# No. 21-1365

In the United States Court of Appeals
for the Second Circuit

SELINA SOULE, a minor, by Bianca Stanescu, her mother; CHELSEA MITCHELL, a minor, by Christina Mitchell, her mother; ALANNA SMITH, a minor, by Cheryl Radachowsky, her mother; ASHLEY NICOLETTI, a minor, by Jennifer Nicoletti, her mother,
*Plaintiffs-Appellants*,

v.

CONNECTICUT ASSOCIATION OF SCHOOLS, INC. D/B/A/ CONNECTICUT INTERSCHOLASTIC ATHLETIC CONFERENCE;
(*Caption continued on inside cover*)

On Appeal from the U.S. District Court for the District of Connecticut

Brief *Amicus Curiae* of Public Advocate of the United States, America's Future, U.S. Constitutional Rights Legal Defense Fund, Fitzgerald Griffin Foundation, and Conservative Legal Defense and Education Fund in Support of Plaintiffs-Appellants and Reversal

J. Mark Brewer
BREWER & PRITCHARD, P.C.
800 Bering Drive, Suite 201A
Houston, Texas 77057

Rick Boyer
INTEGRITY LAW FIRM
P.O. Box 10953
Lynchburg, Virginia 24506

Joseph P. Secola*
SECOLA LAW OFFICES, LLC
113 Mill Plain Road #1002
Danbury, Connecticut 06811
(203) 417-3186
Attorney for *Amici Curiae*

March 30, 2023
*Counsel of Record

BLOOMFIELD PUBLIC SCHOOLS BOARD OF EDUCATION; CROMWELL PUBLIC SCHOOLS BOARD OF EDUCATION; GLASTONBURY PUBLIC SCHOOLS BOARD OF EDUCATION; CANTON PUBLIC SCHOOLS BOARD OF EDUCATION; DANBURY PUBLIC SCHOOLS BOARD OF EDUCATION;
*Defendants-Appellees*,

and

ANDRAYA YEARWOOD; THANIA EDWARDS on behalf of her daughter, T.M.; CONNECTICUT COMMISSION ON HUMAN RIGHTS,
*Intervenors-Appellees*.

## DISCLOSURE STATEMENT

The corporate *amici curiae* herein, Public Advocate of the United States, America's Future, U.S. Constitutional Rights Legal Defense Fund, Fitzgerald Griffin Foundation, and Conservative Legal Defense and Education Fund, through their undersigned counsel, submit this Disclosure Statement pursuant to Rules 26.1(a) and 29(c), Federal Rules of Appellate Procedure. All of these *amici curiae* are non-stock, nonprofit corporations, none of which has any parent company, and no person or entity owns them or any part of them.

/s/ Joseph P. Secola
Joseph P. Secola

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## INTEREST OF *AMICI CURIAE*[1]

Public Advocate of the United States, America's Future, U.S. Constitutional Rights Legal Defense Fund, Fitzgerald Griffin Foundation, and Conservative Legal Defense and Education Fund are nonprofit organizations, exempt from federal taxation under sections 501(c)(3) or 501(c)(4) of the Internal Revenue Code. Each is dedicated, *inter alia*, to the correct construction, interpretation, and application of law.

## STATEMENT OF THE CASE

The Connecticut Interscholastic Athletic Conference ("CIAC") is a nonprofit organization formed to protect the interests of student athletes in secondary schools in Connecticut. The circumstances which led to this rehearing *en banc* began a full decade ago, when in 2013, CIAC adopted a "Transgender Participation" Policy which requires the member schools to allow students to participate in the sex-specific sports based on the student's perceived "gender," regardless of the student's actual biological sex:

> a student's eligibility to participate in a CIAC gender specific sports team [is] based on the gender identification of that student in current

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[1] No party's counsel authored the brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting the brief. No person other than these *amici curiae*, their members or their counsel contributed money that was intended to fund preparing or submitting this brief.

> school records and daily life activities in the school.... [En Banc Opening Brief of Appellants at 10 (citing CIAC 2022-2023 Handbook at 54).]

Plaintiffs are four female athletes who were injured because the CIAC Policy violated Title IX of the Education Amendments of 1972 and implementing regulations. Title IX was designed to protect women in education, but also recognizes that, in providing equal opportunities to females, it is appropriate to provide separate sports for males and females.

Instead of providing the same opportunities in sports to female students that are available to male students, the CIAC Policy opens up female sports to males as long as those males "identify" as females, the only exception being if the "claim [of] a particular gender identity [is] *for the purpose of* gaining a *perceived advantage* in athletic competition." *See* En Banc Opening Brief of Appellants at 10-11 (citing CIAC 2022-2023 Handbook at 54).

As a result of the Policy compelling biological females to compete against biological males, plaintiff female athletes ranked lower in the girls' sports competitions. In some circumstances, the biological males took limited qualifying spots to compete in state finals away from the female plaintiffs and other females.

The female athlete plaintiffs sued CIAC, seeking to have its Transgender Policy declared a violation of Title IX, as well as to have the athletic records

corrected to remove the male athletic records from the females' records, titles, and achievements. The male athletes who "identified" as female and then participated in the female competitions were permitted to intervene in the litigation.

Proceedings in the district court appear to have been contentious, with the district court judge ordering plaintiffs' counsel not to refer to the male intervenors as males, at one point seeming to accuse counsel of "bullying." (*See* section IV, *infra*.)

The district court made several findings of actual harm suffered by the plaintiffs, where the student athletic records were in error, based on plaintiffs' theory of the case:

> (1) Chelsea Mitchell would have finished first in four elite events in 2019, and qualified for the 2017 New England Regional Championship in the Women's 100m; (2) Selina Soule would have advanced to the next level of competition in the 2019 CIAC State Open Championship in the Women's Indoor 55m; (3) Ashley Nicoletti would have qualified to run in the 2019 CIAC Class S Women's Outdoor 100m; and (4) Alanna Smith would have finished second in the Women's 200m at the 2019 State Outdoor Open. [*Soule v. Conn. Ass'n of Schools*, 2021 U.S. Dist. LEXIS 78919, *21 (Dist. Conn. 2021).]

Nevertheless, the district court dismissed all of the claims. The request for an injunction and a declaratory judgment against the Policy was deemed moot because two of the plaintiffs had graduated, and the other two did not immediately

face competition from transgender women. *Soule*, 2021 U.S. Dist. LEXIS at *15-20. With respect to plaintiffs' request that the Connecticut past sports records be corrected, the district court determined that the plaintiffs lacked standing as modification of the records would not redress the claimed injuries. *See id*. at *21-22.

As to plaintiffs' claim for monetary damages, the district court applied the adequate notice test of *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1 (1981), concluding that Department of Education guidance and Title IX rulings did not give Connecticut clear notice that its Policy is unlawful. *See Soule*, 2021 U.S. Dist. LEXIS at *22-23.

A panel of this Court affirmed the district court's dismissal: "We conclude that, first, Plaintiffs lack standing to seek an injunction rewriting the records and, second, Plaintiffs' claims for monetary relief are barred under *Pennhurst*." *Soule v. Conn. Ass'n of Sch.*, 57 F.4th 43, 50 (2d Cir. 2022). This Court, *sua sponte*, granted rehearing *en banc* on February 13, 2023.

## ARGUMENT

This Court ordered the parties to brief three issues before the *en banc* court and invited *amicus* briefs to be filed. These *amici* primarily address the second issue: "Whether Plaintiffs-Appellants have alleged an injury-in-fact redressable by ordering the alteration of athletic records." Second Circuit Order of February 21, 2023.

### I. The District Court Gave Short Shrift to Plaintiffs' Allegations Supporting a Correction in Their School Records.

As a result of the "transgender participation policy" of the Connecticut Interscholastic Athletic Conference ("CIAC"), biological males were permitted to participate in sex-segregated sports for biological females. The only precondition for a male to participate in female sports was the male's subjective perception of "gender identity" as a female. *Soule*, 2021 U.S. Dist. LEXIS at *3.

Plaintiffs' complaint alleged that the CIAC Policy violated 20 U.S.C. §§ 1681-1688 and implementing regulations found at 34 C.F.R. § 106.41(c). Among the regulations is a requirement that in athletic programs segregated by sex, it must do so in a manner that "[p]rovide[s] equal athletic opportunity for members of both sexes." 34 C.F.R. § 106.41(c). This rule was violated by CIAC, in that it allows male athletes to participate in either male sports or female sports,

where they often would have a competitive advantage, based on nothing more than an assertion of "gender identity." *Soule*, 2021 U.S. Dist. LEXIS at *3. Among the types of relief requested were:

> [a]n injunction requiring all Defendants to **correct any and all records**, public and non-public, to remove male athletes from any record or recognition purporting to record times, victories, or qualifications for elite competitions designated for girls or women, and conversely to correctly give credit and/or titles to female athletes who would have received such credit and/or titles but for the participation of males in such competition.... [*Id.* at *9 (emphasis added).]

The district court concluded that but for the CIAC policy, each of the four plaintiffs would have placed higher in competitions than they were reported in their records as having done. However, the district court asserted that "redressability is not sufficiently supported to provide any of the plaintiffs with standing." *Id.* at *20. The court addressed redressability only from the standpoint of whether a potential employer would have been "impressed" by learning that the plaintiff as a job applicant had placed higher in these races. The court did not expend even one word in considering redressability from the standpoint of having the records reflect the actual, lawful result of the contests had they been conducted consistent with federal law and regulations.

The district court found plaintiffs' authorities supporting "expungement of erroneous disciplinary action from a student's school record" were "readily distinguishable" because they involved "disciplinary action[s]." *Id.* at *22. In essence, the court concluded that redressability always requires correcting erroneous student **disciplinary** records, but redressability never allows correcting erroneous student **athletic** records. For this remarkable proposition, the district court offered no authority whatsoever.

However, the district court offered three cases for the view that "'standing theories that require guesswork'" were not permitted. The first case was *Clapper v. Amnesty Int'l USA*, 568 U.S. 398 (2013), where the court's statement about guesswork was made in the context of denying standing to prevent plaintiffs' contacts with foreign persons from being surveilled because the government targeting methods of those foreign nationals were classified. By requiring plaintiffs to prove what they could not know, *Clapper* immunized surveillance of Americans from judicial review. Although national security considerations might have supported such a decision, to which Justices Breyer, Ginsburg, Sotomayor, and Kagan disagreed in dissent, there are no such considerations here.

The second case was *ASARCO Inc. v. Kadish*, 490 U.S. 605, 614-15 (1989), which found standing to be lacking because plaintiffs could not demonstrate they

suffered any certain harm. The last case was *Simon v. E. Kentucky Welfare Rights Org.*, 426 U.S. 26, 42-43 (1976), in which plaintiff was unable to show a connection between the issuance of an IRS Revenue Ruling and hospitals which refuse services to indigents. There is no question that the inability in these two cases of plaintiff to show any harm whatsoever affects standing, but here the harm is that the athletic records are erroneous, which may manifest itself in different ways, including, but not limited to, with employers.

The district court judge's view of redressability may well have been affected by a view that athletic accomplishments are not important. The issue of redressability may have been thought about in terms of academic accomplishments. For example, if a federal law were violated so that the district court judge's transcript as an undergraduate at Brown University had demonstrated that he had merely graduated with an A.B. degree, when he had actually graduated *magna cum laude*, undermining the correctness of his curriculum vitae, redressability might have been viewed differently. When an academic rather than an athletic achievement is involved, it is much more difficult to dismiss the significance of the matter by simply asserting: "At this point, what difference does it make?"

There is no question that the injury suffered by plaintiffs — being forced to compete with biological males leading to the unlawful results being recorded in student records — would be redressed[2] significantly by a favorable decision, wiping away not all the consequences of the concrete injury suffered — but eliminating an important continuing aspect of that injury. Lastly, it should be observed that the reason that the opposing parties do not want the records corrected is that it would demonstrate that they wrongly imposed a policy that violated federal law and implementing regulations, leading to that so-called Transgender Policy being revoked. That would be the natural consequence of the correction of records, and one which CIAC and the male athletes who abused the system want to avoid at all costs.

## II. The Panel Likewise Gave Little Attention to Plaintiffs' Allegations Supporting a Correction of Records.

The panel asserted that "'psychic satisfaction' ... 'is not an acceptable Article III remedy.'" *Soule*, 57 F.4th at 52. But "psychic satisfaction" is not what

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[2] Here, plaintiffs alleged they suffered and pled actual damages, but the U.S. Supreme Court has made clear that "redressability" is not so high a burden that it should defeat a well pled claim for a past injury based only on a demand for nominal damages, even without proof of actual damages. *See Uzuegbunam v. Preczewski,* 141 S. Ct. 792, 802 (2021) ("we conclude that a request for nominal damages satisfies the redressability element of standing where a plaintiff's claim is based on a completed violation of a legal right.").

plaintiffs seek. They seek to have Connecticut's high school sports recordbooks corrected to reflect the positions plaintiffs would have achieved had biological males not illegally competed in their sports, including the "55 meter race at the 2019 State Open Championship," which would have been won by Plaintiff Chelsea Mitchell had not two biological males taken first and second place, relegating Mitchell, the fastest girl competing, to third place. Certainly, the loss of that championship is more than a "psychic" loss, and entitles her to standing. Although the cases relied on by the panel mention "psychic satisfaction" in dicta, they stand for an altogether different proposition, that if a court has no ability at all to grant redress for the injury, there is no standing.

The primary case cited by the Court is *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83 (1998). There, plaintiff environmental organization sued a company that failed to file required environmental reports, resulting in environmental damage. The plaintiff sought a declaratory judgment that the company had failed in its duty, subjecting it to civil penalties authorized by statute. *Id.* at 106. Since the civil penalties were statutorily payable to the U.S. Treasury, not plaintiff, the Court believed the only benefit the Court could give Plaintiff was "psychic satisfaction," which did not constitute redressability. *Id*. at 107.

In *Doyle v. Town of Litchfield,* 372 F. Supp. 2d 288 (D. Conn. 2005), the plaintiff sued the town under the Resource Conservation & Recovery Act ("RCRA"). By the time the plaintiff sued, alleging environmental damage to his property and resulting damage to his marriage, the mortgage on the damaged property had been foreclosed, and he no longer had any interest in it. The Court noted that "Doyle's economic injury would not be redressed by an abatement order because any increase in the Property's value would no longer benefit him." *Id*. at 302. In addition, "[h]is alleged injuries (costs responding to the release and destruction of financial investments, business, and marriage) are past, and though they are regrettable, they are not redressable under RCRA. RCRA's remedies do not provide for past cleanup costs or damages." *Id*. at 303. Thus, the court held, "emotional or mental satisfaction ... is inadequate to confer standing." *Id.*

In *Kapur v. FCC*, 991 F.3d 193 (D.C. Cir. 2021), the Kapurs were minority owners of a television station. Against the Kapurs' wishes, the majority owner sold the station. *Id*. at 194. The Kapurs opposed the sale, arguing that the buyer could not pass a character review required to obtain an FCC broadcast license. They sought to rescind the sale and have the station and its FCC broadcast license returned to the original ownership group, of which plaintiffs were a part. *Id*. at 195. While the case was underway, the buyer sold the station to a second buyer,

against whom the Kapurs could not raise a "character" objection. *Id.* Meanwhile, the original ownership group underwent a dissolution and ceased to exist. Accordingly, the court ruled that even if it ruled that the first buyer could not pass an FCC character review, because the sale to the second buyer was proper and the original ownership group was dissolved, a ruling in the plaintiffs' favor could not restore the station or the FCC license to the plaintiffs. Thus, the court held, "the 'psychic satisfaction' of winning doesn't cut it." *Id*. at 196.

Finally, the Court cited to *I. L. v. Alabama*, 739 F.3d 1273 (11th Cir. 2014). There, plaintiff black and white children in two Alabama county school systems challenged an Alabama statute dealing with property assessments, alleging that the statute undervalued land in poor rural localities, depressing property tax revenue and resulting in racial discrimination against poorer county school systems. *Id*. at 1276-77. But the court found that, even if the statute were changed, it would not necessarily result in higher tax revenues, noting that on multiple occasions, voters in the two counties had rejected referenda to raise property tax rates. Thus, even if the statute were changed, there was no evidence that it would redress the underfunding of schools, and accordingly, the plaintiffs lacked standing. *Id*. at 1281.

Readily distinguishable, these cases provide no support for the panel's conclusion that correction of the students' athletic records was not redressable.

## III. Athletic Records Have Enduring Significance, and Correction of Records Significantly Redresses Injuries.

The district court (and the panel) assumed that athletic records are of no great significance, and it should not matter whether they incorrectly reflected that male athletes had been allowed to illegally and unfairly compete, and in those competitions, had beaten female athletes. However, Plaintiffs-Appellants point out that CIAC records must be corrected if performance enhancing drugs are involved (En Banc Opening Brief of Appellants at 18-19) and the fact that the male athletes had testosterone coursing through their bodies since puberty is very much like use of a performance enhancing drug, rendering their participation just as chemically unfair.

This view of the district court and panel that records do not matter is shared by virtually no one who has ever competed in any athletic endeavor.

- U.S. cyclist Lance Armstrong, whose team was sponsored by the U.S. Postal Service, was found to have used performance enhancing drugs, which led to his "results dating back to 1 August 1998 being erased." "Lance Armstrong 'stripped' of Tour de France titles and banned," BBC Sport (Aug. 24, 2012).

- The most comprehensive list of Olympic medals that were stripped from the persons to whom they were originally awarded appears on

Wikipedia. That posting for List of Stripped Olympic Medals reports that 154 medals have been stripped, with 9 medals declared vacant. The 2008 Summer Olympics saw a high of 50 medals stripped. Persons who had their medals stripped were required to return them, evidencing that the person who won the race had a property interest in the medal as well as the records.

- In Major League baseball, Senator George J. Mitchell conducted an investigation into drug use, producing the "Report to the Commissioner of Baseball of an Independent Investigation into the Illegal Use of Steroids and Other Performance Enhancing Substances by Players in Major League Baseball" released December 13, 2007. "The Mitchell Report names eighty-nine Major League Baseball players who are alleged to have used steroids or drugs." Mitchell Report, "Baseball Almanac." The debate over which records were justified and which were not continues to this day.

## IV. The District Court's Pre-judging of the Case Requires Reversal.

Plaintiffs requested that the district court judge recuse himself for animus against plaintiffs and their counsel. Their motion was based, in part, on the judge's directive forbidding plaintiffs' counsel from referring to intervenors by their actual biological sex — male. In a hearing held on April 16, 2020, the court instructed: "going forward, we will not refer to the proposed intervenors as 'males'...." Tr. 26, ll. 22-23. "[Y]ou must refer to them as 'transgender females' rather than as 'males.'" Tr. 29, ll. 4-5. "I don't want you to be bullying anybody else." Tr. 29, l. 21.

The judge followed the observation of famed journalist M. Stanton Evans when he said: "he who writes the resolved clause wins the debate." With the lexicon of the case having been resolved in favor of defendants-respondents, the judge restated the issue of the case in a way that favors the male athletes.

> I don't think that you surrender any legitimate interest or position if you refer to them as transgender females. That is what the case is about. This isn't a case involving males who have decided that they want to run in girls' events. **This is a case about girls who say that transgender girls should not be allowed to run in girls' events**. [Tr. 26, ll. 15-21 (emphasis added).]

Consider how much different the case would be if the judge had phrased the issue before the court as follows:

> This is a case about girls who say that **boys** should not be allowed to run in girls' events.

Before Plaintiffs-Appellants took the district judge up to the Second Circuit, as he suggested, the judge denied the motion on the following basis:

> ORDER denying 103 Motion to Transfer/Disqualify/Recuse Judge. Plaintiffs have moved for my recusal pursuant to 28 U.S.C. s 455(a) because during a telephone conference I informed plaintiffs' counsel that **I wanted them to refrain** from continuing to refer to the transgender females involved in this case as "**males**." In calling on plaintiffs' counsel to accept that limitation going forward, I explained that for plaintiffs' counsel to continue to call these transgender youth "males" would be **needlessly provocative**, and **inconsistent with norms of civility** in judicial proceedings, which I want to be careful to maintain. As I further explained, for plaintiffs' counsel to refer to these young people as **"transgender females" in accordance with**

**their gender identity** would entail **no concession whatsoever relating to the merits** of the case; plaintiffs' counsel would still be able to refer to them as "biologically male" with "male bodies." They just couldn't refer to them as "males, period." Plaintiffs assert that as a result of my statement the public might reasonably believe that I am partial or biased. Plaintiffs have clarified that what troubles them in particular is my statement that for plaintiffs' counsel to refer to the transgender students involved in this case as "transgender females" rather than "males" would be consistent with "**science.**" Plaintiffs argue that "the public might reasonably conclude that the Court has bias in [this] case where [plaintiffs'] arguments, claims, and expert testimony are based on the assertion that athletes born male remain male as a matter of **scientific** fact no matter their gender identity, and that as a result those athletes have 'an unfair competitive advantage to competition' in women's and girls' sports." ECF No. 199, at 3-4. I do not agree that the public might reasonably construe my reference to "science" as a comment on the merits of the issue whether transgender athletes have an unfair competitive advantage in girls' sports. In the telephone conference, I stated that referring to the transgender youth involved in this case as "transgender females" would be **consistent with "science, common practice, and perhaps human decency."** That statement does not reflect a preconceived conclusion on the issue of unfair competitive advantage presented by this case. In fact, and as I think objective members of the public would readily understand, the "science" I referred to is not the science relating to the issue of unfair competitive advantage but **the science that tells us calling transgender girls "males" can cause significant mental and emotional distress**. The insight provided by this science has led to a "**common practice**" of referring to transgender persons by their gender identity, which is viewed by many as a matter of "**human decency**." Thus, as I said, referring to these transgender youth as "transgender females" would be **consistent with "science, common practice, and perhaps human decency**." By referring to science in this way, in this context, and for this purpose, I did not state or imply anything about whether the transgender youth in this case do or do not enjoy an unfair competitive advantage when they compete in girls' track. To the

> extent plaintiffs' counsel argue that they must be able to refer to the transgender girls in this case as "males, period" in order to fulfill their responsibilities as zealous advocates, and that they have an absolute Constitutional right to do so, the argument is unpersuasive. The issue of unfair competitive advantage can be fully and fairly litigated consistent with professional ethics and constitutional protections without referring to the transgender females involved in this case as "males, period." I think **objective members of the public** would agree. I also think objective members of the public would understand that just because I want plaintiffs' counsel to avoid **needlessly** calling the transgender females in this case "males, period" does not mean I am partial or biased with regard to any issue in the case. Accordingly, the motion is hereby denied. Signed by Judge Robert N. Chatigny on 6/16/20. [Emphasis added.]

In response, on July 6, 2020, plaintiffs filed a petition for writ of mandamus with this Court (docket no. 20-2180), seeking to have the case reassigned. On November 4, 2020, this Court denied the petition, supported by the bare statement that plaintiffs "have not demonstrated that the district court judge clearly and indisputably abused his discretion or that a writ is appropriate under the circumstances." *Soule v. Conn. Ass'n of Schools*, No. 20-2180 (emphasis added).

Now that the case is before this Court *en banc*, these *amici* suggest the Court consider whether the district court's directive to counsel not only evidenced bias in that the court had prejudged the basic legal question at issue, but also constituted an effort by the court to shape the conduct of the litigation to favor CIAC, in violation of due process of law. Plaintiffs-Appellants were entitled to a

hearing before a fair and impartial tribunal. *See Goldberg v. Kelly*, 397 U.S. 254, 271 (1970). The district court's directive revealed the following:

1. Calling biological males "males" is neither "needlessly provocative" nor "inconsistent with norms of civility in judicial proceedings."

2. Calling biological males "'transgender females' in accordance with their gender identity" is most certainly a concession on the issue underlying the case.

3. Referring to biological male intervenors as "transgender females" may be consistent with "woke" practice, but not necessarily common practice. It certainly is not consistent with "science" or "human decency."

4. There may be individual social scientists who embrace this political position, but there is no actual hard "science" supporting the view that "calling transgender girls 'males' can cause significant mental and emotional distress." *See, e.g.*, The Myth About Suicide and Gender Dysphoric Children. Science is not based on how people feel, but objective truth. Further, the court expressed no similar concern for how the female athletes feel about their lawyers calling the very same male athletes who unfairly competed with them "transgender girls."

5. The court's statement that "objective members of the public would agree" with the court's order indicates that those members of the public who disagree are not "objective," not fair, and not exhibiting human decency.

In all these ways, the district court's order showed that the district court judge was at least deeply influenced by, if not controlled by, transgender ideology, and hostile to those with a different view. Moreover, the district court did not just "call upon" counsel to use the lexicon that he approved for the case; he directed it. *See* En Banc Opening Brief of Appellants at 16. He accused those who disagreed with him of "bullying." The district court revealed its complete agreement with and acceptance of the presuppositions of transgenderism, and that expressed bias cannot be disregarded by the public and should not be disregarded by this Court.

In the view of these *amici*, it was inappropriate of the district court to continue its consideration of the case when it had already accepted as fact the presuppositions of the transgender movement, ignoring the fact that the statute and regulations were adopted well prior to the current trans mania to protect girls' sports, giving every indication that it had prejudged the outcome of the legal issues, and then ruling that it really did not matter that the plaintiff female students' athletic records unfairly diminished their accomplishments.

## V. The CIAC Transgender Policy Is Built on a Dangerous, Pagan Lie.

The Transgender Policy assumes that a male can become a female by wishing it to be so. That Policy violates both the Bible and biology. The Bible teaches that "So God created man in his own image, in the image of God created

he him; male and female created he them." *Genesis* 1:27. Despite the "cancel culture" underlying of "trans ideology," good science still teaches us that the differences between men and women extend to every cell of our bodies. *See, e.g.*, "Men And Women: The Differences Are In The Genes," *Science Daily* (Mar. 23, 2005); G. Friar, "Genetic study takes sex differences research to new heights," *MIT News* (July 16, 2019). Men cannot become women, and women cannot become men. *See, e.g.,* M. Gershoni & S. Pietrokovski, "The landscape of sex-differential transcriptome and its consequent selection in human adults," *BMC Biology* (2017).

That causes one to ask, what is the agenda of the current trans movement? An LGBT public school teacher who works at Valentine Hills Elementary School in Arden Hills, Minnesota admitted in a public social media video that "the goal" is to intentionally confuse students as to whether they are boys or girls. Thus, inflicting what was until recently considered a mental illness — gender dysphoria — is now "the goal" of some government school teachers. Children, who by definition lack life experience to evaluate such dangerous instruction, conform to the expectations their teachers put on them. Such persons should not be allowed in any position of responsibility over children, which is why people are leaving the

government schools in droves. *See* J. Valley, "Families are leaving public schools. How will that change education?", *The Christian Science Monitor* (Feb. 15, 2023).

The goal of promoting sexual confusion is not limited to a few teachers — it is the official policy of the Biden Administration. Dr. Rachel Levine, who serves as Assistant Secretary for Health of the Department of Health and Human Services, recently gave a speech at Connecticut Children's Medical Center in Hartford, Connecticut, which predicted that chemical and surgical medical treatments of children soon will become the norm:

> "I think that it's not going to be politically advantageous. It wasn't particularly in 2022. And so I think that as we look at all the different elections in 2024, I think the next two years are going to be challenging. But I am positive and optimistic and hopeful that the wheel will turn after that and that this issue won't be as politically and socially such a minefield," Levine said. [B. Carter, "Transgender HHS official confirms that Biden fully supports child mutilations," *Gender.news* (Mar. 23, 2023).]

The district court's assertion that using biologically correct pronouns somehow constituted "bullying" reflects trans ideology, which teaches "trans people" that they are being targeted. Perpetuation of this type of myth is highly dangerous, as there are apparently many "trans persons" already suffering from a mental problem, who are becoming convinced that their lives are constantly under attack.

It is too early to know the effect that Audrey Hale's "trans" status had on her[3] actions in murdering three adults and three children at Nashville's Covenant School on March 27, 2023. She was shot by responding police. However, hers was not the only shooting committed by "trans people" in recent times.

- On November 19, 2022, Anderson Lee Aldrich, who claims to be "nonbinary," killed five persons and injured 19 others at a LGBTQ nightclub in Colorado Springs, Colorado. Aldrich is facing over 300 criminal counts.
- On May 7, 2019, Alec McKinney, described as a female-to-male transgender teen and an accomplice, killed one student and injured seven others at a school in Highlands Ranch, Colorado. McKinney was sentenced to life in prison.
- On September 20, 2018, Snochia Moseley, a "trans person," shot six persons before committing suicide at a Rite Aid distribution center in Aberdeen, Maryland.

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[3] It is unclear why even mainstream media describing Audrey Hale refer to this biological female as "she/her," even though these media outlets have adopted the terminology of using pronouns associated with the person's assumed status. For some reason, only rarely are these media outlets using female pronouns accused of "misgendering" Audrey Hale, as the district court accused counsel for plaintiffs of doing to defendants.

- In the early morning hours of June 8, 2022, Nicholas Roske, who identified online as a "transgender woman," was arrested after he admitted to traveling from California to Maryland in order to assassinate U.S. Supreme Court Justice Brett Kavanaugh.

The perception fostered by the district court has reached the point that a group called the "Trans Radical Activist Network" has organized an event for April 1, 2023 outside the U.S. Supreme Court. The event is called "Trans Day of Vengeance," and on its website, the group describes "vengeance" as "fighting back with vehemence," and the purpose of the event is "fighting against ... eradication of our existence."

Glenn Greenwald describes what lies underneath the current push to expose children to transgender ideology. He says the Left understood that the trans issue as it relates to adults would not be enough to mobilize around, since most did not care what adults did to themselves. To maintain their edge, these leftist groups had to go after the children. *See* Glenn Greenwald, "Elite Meltdown," System Update (Feb. 16, 2023).

The American College of Pediatricians takes the position that there is no evidence that transgender interventions are safe for children:

> There is not a single long-term study to demonstrate the safety or efficacy of puberty blockers, cross-sex hormones and surgeries for

> transgender-believing youth. This means that youth transition is experimental, and therefore, parents cannot provide informed consent, nor can minors provide assent for these interventions. Moreover, the best long-term evidence we have among adults shows that medical intervention fails to reduce suicide.

As demonstrated below, it is bad enough when boys are given trophies to which girls are entitled, but the damage is much more severe when boys are surgically or pharmaceutically castrated, girls are surgically mutilated or rendered sterile by pharmaceuticals, and the authority figures in our society view this child abuse as normal.

It is time to consider the fact that transgenderism is not a new phenomenon. It has ancient roots. It begins with the notion that there is no objective truth:

> [A]s America and Western civilization turned away from God, they began undergoing a process of subjectification.... The transformation affected language. Truth was now what was true for the individual. If a man believed he was not himself but was someone or something other than what he was, a child, a woman, a leopard, or a tree, there was no ultimate or absolute truth ... to contradict his own personal "truth." [*See* J. Cahn, The Return of the Gods at 55 (Frontline: 2022).]

In turning away from God, without even knowing it, many have adopted a pagan worldview, which was once quite common. One of the "gods" of the pagan world was Ishtar, the "goddess of war and sexual love." *See* "Ishtar," *Britannica*. "An ancient Mesopotamian tablet records ... 'When I sit in the alehouse, I am a woman, and I am an exuberant young man.'" Cahn at 117-18.

> [Ishtar's] priests and ministers, her temple singers, and her ritual performers, the *assinnu*, the *kurgarru*, the *kalu*, and the *gala*, were known for publicly bending and breaking the parameters and definitions of gender. They were men who had taken on the appearances and attributes of women.... They dressed in women's garments; they made up their faces. Today, they would be called cross-dressers, transvestites, nonbinary, bi-gender, or androgynous. [*Id*. at 127.]

The goddess Ishtar had summertime festivals and parades. Cahn states: "The parades of the goddess featured men dressed as women, women dressed as men, each dressed as both, male priests parading as women, and cultic women acting as men. They were public pageants and spectacles of the transgendered, the cross-dressed, the homosexual, the intersexual, the cross-gendered." *Id*. at 181. Cahn further explains:

> Even a modern transgendered commentator, writing of the goddess's ancient festival, could not fail to see the connection:
>
> > The description of the festival appears to show the people of the city cross-dressing specifically for the purpose of the celebration. Indeed the whole thing sounds very like a gay pride parade. [*Id*. at 182 (citing Cheryl Morgan, "Evidence for Trans Lives in Sumer," Notches (blog), May 2, 2017).]

While the term "transgender" may have been coined only in 1965, it has ancient roots, demonstrating, as Solomon explained: "The thing that hath been, it is that which shall be ... and there is no new thing under the sun." *Ecclesiastes* 1:9. The Bible also makes clear that what may appear to only be political or cultural dispute, has an important spiritual component. "For we wrestle not

against flesh and blood, but against principalities, against powers, against the rulers of the darkness of this world, against spiritual wickedness in high places." *Ephesians* 6:12.

But regardless of whether this Court believes this to be true, this Court has the opportunity to stop the slide of the nation into pagan religious practices, by not rewarding those boys who seek to compete unfairly with girls. The objective truth is that such persons are boys, not "transgender females" as the district court asserted and admonished counsel to repeat. The decisions of the district court and the panel, albeit unknowingly, only serve to uphold and enforce pagan religious beliefs that by adopting the appearance and mannerisms of biological females, biological men can become women and must be treated as such. Such pagan religious beliefs are not neutral and must not become enshrined in our law. Justice demands reversal.

## CONCLUSION

The district court and panel opinion should be reversed, and the case be returned to the district court for trial.

Respectfully submitted,

/s/ Joseph P. Secola

J. Mark Brewer
BREWER & PRITCHARD, P.C.
800 Bering Drive, Suite 201A

Joseph P. Secola*
SECOLA LAW OFFICES, LLC
113 Mill Plain Road #1002

Houston, Texas 77057

Rick Boyer
INTEGRITY LAW FIRM
P.O. Box 10953
Lynchburg, Virginia 24506

Danbury, Connecticut 06811
(203) 417-3186
Attorney for *Amici Curiae*

March 30, 2023
*Counsel of Record

**CERTIFICATE OF COMPLIANCE WITH RULE 32(a)**

IT IS HEREBY CERTIFIED:

1. That the foregoing Brief of *Amicus Curiae* of Public Advocate of the United States, *et al.* in Support of Plaintiffs-Appellants and Reversal complies with the type-volume limitation of Rule 29(a)(5), Federal Rules of Appellate Procedure, because this brief contains 6,134 words, excluding the parts of the brief exempted by Rule 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect version 21.0.0.194 in 14-point Times New Roman.

/s/ Joseph P. Secola
Joseph P. Secola
Attorney for *Amici Curiae* Public Advocate of the United States, *et al.*
Dated: March 30, 2023

## CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing Brief *Amicus Curiae* of Public Advocate of the United States, *et al.*, in Support of Plaintiffs-Appellants and Reversal, was made, this 30th day of March 2023, by the Court's Case Management/ Electronic Case Files system upon the attorneys for the parties.

/s/ Joseph P. Secola
Joseph P. Secola
Attorney for *Amici Curiae* Public Advocate of the United States, *et al.*