20-2194

To Be Argued By:
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IN THE

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 and in their official capacities,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF OF THE DEFENDANTS-APPELLEES UNIVERSITY OF CONNECTICUT BOARD OF TRUSTEES, WARDE MANUEL, LEONARD TSANTIRIS, and MONA LUCAS

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2. Whether the District Court properly granted summary judgment for defendants on plaintiff's procedural due process claim because plaintiff had no protected property interest in her one-year athletic scholarship or, alternatively, because defendants are entitled to qualified immunity and plaintiff was provided all the process she was due.

3. Whether the District Court properly granted summary judgment for defendant University of Connecticut, Board of Trustees ("UConn"), on plaintiff's Title IX claim because she failed to establish a *prima facie* case of sex discrimination; and, alternatively, even if she had established a *prima facie* case, she failed to carry her burden of proof after UConn put forward legitimate non-discriminatory reasons for plaintiff's discipline.

STATEMENT OF THE CASE

Factual background

The plaintiff in this case is Noriana Radwan, whose one-year athletic scholarship to play soccer at the University of Connecticut was cancelled for serious misconduct when she showed her middle finger to a national television camera after a conference championship game.

The defendants are UConn's Board of Trustees, UConn women's soccer coach Leonidas Tsantiris, UConn Athletic Director Warde Manuel, and UConn Financial Aid Director Mona Lucas.

Plaintiff's one-year athletic grant-in-aid agreement from UConn expressly provided that it could be cancelled if plaintiff engaged in "serious misconduct"

In February 2014, plaintiff was offered and accepted a full out-of-state athletic scholarship – also known as a "grant-in-aid" – from UConn for the 2014-15 academic year. JA591-92¶¶17-18.[1] As specified in the financial aid agreement signed by plaintiff, the 2013-2014

[1] "JA" refers to Joint Appendix references. Where possible, in this section of the brief, the first citation is to the plaintiff's Rule 56(a)(2) Statement with paragraph numbers. Other citations are only to the Joint Appendix page numbers. Citations relating to student-athletes, other than plaintiff, refer to the Sealed Volume (Volume V) of the Joint Appendix and will be placed in parenthesis, e.g., (JA1045).

NCAA Bylaw ("NCAA Bylaw") 15.3.4.2 permits a member institution to cancel a student-athlete's athletic grant-in-aid during the term of the grant award under only four circumstances. JA591¶17, JA59, JA857. One such circumstance is when the student-athlete "engages in serious misconduct warranting substantial penalty." 15.3.4.2(c). JA857. Plaintiff became a member of the UConn women's soccer team and a full-time student at UConn in August 2014.

Plaintiff was required to comply with Student-Athlete Codes of Conduct and women's soccer team rules

All UConn student-athletes had to comply with a certification process specified in NCAA Bylaws 12.7 and 14.4 to be eligible to participate in intercollegiate athletics. JA92¶20. Plaintiff completed the certification process shortly after she arrived at UConn in August 2014. JA592¶21. As part of this certification process, plaintiff electronically signed a "Verification of Documents Received," acknowledging that the Student-Athlete Handbook was available online and that she understood it "explains my obligations and responsibilities as a student-athlete at the University of Connecticut." JA592¶21. She consented to the "obligation to read and understand the Student-Athlete Handbook." Id.

Importantly, every UConn student must comply with the "Responsibilities of Community Life: The Student Code," ("Student Code"). JA620¶116, JA274. Student-athletes are required to comply with the additional requirements contained in the Student-Athlete Handbook because "student-athletes enjoy privileges that other students do not and they are responsible for requirements that do not apply to other students, i.e., athletic eligibility requirements, media relations." JA591-92¶19.

The Student-Athlete Handbook[2] plaintiff was obliged to read and understand contained a student-athlete code of conduct that described unsportsmanlike behavior, including: "using obscene or inappropriate language or gestures to officials, opponents, team members or

[2] The grant-in-aid agreement incorporated the terms of the NCAA Bylaws; and the Student-Athlete Handbook summarized the NCAA Bylaws and the terms of the grant-in-aid agreement. JA58-59, JA82, JA591. The NCAA Bylaws and Student-Athlete Handbook also provided that a student-athlete was to be provided an opportunity for a hearing if the student-athlete's athletic grant-in-aid is nonrenewed for a subsequent academic year. JA82, JA131. A student-athlete's grant-in-aid may not be renewed for a variety of reasons that include, "inability to reach reasonable performance goals, exhibit problems of motivation or incompatibility with the coaching staff or teammates." JA82. Plaintiff incorrectly states (Appellant's Brief, p. 5) that the Student-Athlete Handbook did not contemplate that a student's athletic grant-in-aid could be cancelled mid-year.

spectators . . . [and] violating generally recognized intercollegiate athletic standards or the value and standards associated with the University as determined by your head coach and approved by the AD." JA 592-93¶22; JA73. It specified further that such behavior, like plaintiff's at issue here, would not be tolerated. Id.

Plaintiff was also subject to the women's soccer team rules (UConn Women's Soccer Contract) that were developed by defendant Tsantiris and his assistant coaches and approved by Sports Administrator Neal Eskin ("SA Eskin"). JA593-594¶24-25. The women's soccer team rules were in writing; they required the women's soccer team members to comply with all UConn, UConn Athletic Department and women's soccer program rules that concerned their conduct and behavior. JA594¶¶26-28, JA373-74.

The women's soccer coaches provided plaintiff and all women's soccer players the rules and plaintiff signed an acknowledgement of receipt and agreement page. Id. This acknowledgement provided that "should I fail to meet any of the criteria described in this contract . . . I accept and understand that I may be sanctioned, suspended, and/or released from the UConn Women's Soccer program at any time. I

understand that the coaching staff will constantly evaluate . . . and will be the judge of whether any of the above penalties should be imposed." JA587¶27.

Plaintiff Committed Serious Misconduct on National Television

Plaintiff committed serious misconduct in Florida at the end of the UConn-University of South Florida ("USF") American Athletic Conference ("AAC") Championship game on November 9, 2014, when she showed her middle finger to the ESPNU camera while the team was on the field celebrating their conference championship win. JA595¶¶29-30, JA17, JA365, JA412-13, JA464-468, JA310, JA318, JA321.

In defendant Tsantiris' 34 years of coaching UConn women's soccer, no athlete on his team had ever engaged in this conduct. JA596-97¶34. The incident was widely publicized. JA595¶30. Defendant Manuel learned about plaintiff's conduct when someone showed him a screen shot and video of plaintiff's gesture while he was in Hartford, Connecticut attending a UConn basketball game. JA595-596¶¶31-32, JA382-386. In his view, plaintiff's conduct publicly embarrassed her, the team, and UConn, as it was unsportsmanlike and disrespectful. JA596¶32.

The UConn Athletic Department issued a press release shortly after the game wherein defendant Tsantiris apologized to the conference, USF and everyone who watched the game on television. JA61. His statement made clear that plaintiff's poor sportsmanship "does not represent what we want our program to stand for." Id. *See also* JA597-598¶37, JA245-246, JA365-366, JA419-421.

On November 10, 2014, the Associated Press reported that UConn suspended plaintiff for "mak[ing] an obscene gesture to a television camera" after the AAC championship game and that defendant Tsantiris issued a statement apologizing for plaintiff's conduct. JA63.

The women's soccer coaching staff and UConn Athletic Department had to focus immediately on plaintiff's disruptive behavior instead of focusing on the team's achievement of winning the conference championship for the first time since 2004 and qualifying for the NCAA tournament for the first time since 2010. JA595-600¶¶29, 34-37, 39-43, JA17, JA60-61, JA365-366, JA412-421, JA464-465, JA469, JA245-246.

Plaintiff's behavior violated the student-athlete code of conduct (contained in the Student-Athlete Handbook), the women's soccer team rules/contract and the AAC's Code of Conduct. JA592-593¶¶21-22,

JA593-594¶¶24-28, JA599-600¶43, JA287-288, JA295, JA66-67, JA18, JA363-365, JA405-411, JA245, JA309, JA359, JA373-374, JA460-463.

UConn took immediate action in response to plaintiff's serious misconduct, ultimately cancelling her grant-in-aid

Defendant Tsantiris, in consultation with UConn Athletic Department staff, suspended plaintiff from all team activities immediately following her misconduct. JA597¶¶35-36, JA17, JA469, JA365, JA415-416, JA245-246.

Over the course of the next two days, Athletic Department staff members, SA Eskin and Senior Woman Administrator Deborah Corum ("SWA Corum"), responded to the AAC's concern that plaintiff violated the AAC code of conduct. JA598-600¶¶39-43. In fact, the AAC determined that plaintiff violated the AAC code of conduct and issued a reprimand to plaintiff. JA599-600¶41-43. Plaintiff was the only UConn student-athlete that the AAC reprimanded from 2013 to October 2019. JA600¶44, JA248.

Women's Assistant Soccer Coach Zachary Shaw advised plaintiff in November 2014 that her conduct on November 9, 2014, was serious and that it could impact her scholarship. JA601-602¶51, JA360-361. Then, in December 2014, defendant Tsantiris recommended cancelling

plaintiff's athletic grant-in-aid to SA Eskin after he consulted with his assistant coaches and understood that plaintiff's conduct met the standard for serious misconduct under the NCAA Bylaw.[3] JA605-06¶62(a), JA369, JA314-15, JA361; JA606-607¶64, JA249, JA369. SA Eskin supported defendant Tsantiris' recommendation to cancel plaintiff's athletic grant-in-aid due to her serious misconduct. JA607¶65, JA249, JA369.

SA Eskin, defendant Tsantiris and defendant Manuel met in December 2014 and discussed cancelling plaintiff's athletic grant-in-aid. JA607¶ 66, JA249, JA369, JA390. Defendant Manuel requested defendant Tsantiris and SA Eskin confirm with Athletics Compliance staff that plaintiff's grant-in-aid could be cancelled for serious misconduct under the NCAA Bylaws. Id. SA Eskin followed through with this request and confirmed that plaintiff's conduct was a sufficient basis to cancel the plaintiff's grant-in-aid for serious misconduct. Defendant Manuel made the final decision that plaintiff's athletic

[3] Defendant Tsantiris did not tell plaintiff prior to the end of the semester that he was considering recommending that her grant-in-aid be cancelled and that she be cut from the team because he did not want to affect plaintiff's performance on her final exams. JA603-604¶56, JA368.

grant-in-aid should be cancelled. JA607-608¶67, JA249, JA369, JA389-92, JA397-98.

UConn followed the appropriate process in cancelling plaintiff's grant in aid

On December 21, 2014, defendant Tsantiris called plaintiff and advised her that her grant-in-aid would be cancelled for serious misconduct. JA609-610¶¶73-75, JA326-27; *see also* JA989-90. He told her that if she needed help transferring to another school to join their soccer program, he could help her by talking to other coaches. JA608¶69, JA369, JA430-432. NCAA Bylaw 15.3.2.3 required the Office of Financial Aid ("Financial Aid") to provide plaintiff notice that her athletic grant-in-aid would be cancelled and provide her an opportunity to be heard as specified in UConn Financial Aid Hearing Procedure ("UConn hearing procedure"). JA855. The UConn hearing procedure specified that if a student requested a hearing within 14 days from the date of the notification letter, the student would be provided a hearing before a Financial Aid Hearing Committee. JA298. The Financial Aid Hearing Committee would be comprised of the Director of Financial Aid and two UConn staff persons selected by the Director of Financial Aid. Id. The UConn procedure complied with NCAA Bylaw 15.3.2.3. JA855.

The custom and practice of the Financial Aid and Athletics Compliance staff was that Athletics Compliance would prepare a cancellation letter for Director of Financial Aid Lucas' signature and either Ms. Lucas or her authorized representative would sign it. JA610-611¶78, JA288, JA489-491. Financial Aid would send the signed letter back to Athletics Compliance to distribute to the student-athlete via email and U.S. mail. Id.

UConn staff followed this process. Kimberly Campbell, defendant Lucas' authorized representative, signed the letter on December 22, 2014, because defendant Lucas was not in the office. JA611¶80, JA340, JA489-90, JA 288-89, JA296. The same day, Athletics Compliance staff member, Anne Fiorvanti, emailed the letter to plaintiff with a written copy of the UConn hearing procedures. JA611¶80.

The letter complied with NCAA Bylaw 15.3.2.3. JA855. It notified plaintiff that she had an opportunity to request a hearing if she felt that the cancelled aid was unfair or unjustified, and it included the UConn hearing procedures. JA855; JA611-612¶81, JA289. The letter stated in error that plaintiff had 14 business days from the date she received the letter to request a hearing in writing. JA612¶82, JA288-289, JA296,

JA493, JA495. But the UConn hearing procedures included with the letter, advised plaintiff she had 14 business days *from the date of the letter* to request a hearing in writing. Id.

On January 5, 2015, Suzanne Pare of UConn Financial Aid emailed plaintiff inquiring whether she would be requesting a hearing regarding her financial aid. JA618¶106, JA497-498, JA341.[4] On January 14, 2015, after the deadline for requesting a hearing and nine days after Ms. Pare's inquiry, plaintiff emailed UConn Financial Aid her request for a hearing. JA618¶108, JA24, JA137.

On January 23, 2015, defendant Lucas became aware that plaintiff had requested a hearing. JA618¶109, JA503-505, JA518-520, JA342-43. Financial Aid consulted with Athletics Compliance about whether a Financial Aid Hearing Committee needed to provide the plaintiff with a hearing, and Athletics Compliance advised that no hearing was required because plaintiff's request was not timely submitted within 14 business days of the December 22, 2014, letter. Id. On this basis, defendant Lucas denied plaintiff's request for hearing

[4] Plaintiff did not respond to this email until February 6, 2015. JA619¶112, JA499, JA515, JA341.

and so notified her in a letter dated January 29, 2015. JA619¶110, JA24, JA138-139, JA500-502, JA509-510, JA517, Dkt.15 ¶44. Ms. Pare also emailed plaintiff the hearing denial letter on February 6, 2015. JA619¶113, JA506, JA514, JA341.

Plaintiff transferred to Hofstra University and joined its soccer team

On December 23, 2014, plaintiff began contacting other Division I soccer coaches seeking to transfer from UConn and to play soccer at their schools. JA613¶86, JA455. Defendant Tsantiris, and Assistant Coaches Rodriguez and Shaw helped plaintiff find a soccer program that she could transfer to in Spring 2015. JA613-615¶¶87-90, ¶94, JA251-52, JA316-17, JA328-29, JA361, JA370-71, JA376, JA433-36, JA523-26, JA532-33.

On January 7, 2015, plaintiff accepted the offer of Hofstra University women's soccer coach, Simon Riddiough, for athletic grant-in-aid to transfer to Hofstra and join the women's soccer team. JA614¶92, JA459, JA527-529, JA538. Plaintiff confirmed via text message to Assistant Coach Rodriguez on January 9, 2015 that she was transferring to Hofstra. JA615¶95, JA317, JA336-337.

On January 21, 2015, plaintiff received a written athletic grant-in-aid offer from Hofstra that she signed and accepted on January 22, 2015. JA617¶103, JA470-471, JA577-78. Plaintiff started classes at Hofstra on January 27, 2015. JA617¶105, JA441. From Spring 2015 until 2018, plaintiff was a member of the Hofstra's women's soccer team and received approximately 73% of full athletic grant-in-aid. JA617¶104, JA577-86. Plaintiff graduated from Hofstra in 2018. Id.

PROCEDURAL BACKGROUND

On December 19, 2016, plaintiff brought a federal action in the District of Connecticut against UConn and its employees, defendant Tsantiris, defendant Manuel and defendant Lucas. JA13. She alleged both statutory Title IX violations and constitutional violations under the First Amendment, the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

On December 14, 2017, the District Court dismissed plaintiff's constitutional claims against UConn and her claims against the individual defendants in their official capacities. JA221. Defendants then moved for summary judgment on all remaining claims; and plaintiff cross-moved for summary judgment on all claims, except Title

IX. Dkts. 90 (91), 102. After full briefing, the District Court on June 6, 2020, granted summary judgment in favor of defendants on all claims. JA976-1034. Plaintiff filed a Notice of Appeal on July 3, 2020. JA1035.

SUMMARY OF ARGUMENT

This case is about UConn, defendant Manuel and defendant Tsantiris' decision to discipline the plaintiff, a UConn women's soccer player, for showing her middle finger on national television at the conclusion of a UConn women's soccer game. Plaintiff made this gesture to an ESPNU camera when the team was celebrating their AAC championship. JA595.

The District Court correctly held that UConn and its employees acted lawfully and constitutionally when they disciplined plaintiff for showing her middle finger to an ESPNU camera. The grant of summary judgment to defendants on all grounds should be affirmed, for three reasons.

First: There is no clearly established and controlling precedent barring universities from disciplining student-athletes who publicly embarrass a school and invite national scrutiny by making an obscene gesture on national television. Thus, the District Court correctly held

that defendant Manuel and defendant Tsantiris were entitled to qualified immunity on plaintiff's First Amendment claim.[5]

Second: Plaintiff had no protected property interest in her one-year athletic scholarship, so the District Court correctly ruled against her procedural due process claim. Even if plaintiff had a protected property interest, she received all the process she was due. In the alternative, the District Court correctly held that the defendants were entitled to qualified immunity because there is no controlling, clearly established precedent holding that a limited-term, revocable, college athletic scholarship gives rise to a constitutionally protected property interest.

Third, and finally: The District Court properly rejected plaintiff's Title IX claim. She is limited here to the sole basis of her claim below, where she claimed that she was subject to selective disciplinary enforcement. The District Court correctly held that plaintiff could not

[5] Plaintiff does not challenge the District Court's decision to grant defendant Lucas summary judgment on her First Amendment claim. As the record of evidence demonstrated below, defendant Lucas was not personally involved in the decision to terminate plaintiff's athletic grant-in-aid and she was not aware of the circumstances that even led to the UConn Athletic Department's decision. JA1033.

make out a *prima facie* case for selective enforcement because she pointed to no male student-athletes who were similarly situated to her in all material respects and treated more favorably than her. Alternatively: Even if plaintiff had made out a *prima facie* case, UConn carried its burden of putting forward legitimate non-discriminatory reasons for disciplining her, and plaintiff failed to show that UConn's stated reasons were pretextual. JA1009-1011.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews the District Court's grant of summary judgment *de novo*. Fincher v. Depository Trust & Clearing Corp., 604 F.3d 712, 720 (2d Cir. 2010). It is proper to grant a motion for summary judgment when there is no genuine issue as to any material fact, and it is clear that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action." Id. at 327 (internal

quotation marks and citations omitted). On appeal, the non-moving party must show that there is a genuine dispute as to material facts. Niagara Mohawk Power Corp. v. Jones Chem., Inc., 315 F.3d 171, 175 (2d Cir. 2003).

As this Court has noted, where the plaintiff alleges discrimination, a District Court considering summary judgement motions must "carefully distinguish between evidence that allows for a reasonable inference of discrimination and evidence that gives rise to mere speculation and conjecture. . . Thus, the question is whether the evidence can reasonably and logically give rise to an inference of discrimination under all the circumstances." Bickerstaff v. Vassar College, 196 F.3d 435, 448 (2d Cir. 1999). The nonmoving party cannot rely on "mere speculation or conjecture" or "conclusory allegations or denials," but instead must offer specific evidence sufficient to create a genuine issue of material fact. Hicks v. Baines, 593 F.3d 159, 166 (2d Cir. 2010). "Unsupported allegations do not create a material issue of fact," Weinstock v. Columbia Univ., 224 F.3d 33, 41 (2d Cir. 2000) (citations omitted), and self-serving, conclusory and unsubstantiated assertions are inadequate to defeat summary judgment. *See, e.g.*,

Kulak v. City of New York, 88 F.3d 63, 71 (2d Cir. 1996); Alteri v. General Motors Corp., 919 F. Supp. 92, 94-95 (N.D.N.Y) (to survive a motion for summary judgment, the non-moving party . . . must submit *specific, concrete evidentiary support* for any claims that a material issue of fact exists requiring trial) (emphasis added).

II. THE DISTRICT COURT CORRECTLY HELD THAT THE DEFENDANTS WERE ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFF'S FIRST AMENDMENT CLAIM

The District Court correctly held that defendant Manuel and defendant Tsantiris were entitled to qualified immunity on plaintiff's First Amendment claim because no Supreme Court or Second Circuit authority in 2014 clearly established that a student-athlete representing her team and university on the playing field had a First Amendment right to make an obscene/lewd gesture to a national television camera. Additionally, within the context of existing Supreme Court and Second Circuit precedent, it was objectively reasonable for the defendants to believe their actions were lawful.

A. The Doctrine of Qualified Immunity Shields Government Officials Whose Conduct did not Violate Clearly Established Rights

Qualified immunity is both a defense to liability and a limited entitlement not to stand trial or face the other burdens of litigation. Garcia v. Does, 779 F.3d 84, 91, 97 (2d Cir. 2015). Qualified immunity protects government officials unless the official (1) violated a statutory or constitutional right that (2) was clearly established at the time of the challenged conduct. Taylor v. Barkes, 575 U.S. 822, 135 S. Ct. 2042, 2044 (2015) (citing Reichle v. Howards, 566 U.S. 658, 663 (2012)). To determine whether the defendants are entitled to qualified immunity the court is not required to decide first whether there is a constitutional violation before deciding whether the statutory or constitutional right is clearly established. Pearson v. Callahan, 555 U.S. 223, 236 (2009). If the court determines that either prong is not satisfied, it need not reach the other. Id. at 236.

Whether a right is clearly established at the time the defendants acted depends upon whether: "(1) [the right] was defined with reasonable clarity, (2) the Supreme Court or the Second Circuit has confirmed the existence of the right, and (3) reasonable defendant[s]

would have understood that [their] conduct was unlawful. Id.; *see also* Wilson v. Layne, 526 U.S. 603, 615-17 (1999).

Whether the Defendants are entitled to qualified immunity is determined by looking at the law as it existed at the time of the Defendant's actions or decisions. Doninger v. Niehoff, 642 F.3d 334, 345 (2d Cir. 2011). And, most relevantly here: "The clearly established right must be defined with specificity." City of Escondido, Cal. v. Emmons, 139 S. Ct. 500, 503 (2019). It is not enough that a plaintiff can point to a "broad general proposition" that the defendants allegedly contravened. Doninger, 642 F.3d at 345 (quoting Saucier v. Katz, 533 U.S. 194, 201 (2001)). Instead, "when faced with a qualified immunity defense, a court should consider the specific scope and nature of a defendant's qualified immunity claim. That is, a determination of whether the right at issue was clearly established must be undertaken in light of the specific context of the case." Id.

B. The District Court Correctly Held that the Plaintiff's First Amendment Right was Not Clearly Established When She Showed her Middle Finger to an ESPNU Camera While She was Representing UConn as a Member of the Women's Soccer Team[6]

The District Court held that defendants Tsantiris and Manuel were entitled to qualified immunity on the basis that the law was not clearly established that defendants violated plaintiff's First Amendment right. JA1026-27, 1032. The District Court correctly reached this conclusion after reviewing Supreme Court and Second Circuit precedent involving restrictions on student speech. No Supreme Court or Second Circuit authority existed in 2014 that clearly established a constitutional violation here.

Plaintiff cannot and does not cite any case in which the Supreme Court or this Court held that a collegiate athletic director and coach cannot constitutionally discipline a student-athlete for making an obscene/lewd gesture to a television camera while representing the university on the playing field.

Instead of citing controlling precedent about the "specific context,"

[6] The District Court made no determination whether defendants violated plaintiff's First Amendment right. JA1026-1032.

Doninger, 642 F.3d at 345, plaintiff tries to cobble together a rule from easily distinguishable Supreme Court precedent that speaks to entirely different contexts. Plaintiff points to cases where courts hold it is a First Amendment violation to be arrested or charged criminally for showing one's middle finger; and cases wherein the court considered prohibitions based on "viewpoint discrimination." In these viewpoint cases, the courts (1) addressed whether a university may deny student groups access to university resources or funding on the basis of their viewpoints; (2) held that a public school that provided private groups access to school property after hours could not prohibit access to a group that sought to show a film on family values from a religious perspective when the subject (family values) was otherwise permitted and the restriction was solely based upon the religious viewpoint; and (3) determined that a provision of federal trademark law (the disparagement provision of the Lanham Act) was unconstitutional. (Appellant's Brief, pp. 20-25).

The general principles contained in these inapposite cases, fail to provide defendant Manuel and defendant Tsantiris with clear notice that they would violate plaintiff's First Amendment right by

disciplining her for her televised obscene/lewd gesture. (Appellant's Brief, pp. 20-25).

C. Existing Supreme Court and Second Circuit First Amendment Caselaw Relating to Restrictions on Students' Speech Did Not Clearly Establish a Rule in this Case and it was Objectively Reasonable for the Defendants to Believe Their Actions Were Lawful

The Supreme Court has enunciated four principles to guide the assessment of whether a restriction on student speech is constitutionally permissible in school settings. R.O. v. Ithaca City Sch. Dist., 645 F.3d 533, 540-41 (2d Cir. 2011). Only two of the four are relevant to the present case: the principles that emerge from Tinker v. DesMoines Indep. Community. Sch. Dist., 393 U.S. 503, 513 (1969) and Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 685 (1986).

In Tinker, school officials sought to suspend students for silently protesting the Vietnam War by wearing black armbands at their high school. Id. The court held that student speech that occurs on campus may be restricted if the speech will "materially and substantially disrupt the work and discipline of the school." Id. at 513. School officials' ability to restrict student speech under this standard applies even when school officials seek to restrict expression of only one

viewpoint. Id. at 511 ("[T]he prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible").

Fraser established that schools have wide discretion to prohibit speech that is vulgar, lewd, indecent or plainly offensive. Fraser, 478 U.S. at 685; Collins v. Putt, 979 F.3d 128,133 n.2 (2d Cir. 2020). Under Fraser, "a school may categorically prohibit lewd, vulgar or profane language." Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 214 (3d Cir. 2001) (Alito, J.). Thus, confronted with vulgar, lewd, and offensive speech, school officials are not required to meet the "substantial disruption standard" contained in Tinker because the restriction on student's speech is "unrelated to any political viewpoint." Guiles v. Marineau, 461 F.3d 320, 325 (2d. Cir. 2006) (quoting Fraser, 478 U.S at 685).

The Court in Fraser noted the interest of public schools in restricting vulgar and offensive speech in public discourse, to "inculcate the habits and manners of civility" and to not "surrender control" to their students. Id. at 681, 683, 686. The Court further held, "[n]othing

in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions. The inculcation of these values is truly the work of the schools." Id. at 683 (quoting Tinker, 393 U.S. at 508).

Significantly, the Supreme Court's holding in Fraser reversed the Ninth Circuit's decision that a student could not be disciplined for lewd speech at a school assembly based upon Tinker's holding that students "do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." Fraser at 680 (quoting Tinker, 393 U.S. at 506). The Court observed that the Ninth Circuit gave little weight to "the marked distinction between the political 'message' of the armbands in Tinker and the sexual content of Fraser's speech. . . ." Fraser, at 680.

No post-Fraser cases apply the Court's First Amendment jurisprudence to the university setting. But the Court did consider university student speech in two cases decided over twelve years *prior* to Fraser, Healy v. James, 408 U.S. 169, 188-89 (1972) and Papish v. Bd. of Curators of the Univ. of Mo., 410 U.S 667 (1973).

Healy concerned the state university's recognition of a student organization. Id. at 180, 189. The Court explained that, "where state-operated educational institutions are involved, this Court has long recognized 'the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.' " Id. at 180 (quoting Tinker, 393 U.S. at 507). Healy also reiterated that "First Amendment rights must always be applied 'in light of the special characteristics of the . . . environment' in the particular case." Id. at 180 (quoting Tinker, 393 U.S. at 507).

In Papish the Supreme Court considered the First Amendment rights of a graduate journalism student who was expelled for distributing an underground newspaper on campus that depicted a political cartoon of a policeman raping the Statute of Liberty and the Goddess of Justice and an article that was entitled "M----- F------ Acquitted." Id. at 667-68. The Court referred to the Tinker standard and held "in the absence of any disruption of campus order or interference with the rights of others, the sole issue was whether a state university could proscribe this form of expression." Id. at 670 and n. 6.

A divided court held that "the mere dissemination of ideas – no matter how offensive to good taste – on a state university campus may not be shut off in the name alone of 'conventions of decency.'" Id. at 670. But Papish does not clearly establish a rule that applies in the specific context of plaintiff's case.

First: The Second Circuit has taught that there is no clearly applicable rule for student speech in light of Fraser and Tinker. In Doninger, 642 F.3d at 353-54, this Court observed that "[i]t is not entirely clear whether Tinker's rule (as opposed to other potential standards) applies to all student speech not falling within the holding of Fraser, Hazelwood, or Morse." Id.; *see also* Morse v. Frederick, 551 U.S. 393, 401 (2007). Further, in Doninger, this Court acknowledged that, "[t]he law governing restrictions on student speech can be difficult and confusing, even for lawyers, law professors, and judges. The relevant Supreme Court cases can be hard to reconcile, and courts often struggle to determine which standard applies in any particular case." Doninger, 642 F.3d at 353-54.[7]

[7] Other Circuit Courts of Appeal have held that it is unclear the extent to which a university student's "expressive conduct" can be restricted by university officials and there is no controlling Second Circuit precedent.

Second: This context is sufficiently different from any Supreme Court precedent that it was objectively reasonable for defendants here to believe their conduct was lawful. Plaintiff was not disciplined because she expressed a political or religious view – she was disciplined because she showed her middle finger to a television camera while she was on the playing field representing UConn and the women's soccer team. JA606-608, JA249, JA314-15, JA317, JA361, JA369-72, JA397-98, JA389-92, JA427-28.

Plaintiff committed a violation serious enough to result in a reprimand from the Conference – a sanction that no other UConn student-athlete had ever received. JA600¶44, JA248. Here, where a

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Most recently, the Tenth Circuit held that individual medical school defendants were entitled to qualified immunity under the "clearly established" prong of qualified immunity for discipline that they imposed on a medical student for posting a political post on social media that used inflammatory and expletive language that violated the medical school's standards of professionalism contained in various campus policies. Hunt v. Board of Regents of University of New Mexico, 792 F. App'x. 595 (10th Cir. 2019). With regard to Supreme Court precedent the Tenth Circuit held "[w]e conclude that the Supreme Court's K-12 cases of Tinker, Fraser, Hazelwood, and Morse, and its university cases of Papish and Healy fail to supply the requisite on-point precedent." Id. at 22-23; s*ee also* DeJohn v. Temple Univ. 537 F.3d 301, 315 (3d Cir. 2008); and Hosty v. Carter, 412 F.3d 731 (7th Cir. 2005).

student-athlete made a lewd/obscene gesture that violated university and AAC codes of sportsmanship[8] (Fraser) and disrupted the Athletic Department and took their focus away from the team's success and preparation (Tinker), it was objectively reasonable for the college athletic director and coach to believe they had leeway "to operate as the circumstances demand when confronted with [plaintiff's] speech" in disciplining plaintiff.[9] *See* Hunt v. Bd. of Regents, 792 F. App'x. 595,

[8] Plaintiff for the first time on appeal raises in a footnote (Appellant's Brief, p. 24, n.4) the general claim that cancelling plaintiff's scholarship on the basis of "serious misconduct," is unconstitutionally vague and overbroad. The court should not address this issue and deem it waived because it was not raised at the District Court and it is not sufficiently briefed here in her appeal. *See* United States v. Botti 711 F.3d 299, 313 (2d Cir. 2013); Tolbert v. Queens Coll., 242 F.3d 58, 76 (2d Cir. 2011). Nonetheless, plaintiff had sufficient notice that her obscene/lewd gesture on the playing field was a clear violation of numerous codes of conduct that applied to her as a student-athlete and violation of these rules could result in termination of her athletic grant-in-aid. JA592-93, JA594, JA598-599.

[9] Plaintiff argues that defendants had "impermissible motives" when they disciplined plaintiff because they found her speech to be embarrassing to herself, UConn, the team and UConn Athletic Department. (Appellant's Brief, pp. 22-24). This is not a basis to deny defendants qualified immunity under a Tinker-related defense. In Doninger, this Court held, "our case law has not clearly established motive as an element of any Tinker-related claim or defense." Doninger, 642 F.3d at 334, 352 n.11. "As a result, any factual dispute as to" defendant Manuel's or defendant Tsantiris' motives "does not preclude the conclusion" that their "conduct was objectively reasonable and

605(10th Cir. 2019) .

Contrary to plaintiff's contention, upholding summary judgment for the defendants on the "clearly established" prong of qualified immunity would not have a far-reaching impact on college student speech. The District Court's ruling simply holds that under the circumstances of this case, it was objectively reasonable for the defendants to believe that they did not violate plaintiff's First Amendment right. Plaintiff's conduct was markedly different from her example of a student who is in the quad celebrating her university athletic team's victory or wearing a vulgar t-shirt on campus. Such students are: (1) not required to comply with various codes of conduct that apply to student-athletes; (2) not subject to the authority of the Athletic Department or its personnel; and (3) not officially representing the university in inter-collegiate play.

That last point is crucial. Plaintiff would have it that universities cannot preserve their reputational and academic interests by disciplining students who choose to offend and insult the public while

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entitled to qualified immunity." Id. (citing Crawford-El v. Britton, 523 U.S. 574, 588 (1998)).

wearing the university's uniform. Nevertheless, they can. To hold otherwise would create an unsustainable rule for public colleges and universities. Contrary to plaintiff's hypothesized nightmare scenario, affirming the District Court's ruling would not affect university students' First Amendment rights.

III. THE DISTRICT COURT CORRECTLY GRANTED SUMMARY JUDGMENT FOR INDIVIDUAL DEFENDANTS ON PLAINTIFF'S PROCEDURAL DUE PROCESS CLAIM

Plaintiff's procedural due process claim fails for three reasons. First: As the District Court correctly held, she did not have a constitutionally protected property interest in her one-year athletic scholarship. Second: Even if plaintiff did have a protected property interest, she received all the process that she was due. Third: In the alternative, the District Court properly determined that the individual defendants were entitled to qualified immunity because no Supreme Court and Second Circuit precedent in 2014 clearly established that students have a constitutionally protected property interest in athletic grants-in-aid. JA1022 n.4.

A. Plaintiff's Athletic Grant-In-Aid Was Not A Protected Property Interest

Established Second Circuit caselaw supports the District Court's holding that plaintiff had no protected property interest in the athletic grant-in-aid. JA1019-22. Because the pertinent caselaw did not support her position below, plaintiff now points to inapplicable caselaw involving public employment contracts, welfare benefits and student suspension and expulsion from public school; and argues that her athletic grant-in-aid involves an equivalent "protected" property interest under the due process clause. (Appellant's Brief, pp. 33-38). Before the District Court, plaintiff relied upon dicta in cases outside the Second Circuit to support her assertion that athletic grant-in-aid was a protected property interest, although the courts in none of the cited cases reached such a conclusion.

To succeed on her Fourteenth Amendment procedural due process claim, plaintiff must establish that state action deprived her of a "protected property interest" without the constitutionally requisite process. *See* Victory v. Pataki, 814 F.3d 47, 59 (2d Cir. 2016). Property interests that are protected by the Due Process Clause of the Fourteenth Amendment are created or defined by "existing rules or

understandings that stem from an independent source such as state law. . . .” Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972). Here, plaintiff makes no claim that she had a property interest established by a state statute or regulation, but instead argues that her grant-in-aid agreement was a contract that established an entitlement to grant-in-aid from UConn. Plaintiff alleged in her complaint that her “contract with Defendant UConn created a property interest both in its protection against cancellation absent serious misconduct or other conditions and in the completion of its terms.” JA39¶103. As the District Court held, her grant-in-aid agreement created no such interest.

Plaintiff claims three different sources for her property interest: the grant-in-aid agreement, the NCAA Bylaws, and the Student-Athlete Handbook (Appellant’s Brief, pp. 35-36). But the grant-in-aid agreement merely incorporated the terms of the NCAA Bylaws, and the Student-Athlete Handbook summarized the NCAA Bylaws and terms of the grant-in-aid agreement as it related to cancelling athletic grant-in-aid during the period of the award. JA58-59, JA82, JA591. Thus, plaintiff is

left claiming that the grant-in-aid agreement conferred a constitutionally cognizable contractual benefit.[10]

Not every contract benefit rises to the level of a constitutionally protected property interest. Ezekwo v. NYC Health and Hospitals Corp., 940 F. 2d 775 (2d Cir. 1991). "It is neither workable nor within the intent of section 1983 to convert every breach of contract claim against a state actor into a federal claim." Id. at 782*; see also* Costello v. Town of Fairfield, 811 F.2d 782, 784 (2d Cir. 1987). Ordinary or routine contracts do not, by themselves, give rise to a protected property interest. Gizzo v. Ben-Habib, 44 F. Supp. 3d. 374, 385 (S.D.N.Y. 2014); *see also* Res. Servs., LLC v. City of Bridgeport, 590 F. Supp. 2d 347, 358 (D. Conn. 2008) (quoting Martz v. Inc. Vill. of Valley Stream, 22 F.3d 26, 31 (2d. Cir. 1994)).

[10] Plaintiff had no statutory right and points to no statue that would support a constitutionally protected property interest in her grant-in-aid. Plaintiff is unlike the plaintiff in Goss v. Lopez, 419 U.S. 565, (1975), who had a protected right to middle school public education that was statutorily required under Ohio law; the plaintiff in Goldberg v. Kelly, 397 U.S. 254, 263-64 (1970), who had a right to welfare benefits conferred by statute; or the plaintiff in Bd. of Regents v. Roth, 408 U.S. 564, (1972) who had a statutory entitlement to tenure in public employment.

The two distinguishing characteristics of contracts that give rise to a protectable property interest are extreme dependence and permanence: the contract "protects its holder from the state's revocation of a status, an estate within the public sphere characterized by a quality of either extreme dependence in the case of welfare benefits [Goldberg v. Kelly, 397 U.S. 254 (1970)], or permanence in the case of tenure [Roth], or sometimes both." Gizzo, 44 F. Supp. 3d, at 385 (quoting S&D Maintenance Co. v. Goldin, 844 F.2d 962, 966 (2d. Cir. 1988)*; see also* Walentas v. Lipper, 862 F.2d 414, 418-19 (2d. Cir. 1988).

In applying these principles to the facts of the present case, the District Court correctly held that plaintiff's grant-in-aid funds for spring 2015 "did not have the qualities of 'dependence' or 'permanence' required for it to create a constitutionally protected property interest." JA1021.

The contract was for one year of grant-in-aid that could be immediately reduced or cancelled during the term of the award if plaintiff engaged in serious misconduct. JA591. Although the grant-in-aid was subject to renewal, this term does not convert plaintiff's contract into a protected property interest. Plaintiff's cancelled grant-in-

aid did not affect her right to continued enrollment at UConn. JA612. Indeed, had plaintiff chosen to stay at UConn, rather than transfer to Hofstra, she would have been like thousands of UConn students who secure their own funding for university attendance every semester.

Plaintiff's purported reliance on grant-in-aid to avoid having to take out student loans or seek some form of a financial contribution from her parents cannot be compared to the plaintiff's dependence on welfare benefits; a taxi license which provided the sole means of income for individuals and their families at issue in Nnebe v. Daus, 931 F.3d 66, 88 (2d Cir. 2019) ; or the chief resident post in a medical residency program, considered in Ezekwo, 940 F. 2d 775. (Appellant's Brief, pp. 34, 37, 46-48).

In Ezekwo, this Court treated the chief residence position as a prestigious employment opportunity that the plaintiff would not have a second opportunity to attain in her career. Id. Unlike the plaintiff in Ezekwo, plaintiff's athletic grant-in-aid was not an employment[11]

[11] As the District Court acknowledged, the Second Circuit and Supreme Court have held that employment contracts may give rise to protected property interest. JA1021. *See* Roth, 408 U.S. at 576-77; Perry v. Sindermann, 408 U.S. 593, 602-603 (1972). In so holding, the "[Supreme] Court has carefully limited the rule to situations which

opportunity, and plaintiff had – and took advantage of – more than one opportunity to obtain athletic grant-in-aid to attend a college or university. In fact, she received athletic grant-in-aid to attend Hofstra University within a few weeks of her cancelled UConn athletic grant-in-aid. JA617.[12]

Accordingly, the District Court correctly held that plaintiff's one-year athletic grant-in-aid failed to establish a constitutionally protected property interest, and thus the individual defendants are entitled to summary judgment on this claim.

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involve [employment] contracts with tenure provisions and the like, or where a clearly implied promise of continued employment has been made." Walentas v. Lipper, 862 F.2d 414, 418 (2d Cir. 1988) (internal citations omitted).

[12] Plaintiff cites to no case that holds a cancelled student's scholarship amounts to constructive expulsion. Indeed, to accept plaintiff's argument would mean that only student-athletes whose families cannot afford to pay for college would have a protected property interest in athletic grant-in-aid.

B. Even If the Due Process Clause Were Implicated In This Case, The Defendants Provided The Plaintiff All The Process That Would Have Been Due Under The Fourteenth Amendment

1. The record demonstrates that plaintiff was provided notice and an opportunity for a hearing and all the procedures specified under the grant-in-aid agreement and NCAA Bylaws

UConn Financial Aid staff and Athletics Compliance provided notice to plaintiff that her grant-in-aid "will be cancelled" because of serious misconduct and she was provided an opportunity to be heard as specified in the UConn Hearing Procedure. JA611, JA297-99, JA125. The UConn procedure specified that if timely requested, plaintiff would be provided a hearing before a Financial Aid Hearing Committee comprised of the Director of Financial Aid (defendant Lucas) and two UConn staff persons selected by defendant Lucas. JA609-610, JA612, JA297-99.

Defendant Lucas and her staff provided the plaintiff all the process required under the NCAA Bylaws[13] and UConn hearing

[13] NCAA Bylaw 15.3.4 specified the circumstances under which a member institution may cancel or reduce athletic grant-in-aid during the period of the award (i.e., during the academic year). This NCAA Bylaw provided that an institution may cancel a student-athlete's athletic grant-in-aid if the student-athlete: (a) renders himself or

procedure. The NCAA Bylaws did not specify which university entity must preside over a student's timely request for a hearing. Rather, they directed NCAA members to develop procedures that designate the responsibility outside of the athletics department and its faculty

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herself ineligible for intercollegiate competition; (b) fraudulently misrepresents any information on an application, letter of intent, or financial aid agreement; (c) engages in serious misconduct warranting substantial disciplinary penalty; (see 15.3.4.2.4); or (d) voluntarily (on his or her own initiative) withdraws from a sport at any time for personal reasons. JA857.

NCAA Bylaw 15.3.4.2.1 further provides that cancellation of aid during the period of the award may occur only after the student-athlete has been provided an opportunity for a hearing per NCAA Bylaw 15.3.2.3.

NCAA Bylaw 15.3.2.3. JA855, provides:

> **Hearing Opportunity.** The institution's regular financial aid authority shall notify the student-athlete in writing of the opportunity for a hearing when institutional financial aid based in any degree on athletics ability is reduced or canceled during the period of the award, or is reduced or not renewed for the following academic year. The institution shall have established reasonable procedures for promptly hearing such a request and shall not delegate the responsibility for conducting the hearing to the university's athletics department or its faculty athletics committee. The written notification of the opportunity for a hearing shall include a copy of the institution's established policies and procedures for conducting the required hearing, including the deadline by which a student-athlete must request such a hearing.

athletics committee. NCAA Bylaw 15.3.2.3. JA855. UConn's procedures complied with NCAA Bylaw 15.3.2.3. JA298-299.

Financial Aid staff provided plaintiff written notice that her scholarship will be cancelled for serious misconduct. JA611-12, JA297. This notice and UConn hearing procedures advised her that if she requested a hearing in writing within 14 business days from the date of the letter, she would be provided a hearing before the Financial Aid Hearing Committee. JA611-12, JA296-299. Plaintiff's written request for hearing was untimely and, therefore, defendant Lucas properly denied her request. JA619. [14] JA24¶44, JA137; Dkt.15 ¶¶ 44,45; JA611-12, JA618-19. *See* Milo v. University of Vermont, No. 2:12-cv-124, 2013 WL 4647782 *10 (D. Vt. Aug. 29, 2013) (male hockey player was not denied due process where he failed to request a hearing to challenge his dismissal from the team).

Plaintiff mistakenly argues that the NCAA Bylaws (grant-in-aid and Student-Athlete Handbook) required the regular student

[14] Plaintiff's untimely request for hearing on January 14, 2015, was made the same day that she cancelled her enrollment from UConn and the day after she sought a release from her National Letter of Intent to UConn. JA616, JA618.

disciplinary body (UConn's Office Of Community Standards) to determine whether a student-athlete engaged in serious misconduct, and, ultimately, whether a student-athlete's grant-in-aid may be cancelled. JA620. (Appellant's Brief, pp. 42-43). Plaintiff's insistence that only UConn's Office of Community Standards could make a serious misconduct finding stems from a misreading of the NCAA Bylaws, and relies on a provision that defines misconduct, not serious misconduct. The NCAA Bylaw plaintiff relies upon provides that "[a]n institution may cancel or reduce the financial aid of a student-athlete who is found to have engaged in misconduct by the university's regular student disciplinary authority, even if the loss of aid requirement does not apply to the student body in general." NCAA Bylaw 15.3.4.2.4.[15] JA857.

[15] Moreover, 2015 NCAA Bylaw amendments, applicable only to autonomous conference members (UConn is not an autonomous member, JA588) undermine plaintiff's interpretation of the 2013-14 NCAA Bylaws. The 2015 NCAA Bylaw amendments provide that autonomous members may cancel athletic grant-in-aid if the student athlete "engaged in serious misconduct warranting substantial disciplinary penalty, as determined by the institution's regular student disciplinary body." 2015 NCAA Bylaw 15.3.5 JA869, 879-81. There would have been no need for the autonomous members to amend this provision as it applies to them if the 2013-14 Bylaws already specified this requirement. Further, the 2015 NCAA Bylaws that govern non-autonomous member's ability to cancel grant-in-aid because of a

This NCAA Bylaw does not require the university's regular disciplinary authority to determine that a student has engaged in misconduct as a precondition to determining that student has engaged in serious misconduct. Rather, it permits the university to cancel grant-in-aid when the university's regular student disciplinary authority determines that the student-athlete engaged in misconduct. Nonetheless, under any circumstance, the NCAA Bylaws only require the university to provide the student-athlete notice and an opportunity for a hearing pursuant to the university's established procedures when the university seeks to cancel a student's grant-in-aid because the student has engaged in serious misconduct. UConn's hearing procedures provide that the student-athlete may have a hearing before a Financial Aid Hearing Committee if the student makes a timely request for a hearing. NCAA Bylaw 15.3.2.3. JA298-299.

Although plaintiff cites to deposition testimony of Catherine Cocks to argue that plaintiff's conduct should have been referred to the Office of Community Standards (Appellant's Brief, p. 43 n.7), Ms. Cocks says

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student's serious misconduct remained the same as the 2013-14 NCAA Bylaws. *See also* Dkt.106, pp. 16-17.

the exact opposite. Ms. Cocks testified that when she was director of the Office of Community Standards, she did not receive, nor did she expect to receive, referrals from the Athletic Department about a student-athlete's on-field misconduct, including unsportsmanlike conduct or athletics-related misconduct. JA620, JA552-54.[16]

Ms. Cocks' expectation that the Office of Community Standards would not receive these types of referrals from the Athletic Department logically flows from the undisputed evidence in the record that all student-athletes are subject to standards that don't apply to other

[16] According to plaintiff's misinterpretation of the NCAA Bylaws, her grant-in-aid could only be cancelled for serious misconduct if she violated the UConn Student Code. (Appellant's Brief, pp. 42-44). It is undisputed that Coach Tsantiris and AD Manuel's recommendation and decision, respectively, to cancel plaintiff's scholarship were not based on their determination that she violated the UConn Student Code. *See* Dkt.90-1, pp. 17-18. Rather, they determined that plaintiff's behavior violated the student-athlete code of conduct, UConn women's soccer team rules. JA592-93, 594, 596-97, 598-600. Plaintiff offered no evidence below that the Office of Community Standards had jurisdiction to determine whether these rules/codes were violated by student-athletes. Instead, the record of evidence before the District Court demonstrated that the Office of Community Standards' authority related only to determining whether a student's behavior violated the UConn Student Code and that the Office of Community Standards did not have authority over plaintiff regarding her conduct on the soccer field while she was representing UConn's women's soccer. JA620-21, JA552.

UConn students and that plaintiff was aware that she was subject to these additional requirements. *See* discussion *supra*, pp. 3-5.

Based upon the foregoing, plaintiff received all the process she was due and the District Court's ruling granting summary judgment to individual defendants on plaintiff's procedural due process claim should be affirmed on that additional ground.[17]

2. State breach of contract action was available to plaintiff and would have provided her with sufficient procedural due process protection if she had had a protected property interest

If plaintiff's athletic grant-in-aid were a protected property interest, a Connecticut state law action would have been available to resolve plaintiff's contract dispute with UConn and would have provided sufficient procedural due process for any claimed lost property interest. Lujan v. G&G Fire Sprinklers, Inc., 532 U.S. 189, 196-97 (2001)*; see also* DeMartino v. New York Department of Labor, 712 F.

[17] Plaintiff argues that defendant Tsantiris violated her procedural due process rights because he told her not to "involve anyone." (Appellant's Brief, p. 49). This fact, although disputed, is not material to plaintiff's claim that her procedural due process rights were violated. Defendant Tsantiris was not at all involved with the process of determining whether a hearing would take place if timely requested—that decision was made by defendant Lucas without any input from defendants Tsantiris or Manuel. JA619¶110-11.

App'x. 24, 26 (2d Cir. 2017); Tucker v. Darien Bd. Of Education, 222 F. Supp. 2d 202, 206 (D. Conn. 2002).

Although plaintiff is now time-barred from filing a breach of contract claim against UConn, *see* Conn. Gen. Stat. § 4-160 (claim must be filed within one year of the alleged breach), she had ample time to file a claim and cannot now assert a due process violation because she failed to file a timely claim. *See* Giglio v. Dunn, 732 F.2d 1133, 1135 n.1 (2d Cir. 1984)(plaintiff not deprived of due process because he failed to use procedure available to him to challenge the voluntary nature of his resignation from his tenured teaching position).

C. The Individual Defendants Are Entitled to Qualified Immunity

The District Court correctly held that individual defendants are entitled to summary judgment on this claim on the alternative ground of qualified immunity. As discussed, in 2014 there was no Supreme Court or Second Circuit authority that clearly established that students have constitutionally protected property interests in one-year athletic scholarships. JA1022 n.4.

Defendant Lucas is shielded by qualified immunity on the additional basis that it was objectively reasonable for her to believe that she was not violating plaintiff's rights when she denied plaintiff's untimely request for a hearing. No case exists in the Second Circuit that requires college administrators to provide alternative procedures to a plaintiff who failed to timely request a hearing. Milo, 2013 WL 4647782 at *10; *see also* Tooly v. Schwaller, 919 F.3d 165, 175 (2d Cir. 2019).

In this case, defendant Lucas consulted with UConn Athletic Compliance staff about plaintiff's request for hearing and they advised her that plaintiff's request was untimely. Thereafter defendant Lucas determined that no hearing was required. JA618-19, JA509-10.

Plaintiff mistakenly argues that defendant Lucas admitted in an email that UConn failed to comply with their hearing process. (Appellant's Brief, p. 48-49). Instead, the documents reveal that defendant Lucas first learned that plaintiff requested a hearing in the referenced email exchange. JA518. The subsequent emails demonstrate that defendant Lucas investigated whether the hearing request was timely and ultimately determined that it was not and, thus, denied the

plaintiff's request. JA340-43, JA513-20.[18] As the plaintiff did not make a timely request, no hearing was scheduled.

Accordingly, the District Court's decision granting summary judgment to all defendants on plaintiff's procedural due process claim may be affirmed on the alternative ground that they are entitled to qualified immunity.

IV. THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT FOR DEFENDANT ON PLAINTIFF'S DISCRIMINATION CLAIM UNDER TITLE IX

The District Court correctly held that UConn was entitled to summary judgment on plaintiff's Title IX claim. Title IX prohibits subjecting a student to discrimination on account of sex, and thus "bars the imposition of University discipline where gender is a motivating factor in the decision to discipline." Yusuf v. Vassar College, 35 F. 3d 709, 715 (2d Cir. 1994). But gender played no role in UConn's decision

[18] Plaintiff did not make this speculative claim below. Had she done so, defendants would have included relevant pages from defendant Lucas deposition that made abundantly clear that defendant Lucas' concern was that *if* plaintiff's hearing request were timely, her hearing needed to be scheduled within 15 days of receipt of the hearing request as provided in the UConn procedures for cancelling a student-athlete's grant-in-aid. JA298.

to discipline plaintiff for showing her middle finger to an ESPNU camera.

The Second Circuit has "long interpreted Title IX by looking to the . . . caselaw interpreting Title VII'" of the Civil Rights Act of 1964. Menaker v. Hofstra, 935 F.3d 20, 31 (2d Cir. 2019). Accordingly, the District Court followed this Court's lead by properly analyzing plaintiff's claim using the McDonnell Douglas burden shifting framework. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Columbia Univ. v. Doe, 831 F. 3d 46, 53-56 (2d Cir. 2016).
Before the District Court, plaintiff acknowledged that this was the correct standard to evaluate her claim. Dkt. 101, pp. 8-13. On appeal, however, plaintiff fails to acknowledge the McDonnell Douglas burden-shifting framework. Nonetheless, this is the standard to evaluate plaintiff's Title IX claim and the district court correctly held that plaintiff failed to meet her burden

Under the applicable framework, the burden begins with the plaintiff. Columbia Univ., 831 F. 3d 54. "Plaintiff may establish a *prima facie* case without evidence sufficient to show discriminatory motivation" by showing: "(1) that she is a member of a protected class;

(2) that she was qualified for employment in the position; (3) that she suffered an adverse employment action; and, in addition, has (4) some minimal evidence suggesting an inference that the employer acted with discriminatory motivation." Id. If the plaintiff meets this initial burden, the burden shifts to the defendant to articulate a legitimate, non-discriminatory reason for the adverse action. Menaker, 935 F.3d at 30. If defendant meets its burden, the presumption of discrimination raised by the *prima facie* case drops out and the plaintiff must prove by a preponderance of the evidence that the articulated reasons(s) is merely a pretext for discrimination. Columbia Univ., 831 F.3d at 54. At all times, the plaintiff retains the ultimate burden of persuasion on the critical issue of whether the defendant was motived, at least in part, by discriminatory intent. Id.

If the plaintiff fails to raise a triable issue of fact as to whether the defendant's offered explanation is pretextual, summary judgment in favor of the defendant is appropriate. *See* Holt v. KMI-Cont'l, Inc., 95 F.3d 123, 132 (2d Cir. 1996) (citation omitted). Summary judgment is also appropriate where the "plaintiff create[s] only a weak issue of fact as to whether the employer's reason was untrue and there [is] abundant

and uncontroverted independent evidence that no discrimination ha[s] occurred." Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 148 (2000) (citations omitted).

The District Court properly granted UConn summary judgment on plaintiff's Title IX claim because plaintiff (1) failed to establish a *prima facie* case of discrimination; and even if plaintiff *had* established a *prima facie* case, she (2) failed to meet the burden of showing pretext for discrimination that shifted back to her after UConn met its burden of putting forward legitimate non-discriminatory reasons for plaintiff's discipline. JA1005-1111.

A. Plaintiff Failed to Meet Her Initial Burden To Establish a *Prima Facie* Case of Discrimination

1. Plaintiff failed to present evidence of selective enforcement/disparate treatment

Before the District Court, plaintiff's Title IX allegation was limited to a selective enforcement claim. JA1003.[19] A selective enforcement claim "asserts that, regardless of the student's guilt or

[19] The District Court noted in its ruling that "[t]he parties agree that plaintiff's [Title IX] claim is one of selective enforcement. . . She claims that UConn discriminated against her in violation of Title IX by 'subjecting her to more severe penalties than it did, and does, for male student-athletes.' Pl's. Mem. at 2." JA1003.

innocence, the severity of the penalty and/or the decision to initiate the proceeding was affected by the student's gender." Menaker, 935 F.3d at 31.

Plaintiff did not provide direct evidence of discrimination to satisfy the fourth prong of the McDonnell-Douglas *prima facie* standard. Instead, she tried to raise an inference of discriminatory intent through showing that similarly situated male student-athletes were treated more favorably than her. *See* Graham v. Long Island Railroad, 230 F.3d 34, 39 (2d Cir.2000) ("When considering whether a plaintiff has raised an inference of discrimination by showing that she was subjected to disparate treatment, we have said that the plaintiff must show she was "similarly situated in all material respects" to the individuals with whom she seeks to compare herself").

Within the context of Title VII, the Second Circuit has defined the similarly situated standard as follows:

> an employee is similarly situated to co-employees if they were (1) subject to the same performance evaluation and discipline standards and (2) engaged in comparable conduct. . . . The standard for comparing conduct requires a reasonably close resemblance of the facts and circumstances of plaintiff's and comparator's cases, rather than a showing that both cases are identical. In other words, the comparators must be similarly

situated to the plaintiff in all material respects. Ruiz v. Cnty. of Rockland, 609 F.3d 486, 493-94 (2d Cir. 2010); *see also* Raspardo v. Carlone, 770 F.3d 97, 126 (2d Cir. 2014). The District Court correctly held that no reasonable jury could find that plaintiff was "similarly situated" to any of the male student-athletes to whom she compared herself. JA1005-09.

On appeal, plaintiff disputes the District Court's decision only with regard to comparator senior football player Andrew Adams – who kicked a football into the stands during a game –- and four basketball players who broke curfew while the team was in Puerto Rico participating in a basketball tournament. JA1008-09. But none of those student-athletes' circumstances were similarly situated in all material respects. JA600¶44, JA248, JA625-26, JA628-29, (JA1044-45), (JA1069), (JA1073-75), (JA1109-11).

The undisputed evidence demonstrates that neither the male basketball players nor Adams[20] (or any male athlete) were similarly

[20] The record of evidence before the District Court also demonstrated that: 1) Adams graduated at the end of the Fall 2015 semester and, thus, would not be returning to UConn or receiving athletic grant-in-aid for Spring 2016; JA625, and 2) two of the four basketball players were walk-on players and did not have athletic grant-in-aid. JA628.

situated to plaintiff in all material respects because: (1) none of them made an obscene gesture on national television while representing UConn; (2) none of them were reprimanded by the AAC for their behavior; and (3) none of their coaches recommended to the assigned sports administrator and the athletic director that their grant-in-aid should be cancelled because of their behavior. JA600¶44, JA248, JA625-26, JA627-28, JA629, JA631-33, JA478-79. Additionally, Adams' conduct occurred over a year after plaintiff showed her middle finger to the ESPNU camera and the District Court correctly held that this incident was not "sufficiently probative of the intent of the decision regarding Ms. Radwan."[21]

Drawing from Second Circuit Title VII cases, the District Court held that an inference of discriminatory intent from disparate treatment is weakened when the proposed comparators do not report to

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[21] The District Court held that, except for the UConn basketball players breaking curfew, all the other proposed comparators' conduct was too remote in time compared to plaintiff's conduct to be "sufficiently probative of the intent of the decision regarding Ms. Radwan." JA1008-09. They either occurred years before plaintiff's conduct or after when AD Manuel was no longer Athletic Director and had no authority to make any decision regarding the proposed comparators' athletic grant-in-aid. Id.

the same supervisors as the plaintiff. *See* Smith v. Xerox Corp., 196 F.3d 358, 370-71 (2d Cir. 1999) ("Because intent is the critical issue [in disparate treatment cases], only a comparison between persons evaluated by the same decision-maker is probative of discrimination"); and JA1006-07, and cases cited therein.

Recognizing that the Second Circuit has not specifically addressed the circumstance of student-athletes reporting to different coaches, the District Court looked to the Sixth Circuit's holding in Heike v. Guevara, 519 F. App'x 911, 920 (6th Cir. 2013),[22] in concluding that the holding in Smith v. Xerox Corp., extends to student-athletes and their coaches. JA1006-08.

In Heike, the Sixth Circuit held, in the context of a student-athlete's equal protection claim, that "[t]o be similarly situated, a player 'must have dealt with the same [coach], have been subject to the same standards, and have engaged in the same conduct without such

[22] The District Court's ruling does not broadly hold, as plaintiff claims, that a coach of a team of single sex athletes cannot engage in sex discrimination. Rather, the court's ruling was limited to the evidence that plaintiff presented in support of her claim of sex discrimination, i.e. selective enforcement/disparate treatment. JA1015-16.

differentiating or mitigating circumstances that would distinguish their conduct or their employer's treatment of them for it.'" Id. at 920.

As discussed *supra,* one of several reasons plaintiff was not "similarly situated" to the four basketball players or Adams is that their respective coaches did not recommend to their sports administrator that the student-athletes' grant-in-aid should be cancelled for the next semester.

As no UConn athlete engaged in misconduct comparable to the plaintiff's, none received comparable discipline. Plaintiff was neither a football player kicking a football nor a basketball player breaking curfew. She made an obscene gesture on national television and her conduct violated established rules that applied to all UConn student-athletes and all AAC student-athletes. Moreover, unlike the conduct of Adams or the football players, plaintiff's conduct required athletic department staff and coaches to address her behavior and respond to concerns from the AAC which ultimately issued the plaintiff a letter of reprimand. Neither Adams nor any of the football players received this penalty from the AAC; nor did any other UConn student-athlete during the entire period that UConn was an AAC member. JA600¶44, JA248.

Plaintiff seeks to reduce the court's analysis, again under a theory of disparate treatment/selective enforcement, to a comparison of male student-athletes' general category of conduct (breaking a rule that only applied to athletes) and the punishment they received, removing entirely the court's examination of whether the male student-athletes were similarly situated to her in all material respects. (Appellant's Brief, pp. 51-52 and 57-58). The court did not utilize the incorrect standard of comparing a general category of conduct; but rather applied the appropriate analysis of determining whether the comparators were similarly situated. *See* Ruiz, 609 F.3d at 491; Raspardo, 770 F.3d at 125.

2. Plaintiff failed to present any other evidence that would give rise to an inference of discriminatory motive

Plaintiff failed to carry her *prima facie* burden by raising an inference of discrimination based on disparate treatment. And she presented no other evidence that would give rise to an inference of discriminatory motivation.[23] *See* Abdu-Bisson v. Delta Airlines, Inc., 239

[23] During plaintiff's deposition, she was repeatedly asked for the factual basis for her claim that she was discriminated because of her gender. Plaintiff responded only with examples of male student-athletes that

F.3d 456, 468 (2d Cir. 2001) (plaintiff may show inference of discrimination through means other than disparate treatment when there are no employees similarly situated to plaintiff); s*ee also* Arceneaux v. Assumption Par. Sch. Bd., 733 Appx. 175, 178-79 (5th Cir. 2018).

Under Title VII, circumstances that may give rise to an inference of discrimination include an employer's criticism of an employee's performance in offensive terms relating to plaintiff's protected class and invidious comments about others in a protected class. Chambers v. TRM Copy Centers Corp., 43 F.3d 29, 37 (2d Cir. 1994). In the present case, plaintiff presented no evidence that defendant Manuel, defendant Tsantiris or any other UConn Athletic Department employee who had any input or influence in the decision to cancel plaintiff's athletic grant-in-aid (1) used offensive (sexist) terms when criticizing plaintiff's conduct; or (2) made offensive remarks ever about plaintiff or any other woman based on their gender. *Compare*, Holcomb v. Iona College, 521

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she believed were similarly situated to her and treated more favorably than she. JA474-480. Plaintiff acknowledged below that her claim of sex discrimination was only based upon evidence of disparate treatment. Dkt.108, p.3.

F.3d 130, 140 (2d. Cir. 2008) (college employees who were involved with decision to terminate assistant coach, but not final decisionmakers, made racially discriminatory comments about blacks and disapproved of assistant coach's marriage to a black woman raised an inference of impermissible discriminatory motive).

Lastly, if plaintiff had presented evidence that UConn's decision to cancel her athletic grant-in-aid was influenced by an Athletic Department employee's (who was involved or had influence in the decision) perception that plaintiff failed to confirm with stereotypical female conduct, such evidence might have supported an inference of discriminatory motive. *See* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). In Price Waterhouse, the Supreme Court held that Title VII was violated when plaintiff was denied a promotion because she was perceived negatively for lacking stereotypical feminine character traits. Her superior advised her to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." 490 U.S. at 235. The Court held that these statements indicated that Hopkins' superiors discriminated against her

on the basis of sex, because she did not fit the sexual stereotype of what a woman should be. Id.

Plaintiff here presented no evidence, nor does any exist in the record, to support an inference that she was disciplined because her behavior did not conform with impermissible sexual stereotypes. In fact, defendant Manuel clearly testified at his deposition that plaintiff's gesture "was inappropriate and needs to not be repeated by her or anybody." JA383.

For the first time on appeal, plaintiff cites to portions of defendant Tsantiris deposition testimony to argue that his actions in this case were based upon impermissible sexual stereotypes. Inexplicably, plaintiff points to defendant Tsantiris' deposition comparing female athletes whom he coached in the past to female athletes that he coached at the end of his career at UConn when plaintiff was on the team. JA405-408. The defendant's reference only to female athletes he coached at UConn for over 30 years does nothing to advance the plaintiff's argument. JA588¶7. The women's soccer player rules, including the rule that plaintiff violated, were no more stringent than the student athlete code of conduct that applied to all student-

athletes at UConn. JA592¶22, JA594¶¶26-27. None of the defendant's statements amount to circumstantial evidence that supports an inference that he was motivated by sex discrimination when he recommended cancelling plaintiff's athletic grant-in-aid.

Thus, plaintiff failed to demonstrate a *prima facie* case and the District Court correctly held that, on this basis, UConn was entitled to summary judgment.

B. UConn Offered Legitimate, Non-Discriminatory Reasons for Cancelling Plaintiff's Athletic Grant-in-Aid, and Plaintiff Offered No Evidence in Rebuttal

Even if the plaintiff had proved a *prima facie* case, UConn would have been entitled to summary judgment on an alternative ground. As the District Court correctly held, UConn proffered a legitimate, nondiscriminatory reason for disciplining plaintiff. JA1009-11. But plaintiff offered no evidence that UConn's reason was pretext for impermissible discrimination. McDonnell Douglas, 411 U.S. at 802; St. Mary's Honor Center v. Hicks, 509 U.S. 502, 507 (1993); Texas Dep't. of Community Affairs v. Burdine, 450 U.S. 248, 253. (1981).

The District Court correctly held that UConn articulated legitimate, nondiscriminatory reasons for cancelling plaintiff's athletic

grant-in-aid [JA1010]): (1) defendant Tsantiris and defendant Manuel made the final decision that plaintiff's grant-in-aid could be cancelled because she engaged in serious misconduct [JA 606-608]; (2) plaintiff's actions violated a women's soccer team rule and student-athlete code of conduct [JA592-594, 596-597] and reflected poorly on UConn and its women's soccer program [JA596-598]; (3) plaintiff's violation detracted from the team celebration [JA596-597, 604] of the women's soccer team's first advancement to the NCAA tournament in four years and first conference tournament championship win since 2004 [JA595-597]; (4) the violation required defendant Tsantiris to issue a prompt formal apology on behalf of UConn and the women's soccer team [JA597-598] and required UConn to focus immediately on the broadcasted obscene gesture [JA595-598]; and (5) plaintiff was the only UConn student-athlete ever to receive a letter of reprimand from the AAC conference. [JA600]. Plaintiff's argument on appeal that defendants Tsantiris and Manuel's reasons for cancelling her grant-in-aid is pretext for discrimination is meritless.[24]

[24] Plaintiff now suggests, contrary to established precedent from this Court, that she can establish her burden under the McDonnell Douglas burden shifting standard (demonstrate a *prima facie* case of

Plaintiff unconvincingly argues for the first time, without evidence, that UConn's legitimate reason for cancelling plaintiff's grant-in-aid is pretext for discrimination because it is "implausible" that defendants would cancel her grant-in-aid for showing her middle finger on national television. (Appellant's Brief, pp. 52-53). But plaintiff's unsurprising disagreement with UConn's decision is not enough to show that she was subjected to gender discrimination. *See* Anderson v. Delphi Auto. Sys. Corp., 297 F. Supp. 2d 625, 628 (W.D.N.Y. 2004) (noting that the question is not whether the defendant's decision at the time was a "wise one, but whether it was motivated by some impermissible, discriminatory purpose"). Absent such a showing, there is no basis for the court to second guess the decision to cancel plaintiff's athletic grant-in-aid. *See* Wood v. Strickland, 420 U.S. 308, 326 (1975); *see also* Heike, 519 F. App'x. at 918 (extra deference given to coaches comes from the

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discrimination and pretext) by simply showing that UConn's legitimate, nondiscriminatory reason for cancelling plaintiff's athletic grant-in-aid is pretext. (Appellant's Brief, pp. 52-55). *See* Weinstock v. Columbia Univ., 224 F.3d 33, 42 (2d Cir. 2000) (affirming grant of summary judgment wherein the Second Circuit considered whether plaintiff sufficiently demonstrated that defendant's stated adverse employment decision was pretext for discrimination because, unlike here, the district court had held that plaintiff established a *prima facie* case of discrimination).

broad range of legitimate, nondiscriminatory reasons a coach may have for deciding who plays, how much they play, and whether they stay on the team from year to year).

Plaintiff cherry picks statements by defendant Manuel to argue that his reason for terminating plaintiff's scholarship is inconsistent and must be a lie. Although defendant Manuel testified at his deposition that there may have been additional basis for cancelling plaintiff's scholarship that he could not remember JA685-66, he further testified that based on the circumstances of plaintiff's conduct he may have determined that her conduct alone was sufficient to amount to serious misconduct and provide a basis to cancel plaintiff's grant-in-aid. JA397-98.

Defendant Manuel's email to President Susan Herbst also does not contradict his and the UConn Athletic Department's determination that plaintiff engaged in serious misconduct. (Appellant's Brief, 54). Defendant Manuel's email simply provided President Herbst with his opinion that the AAC's likely sanction against plaintiff or UConn would not exceed a reprimand. JA904-06. But UConn and the AAC did not have coextensive disciplinary authority. The AAC did not have

authority to direct UConn to cancel plaintiff's scholarship. JA841, JA904-06.

Finally, the District Court correctly held that plaintiff failed to present evidence that, procedurally, UConn treated plaintiff differently from male student-athletes whose athletic grant-in-aid was cancelled. JA10117-18. Although plaintiff misstates the role of the Office of Community Standards to support this argument, the undisputed evidence established that the Office was not involved at all with matters relating to the Athletic Department's determination of student-athlete discipline. JA1005 n.1.

Accordingly, UConn was properly granted summary judgment on plaintiff's Title IX claim on the basis that she failed to meet her initial burden of establishing a *prima facie* case of discrimination; and even if she had established a *prima facie* case, (2) she failed to demonstrate that UConn's nondiscriminatory reasons for cancelling her athletic grant-in-aid were pretext for discrimination. JA1010-11.

C. UConn Has No Title IX Liability Because the Process for Cancelling a Student-Athlete's Athletic Grant-In-Aid Began With the Coaches' Recommendation to the Athletic Director

For the first time on appeal, plaintiff appears to assert an unfounded Title IX challenge to the UConn Athletic Department's process for cancelling athletic grants-in-aid. This Court should not consider this argument because it was not presented to the District Court and is not sufficiently briefed on appeal. JA1003. *See* United States v. Botti, 711 F.3d 299, 313 (2d Cir. 2013); and Tolbert v. Queens Coll., 242 F.3d 58, 76 (2d Cir. 2011). But if this Court does reach the merits, it should reject the argument, which is not founded in fact or supported by law.[25]

[25] Plaintiff and amici appear to argue (without so stating) that UConn Athletic Department's discipline of its student-athletes must be examined in a manner required under the gender equity components set forth in Title IX implementing regulation. 34 C.F.R. §§ 106.37(c) and 106.41. These components are referred to as the "laundry list." Pursuant to these regulations, the Office of Civil Rights reviews these "laundry list" requirements as part of a holistic comprehensive review of an athletic department's compliance with Title IX. *See* McCormick v. Sch. Dist. of Mamaroneck, 370 F.3d 275, 299 (2d Cir. 2004); and Cohen v. Brown Univ., 101 F.3d 155,165-168 (1st Cir. 1996). Notably, student-athlete discipline is not included in the "laundry list." There is no support in regulation or caselaw for the proposition that a university athletic department must have the athletic director assess all student-athletes' conduct (over 700 when defendant Manuel was Athletic

Plaintiff fails to cite any controlling authority to support her challenge. Instead, she summarily combines different theories of Title IX liability that were not raised below and are qualitatively different from plaintiff's claim of selective enforcement. The cases she relies upon are neither on point nor a basis to reverse the District Court's Title IX ruling.

In the absence of supporting law, plaintiff makes a baseless argument that defendant Manuel "maintained a conscious policy of non-intervention even though he *knew* that policy resulted in sex discrimination." (Appellant's Brief, p. 58). But plaintiff presented no evidence for her conjecture that the custom and practice used by defendant Manuel for cancelling student-athletes' grant-in-aid resulted in sex discrimination, let alone that he *knew* that the practice resulted in sex discrimination. There was no evidence in the record to demonstrate that the Coach recommended cancelling plaintiff's grant-in-aid based upon discriminatory bias or animus, or that defendant

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Director, JA379) and determine the appropriate discipline (regardless of whether the athletes are similarly situated in all material respects and without any input from the student-athlete's coach) or run afoul of Title IX.

Manuel "rubber stamped" defendant Tsantiris' recommendation, failing to inquire into the reasons for the recommendation. In fact, the undisputed evidence in the record demonstrated that defendant Manuel, before approving the coach and sports administrator's recommendation, required them to confirm with UConn NCAA compliance staff that plaintiff's conduct fell within the NCAA standard of "serious misconduct," permitting cancellation of her athletic grant-in-aid. JA607-608.

Moreover, there was no evidence in the record below that defendant Manuel or anyone from the UConn Athletic Department directed defendant Tsantiris or other UConn women's coaches to hold their athletes to a "higher standard" than male athletes or instructed defendant Tsantiris to initiate the process of cancelling plaintiff's scholarship. Significantly, plaintiff's conduct was prohibited by the student-athlete code of conduct and AAC rules – rules that applied to all student-athletes regardless of team or gender.

CONCLUSION

For all the foregoing reasons, defendants respectfully request that this Court affirm the District Court's ruling granting them summary judgment.

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

I hereby certify that this brief complies with the type-volume limitations of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure, as modified by Second Circuit Local Rule 32.1(a)(4), in that this brief contains 13,118 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32 (a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Century Schoolbook font.

Dated: February 11, 2021

/s/ Rosemary M. McGovern
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CERTIFICATION OF SERVICE

I hereby certify that on this 11th day of February, 2021, I caused the foregoing brief to be filed electronically with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. 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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