair enforcement of Title IX in athletics, 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 equal opportunity in all aspects of society.

The **Southwest Women's Law Center** ("SWLC") works to raise New Mexico's women and girls out of poverty, to secure equality and economic justice, and to ensure that New Mexico's women and girls have access to reliable information about, and unfettered access to, safe and legal reproductive healthcare. The SWLC is committed to the ideals represented by Title IX and supports aggressive and fair enforcement of Title IX and the life changing opportunities that come with it for women and girls. The Southwest Women's Law Center is committed to the elimination of all forms of discrimination, including gender and gender identity, race, national origin, sex, age, sexual orientation, religious affiliation, and physical and mental handicap.

The **Women's Law Project** ("WLP") is a Pennsylvania-based public interest legal advocacy organization that seeks to advance the legal, social, and economic status of all people regardless of gender. To that end, WLP engages in impact litigation and policy advocacy, public education, and individual counseling. WLP's

advocacy efforts include equity in education, athletics, employment, insurance, prisoner's rights, LGBTQ rights, sexual and domestic violence, reproductive health, and family law. The WLP has a strong interest in the eradication of discrimination against women and girls in athletics and the availability of strong and effective remedies under the law. Throughout its history, the WLP has played a leading role in efforts to eliminate sex discrimination in athletics and education, representing student athletes in their efforts to achieve equal treatment and equal opportunity and pursuing public policy and educational initiatives aimed at realizing Title IX's goal of equality in athletics.