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Episode 2: State of the Union

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Episode 2: State of the Union

Dara Purvis: Utah passed a ban on trans girls playing sports over the veto of Utah's Republican governor, Spencer Cox and in Governor Cox's veto message before the legislature again passed it, he pointed out the numbers. So there are 75,000 high school students in Utah who play sports. Four students in the entire state who play sports at the high school level are trans. Only one of them, one student out of 75,000 is a trans girl.

Sara Gras: I'm Sara Gras and this is Season 1 of Hearsay from the Sidelines, a show about the place where law, sports and culture intersect brought to you by Culture in Sports and Seton Hall Law School's Gaming, Hospitality, Entertainment and Sports Law program. Welcome to Episode 2: State of the Union. This episode will focus on recent state and federal legislation focused on trans athletes, as well as a few of the key court cases that preceded these laws as well as those that have challenged them.

I mentioned in the prologue that in the last 3 years, 22 states have passed laws prohibiting trans kids, always trans girls, but sometimes also trans boys, from participating in scholastic sports on single gender teams that align with their gender identity.¹ While this is troubling enough on its own, the sports bans are just a small portion of the anti-trans legislation introduced and enacted throughout the country, which saw more bills targeting LGBTQ rights introduced and passed in the first four months of 2023 than at any other time in U.S. history.² But the recent legislative push against trans rights was not unfamiliar to LGBTQ+ advocates and activists.

Shira Berkowitz, Senior Director of Public Policy and Advocacy at PROMO in Missouri, described this new legislation as a resurgence of efforts that began almost a decade ago.

Shira Berkowitz: I would say about eight, nine years ago, we not just in Missouri, but nationally saw some of our very first legislation that looked like bathroom bills, keeping folks who are transgender or non-binary out of using the restroom that maybe does or doesn't correlate to their, the gender marker on their birth certificate. But...instilling that they could only use the restroom if it did. And that type of legislation really peaked with a bill passing in North Carolina, but Missouri had been fighting one very similar for three or four years, just as aggressively. And there seemed to be a moment where the LGBTQ advocacy I guess, climate won that argument or created enough of an alignment with the majority of people that there isn't really an issue with anyone using a restroom and that type of legislation petered out. But with passing the same sex marriage equality nationwide, we saw an, and like an aggressive, uptick in anti-LGBTQ legislation immediately following which went back towards some of that bathroom ban legislation to very specifically attack the transgender population of people. It seems to be like the more narrow the legislation attack is and the more our opposition can create this picture that transgender people are so vastly different from anyone else. That type of legislation, the anti-trans legislation gets legs. And we've seen it in the past three years, really heavily attacking transgender youth. Is this way or this argument to say that transgender, you do not know who they are. Adults, their adults know better. Or just legislators, elected officials in general, know better about who they are. And it's been a really challenging issue to get ahead of on the side of, you know, humanizing transgender youth and making it more widely known and familiar that transgender youth are no different than any other peer of theirs. But

¹ Bans on Transgender Youth Participation in Sports, Movement Advancement Project, https://www.lgbtmap.org/equality-maps/youth/sports_participation_bans.

² Kimberly Kindy, *Historic Surge in Bills Targeting Transgender Rights Pass at Record Speed*, WASH. POST A6 (April 30, 2023).

But because of that wedge that was driven into the unfamiliarity of who transgender people are, and the court cases that have drawn this legislation up into a more prominent space, or priority, or need to legislate away the rights of youth and their parents who don't know what's best for them, or under that guise that don't know what's best for them,

We've been losing the argument. And in a state like Missouri, we are, we had two bills passed this year that take away the rights of a lot of transgender youth and will go into effect pending any kind of court blockage August 28th. And we're in community with many, many other red states, very specifically Texas and Oklahoma and in Florida who are as a state losing the rights for transgender youth and their families to support them.

Sara Gras: As Shira described, anti-trans legislation got legs a few years ago. But those legs didn't grow naturally because there was an issue in any of these states with trans athletes who wanted to play sports. Those legs were manufactured.

I took a deep dive into the specifics of each of these state laws and quickly discovered that the majority of them were not just strikingly similar, but almost identical, right down to the name of the bill, where provided – either the Fairness in Women's Sports Act or the Save Women's Sports Act. With only a couple exceptions and minor variations, the key language reads:

A. EACH INTERSCHOLASTIC OR INTRAMURAL ATHLETIC TEAM OR SPORT THAT IS SPONSORED BY A PUBLIC SCHOOL OR A PRIVATE SCHOOL WHOSE STUDENTS OR TEAMS COMPETE AGAINST A PUBLIC SCHOOL SHALL BE EXPRESSLY DESIGNATED AS ONE OF THE FOLLOWING BASED ON THE BIOLOGICAL SEX OF THE STUDENTS WHO PARTICIPATE ON THE TEAM OR IN THE SPORT:

1. "MALES", "MEN" OR "BOYS".
2. "FEMALES", "WOMEN" OR "GIRLS".
3. "COED" OR "MIXED".

B. ATHLETIC TEAMS OR SPORTS DESIGNATED FOR "FEMALES", "WOMEN" OR "GIRLS" MAY NOT BE OPEN TO STUDENTS OF THE MALE SEX.

C. THIS SECTION DOES NOT RESTRICT THE ELIGIBILITY OF ANY STUDENT TO PARTICIPATE IN ANY INTERSCHOLASTIC OR INTRAMURAL ATHLETIC TEAM OR SPORT DESIGNATED AS BEING FOR "MALES", "MEN" OR "BOYS" OR DESIGNATED AS "COED" OR "MIXED".

So to break this down into plain English – public school teams and any non-public schools who play them must definitively categorize teams as either single sex or coed. Transgender girls cannot play on girls teams, but transgender boys CAN play on boys teams. These provisions were followed by additional provisions which in most states provide a private cause of action for injunctive relief and damages to any individual harmed by violations of the law. This means that individuals who believe a teammate or competitor is not playing on the team that aligns with their biological gender can challenge their participation in court, and those individual students will be forced to defend themselves against those claims. Some also prohibited state government offices, athletic associations, or state accrediting bodies, like those who accredit schools, from receiving or investigating complaints about schools maintaining these separate girls teams on which only cisgender girls could play. This last provision is presumably to

prevent those who oppose the laws from filing civil rights complaints alleging gender identity discrimination against school districts. Virtually every one defines "biological sex" as "the biological indication of male and female in the context of reproductive potential or capacity, such as sex chromosomes, naturally occurring sex hormones, gonads and nonambiguous internal and external genitalia present at birth,"³ and refer to a birth certificate issued in close proximity to the student's birth as documentary proof of biological sex. Even the legislative findings, where provided, seem like they were copied and pasted – with near-identical statistics about the biological differences between men and women, and citations to the same cases, studies, and articles.⁴ There were many close variations of this language from the Idaho law:

Sex-specific teams accomplish [sex equality] by providing opportunities for female athletes to demonstrate their skill, strength, and athletic abilities while also providing them with opportunities to obtain recognition and accolades, college scholarships, and the numerous other long-term benefits that flow from success in athletic endeavors.⁵

Copycat legislation is not rare – thousands of state bills are written by industry or advocacy groups and think tanks. A collaborative investigation by USA Today, The Arizona Republic, and the Center for Public Integrity in 2019 found at least 10,000 bills copied from model legislation introduced in the prior eight years with more than 1/5th of those actually signed into law.⁶ But this particular campaign even reached the federal level with the passage of House Bill 734 in April of 2023.⁷ Titled the "Protection of Women and Girls in Sports Act of 2023," this legislation would have amended Title IX to prohibit recipients of federal funds from allowing athletes who were designated as male at birth from taking a spot on womens or girls athletic teams. While this bill died in the Senate, it's clear that there is powerful movement continuing to push such legislation forward.

I discussed the hidden forces behind these laws with Val Moyer, researcher for Athlete Ally and co-author of a recent Hastings Center Report on trans athlete inclusion.

Val Moyer: It's sort of like a solution without a problem is how a lot of people are talking about this. So sometimes lawmakers in kind of the public forums of these bills can't point to an example of even a trans girl that they know competing in their state at all, let alone, you know, dominating girl sports, which is the verbiage that's often used. Destroy, yes, there's a lot of, you know, really inflammatory language and that's on purpose, right? To really scare people. And so I think what's happening, we saw this kind of, there was a precursor to this, I think, and a lot of political scientists talk about this, with the bathroom bill in North Carolina that attempted to ban trans people from using the bathrooms in alignment with their gender identity. And once again, use the figure of like the little girl who was often imagined as a white cisgender girl in the bathroom as the victim in this scenario that they kind of

³ H.B. 2238, 2023 Leg., Reg. Sess. (Kan. 2023) available at http://kslegislature.org/li/b2023_24/measures/documents/hb2238_enrolled.pdf.

⁴ These include: *United States v. Virginia*, 518 U.S. 515 (1996); *Kleczek v. Rhode Island Interscholastic League, Inc.*, 612 A.2d 734 (R.I. 1992); *Petrie v. Ill. High Sch. Ass'n*, 394 N.E.2d 855 (Ill. App. Ct. 1979); Valerie Thibault, et al., *Women and Men in Sport Performance: The Gender Gap Has Not Evolved Since 1983*, 9(2) J. Sports Sci. Med. (2010); Doriane Coleman, Martina Navratilova, et al., *Pass the Equality Act, But 12 Don't Abandon Title IX*, WASH. POST (Apr. 29, 2019).

⁵ <https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2020/legislation/H0500.pdf>

⁶ Rob O'Dell and Nick Penzenstadler, *You Elected Them to Write New Laws. They're Letting Corporations Do It Instead*, USA TODAY (Apr. 3, 2019), <https://www.usatoday.com/in-depth/news/investigations/2019/04/03/abortion-gun-laws-stand-your-ground-model-bills-conservatives-liberal-corporate-influence-lobbyists/3162173002/>.

⁷ H.R. 734, 118th Cong. (2023), available at <https://www.congress.gov/bill/118th-congress/house-bill/734/text>.

painted over and over again. And so that didn't work. That got pretty like shut down. There was a lot of backlash towards the bathroom bills. But really starting in 2020, it seems like conservative think tanks and advocacy groups realized that there was kind of some passion and fervor that could be created around sports and around trans girls in sports. And I think that's, you know, a lot of it's, our culture is very, you know, we love sports, things like that. And so they kind of perpetuated the narrative that trans girls were taking over sports. They used very, the very few and far between examples of trans girls who were competing well, who were winning at times, again without very little, you know, no context really, but we can't, like the examples of trans girls that are competing well in high school are not necessarily dominating at all. And they're only really covered and talked about in the media when they're winning. And so, Andraya Yearwood and Terry Miller, who are two girls in Connecticut, are often cited in either legislation itself or debates around legislation. They happened to go one and two in, you know, one event at a state meet one time and were subsequently beaten in future state meets, but that's not really talked about. So a lot of, it's a lot of taking very, very few and far between instances and really blowing them up. But that has really worked to kind of stoke this, this fear that this might be happening more or that without this legislation there could be this so-called takeover. And it has worked, I think, in part to kind of mobilize a conservative base, but also to act as a wedge issue. So some, you know, moderate voters look at this and think like, well, I should probably support whoever's introducing this bill, because it's posed as just like a necessary thing that has to happen. And so this was also, these bills were being passed during COVID, and they've sort of escalated from there.

Yeah, so that's what's going on. The other thing is since sort of the beginning of this wave, we've also seen women who are formerly high profile athletes kind of forming coalitions with more conservative entities. So the Women's Sports Policy Working Group, which includes Martina Navratilova and Nancy Hogstead-McCarr formed and posed, like framed themselves as the middle ground and trying to be, you know, scientific, but have since aligned more and more with conservative groups or with women's organizations that are explicitly trans exclusive. And so we've seen these kind of odd lobbying bedfellows forming in the past few years as well.

Sara Gras: The trans girls Val mentions, Andraya Yearwood and Terry Miller, found themselves at the center of a legal dispute that began in Connecticut federal court in 2020. My colleague, Bob Boland, is a nationally known sports law professor who was most recently the Athletics Integrity Officer at Penn State. We talked about the *Soule v. Connecticut*⁸ case at great length with the hope of providing some insight into who the parties were, what they were arguing, and where the case currently stands in the court system because it is, incredibly, still ongoing.

Bob Boland: Initially, three young women, high school athletes, two seniors, one sophomore, were initially the plaintiffs in this case, alleging that two athletes who were who were born genetically male and had now assumed a female identity, were hurting their opportunities to compete and win championships and titles, or at least, because it sought injunctive relief, that it was an immediate, irreparable harm if these two young people, in this case, young women were allowed to compete in the upcoming season. They sought an injunction. It was one sport, it was two people who posed the threat if they were allowed to compete. And it challenged the Connecticut determination of broad competition based on gender identity rather than birth sex.

⁸ *Soule by Stanescu v. Conn. Ass'n of Sch.*, No. 3:20-cv-00201 (RNC), 2021 WL 1617206 (D. Conn. April 25, 2021), *aff'd*, 57 F.4th 43 (2nd Cir. 2022), *pending rev. en banc*.

Sara Gras: The original plaintiffs in this case were Selina Soule, Chelsea Mitchell, and Alanna Smith. They were students at three different Connecticut high schools who were all members of their school varsity track and field teams. The crux of their argument was that the Connecticut Interscholastic Athletic Conference policy that allows students to compete in CIAC competitions based on gender identity violates Title IX because it takes away opportunities from girls by allowing what they call “biological males” to compete on girls teams. While the complaint is full of statistics on physiological differences between men and women and unsupported assertions that “males are seizing one ‘girls’ or ‘women’s’ championship and record after another,”⁹ the facts are far less dramatic. In reality there were two transgender girls, students at different schools, competing in track and field in the entire CIAC. Both girls were very accomplished athletes, a fact highlighted by the plaintiffs in their complaint. In 2018, Terry Miller and Andraya took first and second place respectively at the state open championship in the 100m event, and first and second place in the 55m event at the 2019 state open. While this sounds like a tremendous and overwhelming showing, there are some additional pieces of information I want to highlight. First, there were 18 events at each of these meets. Terry and Andraya displayed dominance in one. Second, they did not beat their competitors by a statistically significant margin – in fact, in the 2018 100m event, Andraya finished only 1/10th of a second faster than Chelsea Mitchell, the 4th place finisher. In the 2019 55m event, Andraya was only 2/10ths of a second faster than Chelsea, who again finished 4th. Because Andraya and Terry performed well in these meets, as well as others, plaintiffs alleged that males, rather than females, were awarded the majority of the awards and opportunities to participate in higher-level state competition, and that this was a violation of Title IX. To prevent this from continuing to happen, they argued, Andraya and Terry must be prevented from competing in the girls division in the 2020 season.

Bob Boland: Obviously track and field, there is the element of time attached to it or distance in the right context. So there is some predictability if you compare best times and lifetime bests that these women might be not able to win titles, not able to compete. This is however, it's something that's really unusual in sport because in almost any sport case, you never look to disqualify participants on the eve of competition and then reorder them or have looked at a harm if a certain competitor is allowed to compete. It is a modern kind of interesting idea. What's also interesting and novel in this case is that the plaintiffs were also looking to the anti-discrimination statute, Title IX, to provide them with their basis for their lawsuit that Title IX would prevent or should prevent injury to women that would be disruptive of their educational experience on the basis of sex. Well, in this case, they're alleging that the participation of the transgender women would be-would do that to the women who were cisgender. It is a remarkably convoluted set of facts, and one that at least in this circumstance is fairly novel.

Sara Gras: While I will talk much more about Title IX in a future episode, I think it's important to say something briefly about what Title IX is. It was an amendment proposed to a 1972 Senate education bill during floor debate that read, “no person in the United States shall, on the basis of sex, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”¹⁰ Quite simply, this broad language prohibits educational institutions who receive federal government funds from excluding students from programs and activities associated with education on the basis of sex. There was no specific mention of athletics, although it has been clarified by the Department of Education and the courts over the years that it does apply to school athletic programs. It also does not promise an equal share of the spoils of

⁹ Complaint at 21, *Soule by Stanescu v. Conn. Ass'n. of Sch.*, No. 3:20-cv-00201 (D. Conn. April 25, 2021).

¹⁰ 118 Cong. Rec. 5803, available at <https://www.govinfo.gov/content/pkg/GPO-CRECB-1972-pt5/pdf/GPO-CRECB-1972-pt5-4-2.pdf>.

the benefits of educational activities – it certainly couldn't provide equal access to jobs or equal pay. It simply promises opportunities.

Bob Boland: Right, and flip the gender balance of gender equality guaranteed under Title IX. That's the novel part of the argument. We've never seen that brought before. We've seen Title IX defined in participatory opportunity. We've seen it defined in facility fairness. We've seen it defined in a lot of different ways. We've never seen something like this, the right to win and the wrong people taking up space in those participatory opportunities. And I think one of the harms that the cisgender women as plaintiffs argued was that their placings, their ranks, their chance for advancement, their chance for college scholarships and the joys of victory would be diminished. And again, that's a...a real reach in individual sports. All you have to do is go out to any road race in any town and find people winning their age group, running personal bests and not finishing first. And the participation is still strong. It was a unique and novel argument, particularly to use the principles of Title IX, which in its history is exclusively an anti-discrimination law made to create opportunities for women, not to define who the women are who seek them.

Sara Gras: By seeking an injunction, the plaintiffs here sought to deprive Terry and Andraya of that opportunity. It's also important to note that in seeking injunctive relief, the plaintiffs in the *Soule* case sought not just to keep Andrea and Terry from running, but they also wanted to change existing records to remove Terry and Andrea's times and to move up athletes who finished after them.

Bob Boland: And essentially they wanted a cleansing of the record. Again, something that has happened in sport in the case of disqualification, but not something we've seen broadly in the idea that history would be widely rewritten.

The district court granted summary judgment to the defendants in this case, saying that there was no issue of fact or law over which reasonable minds could differ in the interpretation of the policy and declined to really cognize any of the claims brought by the plaintiffs, particularly as defined the rule in this case that the rule was on its face neutral.

Just in the general principle of all American cases, you have to bring a conflict by which the court can provide some relief. And then the other question is, if you're bringing that, are you the right person to bring that? Is there relief you can be granted?

And I think the court looked at this and said that was really remote for these young women to have the record book rewritten, to have the people above them in a standing expunged, or to looking forward, have those people who might be otherwise eligible removed under these standards. And it certainly does smack to the participation of the two transgender women, or girls in this case, at least using the high school terminology, because their right to compete would have been at stake and infringed, and they would have been plaintiffs in a separate action.

Sara Gras: The plaintiffs appealed this dismissal to the Second Circuit Court of Appeals. The issues addressed by the court on appeal were whether there was, in fact an actual injury suffered by the plaintiffs and whether that was actually redressable – does preventing two individuals qualified under the state athletic association's rules from running and changing the records to erase their victories actually fix the harm plaintiffs are alleged to have suffered? There was also a separate issue which is whether Title IX even allows this type of private cause of action against an entity who receives federal funds. Here's more from Bob about that particular issue:

Bob Boland: Yeah, Title IX actions generally don't allow money damages to flow out of them. In other words, I could sue my school district because I'm not receiving enough opportunities as a female athlete, but it's generally not that I'm gonna get any kind of monetary benefit attached to this lawsuit, and this lawsuit did have a claim for money damages attached which is again, unusual unless it would be a case of unequal facility where you would be looking at that women had been disadvantaged to a certain number in dollar figure terms. But yeah, and the case turned on the issue there, did the school district have notice or the school district association have notice that money damages would be a part of this and the court determined in that case, no, they didn't have such notice that there wasn't a basis to assume that they would understand that money, they would be liable for money damages to these athletes. I also would think that it also flows out of that as it is very difficult back to our prior conversation to connect a dollar value to the idea that someone comes in second in an event versus someone coming in first. In almost any circumstance, we struggle with that and it's wildly speculative, particularly in high school sports. The idea that if I play second or third or fourth in the state meet and I'm on the podium and the winner would be subsequently disqualified, can we assess some harm or damage in that placement difference?

If I lost the opportunity to compete, maybe there's an issue, but I don't know if money damages are there. And that's where the court couldn't infer that. It was very, very speculative, and it's very difficult to calculate what that loss would be. We're seeing a couple of different analogous situations. We're trying now in the era of NIL that if a player is cut from a team or if a player doesn't receive their college opportunities appropriately, we try to assess the damage of it. But again, in the high school sports ranks, it's very difficult to put dollar figures on those and on those concepts, or differentiate a lifetime earning.

Sara Gras: A big part of the Second Circuit's majority opinion, is that it is so speculative for the appellants, the plaintiffs, to claim they were deprived of the opportunity to be champions and that being champions might have an impact on their future job prospects. The court is just skeptical of the idea that somehow placing first versus second or seventh versus eighth in a high school track championship would have an impact on their employability, particularly when you have not offered any evidence to support that assertion.

Bob Boland: And we've seen this throughout, we've seen this sort of throughout the history of sport and there are widespread apocryphal tales, maybe not exactly factual ones, that athletes were offered scholarships contingent upon winning a state title or placing in a certain spot. That's possible. I don't...I don't argue that those opportunities wouldn't exist, but it certainly becomes an issue. I think it's actually, and maybe if you were thinking about the real value of this, it's probably in college essay terms, if we were to think about it, how you would distinguish yourself, how you would refer to yourself.

Sara Gras: Even though the court did not address it at any point, a big part of the plaintiff's argument is that the deck was so stacked against the cisgender girls competing against these transgender girls. But as the records show, these plaintiffs were putting up times that were within tenths of a second of the athletes who supposedly had such an unfair advantage. In multiple instances, Terry and Andrea were beat by cisgender girls in events. Contrast those facts with the statistics offered in the complaint that biological males have a 10 to 20% athletic performance advantage over females.

Although this is just conjecture on my part, I also think there's something to be said for performance being to some degree the product of environment. Who's to say that if the plaintiffs had not been running against these very gifted athletes that they would have run as fast? I posed this question to Bob:

Bob Boland: Sara I think you're hitting at one of the, and this is more sport philosophy than legal philosophy, you're kind of hitting at the reason why we have competitive categories in sport. And if we did them not based on gender, we do them on objective factors like time or proficiency. And so one of the reasons why we seek fairness in our categories is the idea so that there can be a level competitive playing field. And I think it's very difficult when you see performance being competitive and not dominant to begin to infer that these people, the transgender girls in this case, were at such distinct advantage or the cisgender women in this case were at such distinct, I'm sorry, were at such distinct advantage for the trans girls and that the cisgender girls are at such distinct disadvantage. They are kind of a shuffle deck of competitiveness, which sort of suggests to me from the outside looking in that they're in the right category and that these young trans girls would not be competitive with boys now at their age group level, which would be running faster times and that the argument in this case for identity seems to be fair.

Sara Gras: Although the Second Circuit upheld the district court's decision, now the Second Circuit has agreed to rehear the appeal en banc, which just is a fancy legal way of saying the entire panel of Second Circuit judges rather than just the three. An en banc decision is still forthcoming at the time this episode was recorded. If the full panel reaches a different decision, I'll be sure to add an update in a future episode.

If the *Soule* case was the prequel to the flood of state sports participation bans, the cases that have challenged them, like *Hecox v. Little*, are the sequel. In the original action¹¹, Lindsay Hecox, a transgender woman enrolled at Boise State and a track athlete, sought injunctive relief from the enforcement of Idaho's Fairness in Women's Sports Act, which on its face bans her participation in women's track at her university, despite her compliance with all current NCAA rules governing eligibility. She was joined in her suit by Jane Doe, an Idaho high school student, cisgender girl and athlete who was concerned that her athletic build and more masculine appearance might make her a target for dispute or disqualification from girls athletics following the enactment of the law. I'll talk more about this a bit later, so hold onto this fact.

Their suit was filed against Idaho Governor, Bradley Little, the president of BSU, and a long list of state educational officials. These defendants were joined by two cisfemale track athletes as intervenors, nonparties who have an interest in the case. They were represented by the Alliance Defending Freedom, the same faith-based legal advocacy organization that represented the plaintiffs in the *Soule v. Connecticut* case. If the Alliance Defending Freedom rings a bell, it may be because they represented the Colorado baker who refused to create a wedding cake for a same sex couple in his appeal to the U.S. Supreme Court¹² and successfully advocated for the right of the Boy Scouts of America to bar gay troop leaders¹³—yep, more on them later too.

The federal trial court found that Idaho's law discriminates on the basis of sex by subjecting cisgender females like Jane to invasive exams to prove their biological gender if challenged that males would not have to undergo, and on the basis of transgender status without any appropriate justification and granted an injunction to prevent its enforcement. In examining the legislative history of its enactment, the court found that, quote: "The Act's legislative findings reinforce the idea that the law is directed at

¹¹ *Hecox v. Little*, 479 F.Supp.3d 930 (D. Idaho 2020).

¹² *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Com'n*, 138 S.Ct. 1719 (2018).

¹³ *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).

excluding women and girls who are transgender, rather than on promoting sex equality and opportunities for women.”¹⁴ This injunction was upheld by the 9th Circuit Court of Appeals.¹⁵

Bob Boland: And so the court and the Ninth Circuit basically held that this was an absolute bar, that it was too strong and it provided an immediate irreparable harm to Ms. Hecox in this circumstance with no real burden on anyone else. So the state law was overbroad.

One of my favorite areas of law is the idea of injunctive relief. And anybody who's a sports lawyer, sports law cases almost always have a claim for injunctive relief because, and these cases illustrate it very well, the timing is the issue. You really care about what's happening next now for the next competition. You're not so much worried about waiting for a formal hearing on the merits. So this was, again, a case on injunctive relief. And in this case, the court was affirmative in upholding an injunction saying that the burden, that the immediate irreparable harm that Ms. Hecox would suffer in the process far outweighed any objections the state or any interest the state had in protecting any of these interests. So the balance of the equities absolutely favored her. And if you read the case and look at the case decision, it is becoming a forum for sort of a who's who in law to be interveners and issue friends of the court briefs. The association of largely, basically every democratic attorney general in the country entered this. There were multiple interest groups, solicitor generals across the country and large law firms on behalf of various groups, including industry groups, filed amicus curiae briefs in this case, many on the side of the plaintiff, this case the transgender young woman who was suing and to get the injunction and against an overbroad law. Again, this is a bizarre forum, at least, and this is beyond to some degree my pay grade as a sports lawyer, but sport has become a bizarre forum by which we fight over definitions of gender and definitions of eligibility, particularly with no clear harm showing up.

Sara Gras: Courts are not newcomers to the debate over who can play sports with whom, or to how schools should be treating trans kids. Dara Purvis is a professor of law, currently at Penn, whose scholarship focuses on sexuality, gender identity, and the law. In a recent book chapter, she examines the questions school districts have faced in recent years about the accommodation of transgender students, and the legal history behind these accommodations. She identifies a clear connection between the current controversy over transgender student inclusion and historical challenges to gender-based exclusion from single-sex teams.

Dara Purvis: When you look at political and legal arguments around trans students in schools, there are three questions that come up over and over again, dress codes, bathrooms, and sports. When I started my research, there weren't too many examples of court cases, litigated cases, where a trans student had sued in order to be able to join a sports team that was consistent with their gender identity, particularly examples of younger students doing this. But there is already a body of older cases from the 1970s dealing with single sex sports teams where a cisgender student, usually but not always a girl wanting to join a boys team had brought those kinds of claims. And you see the exact same arguments in those cases as we see in today's arguments around trans students, which is this isn't fair and this isn't safe. Yet in the 1970s you saw many courts rejecting these arguments. The fairness argument as articulated in the 1970s was if we allow boys to play on girls teams that will be unfair because the boys will dominate the girls. They will do better. Today, that argument is if we allow trans girls to play on girls' teams, the trans

¹⁴ Id. at 983.

¹⁵ Hecox v. Little, 79 F.4th 1009 (9th Cir. 2023), *available at* <https://cdn.ca9.uscourts.gov/datastore/opinions/2023/08/17/20-35813.pdf>.

girls will unfairly do so much better than cisgender girls. They will take opportunities away from cisgender girls. Several courts in the 1970s basically just said, why do you think that? Do you have any facts to show that these girls' teams will actually be taken over by boys if we allow this one boy to play?

So one example of this happened in Massachusetts.¹⁶ At the time, there was a rule that if a girl wanted to play soccer, but her school didn't have a girl's soccer team, she could join the boys team in order to be able to play. But a boy in the same position, whose school only had a girl's soccer team, couldn't join the girls team. And when that rule was challenged, the Massachusetts Interscholastic Athletic Association said, well, we have to make this one-sided because if we let boys play on girls teams, those teams will be swamped by, and I will quote here, "boys of skill and prowess superior to those of girls." But the Massachusetts court said, you haven't given us any evidence to show that that's going to happen. We don't want to base a ruling on this assumption that you've given us nothing to back up. Another example was in Rhode Island.¹⁷ There it was a male student who had transferred schools and he had played volleyball at his old high school, transferred to a new high school that only had a girls volleyball team. Again, he asked if he could join it, he's told no. The coach and his school said, well, if volleyball becomes popular among high school boys, they would dominate a co-ed team, girls will lose out on all these opportunities. But the district judge, again, ruled in the boys' favor, in part because the school hadn't presented any evidence that letting him play would mean any other boys at the school would also want to play and swamp the team. Now compare that to today, a state like Utah. Utah passed a ban on trans girls playing sports over the veto of Utah's Republican governor, Spencer Cox and in Governor Cox's veto message before the legislature again passed it, he pointed out the numbers. So there are 75,000 high school students in Utah who play sports. Four students in the entire state who play sports at the high school level are trans. Only one of them, one student out of 75,000 is a trans girl.

So just as courts in the 1970s said, you haven't put anything before us to actually show that this will result in girls being pushed out of sports, these numbers just don't add up to an argument that cisgender girls will be pushed out of sports opportunities either. The other objection that we see today has to do with safety. In the 1970s, this was - if we allow boys and girls to play sports together and against each other, the girls will get hurt because boys are bigger and boys are stronger. Today, this argument is trans girls who went through puberty and developed secondary sex characteristics of the sex that they were assigned at birth are bigger and stronger than cisgender girls. And thus, cisgender girls will be hurt playing sports with and against trans girls. It's definitely true that at least in some sports, playing against a bigger person may increase your chance of injury. But again, as courts pointed out when this came up in the context of girls and boys, schools and sports teams were using sex as an inaccurate proxy if what you actually want to get at is body size. For example, a number of courts pointed out hearing these cases about boys and girls in the 1970s, smaller boys might be injured playing sports against larger boys.¹⁸ And particularly when you're looking at teenagers, you've got kids at various sizes, at various stages of puberty already, big variations in size. But none of these teams, none of these schools who are saying, we can't let girls play because they'll get hurt, told smaller boys, we can't let you play, because you smaller boys may get hurt. And if what you're concerned about is the size of the students, sex isn't always accurate to tell us their size, particularly when we're talking about younger students. There was one case out of New Jersey where some girls wanted to play on a little league team, and the team said, no, we can't let them play because the girls will get hurt. And an expert witness pointed out, we are

¹⁶ Attorney General v. Mass. Interscholastic Athletic Assoc., 393 N.E.2d 284 (1979).

¹⁷ Gomes v. Rhode Island Interscholastic League, 604 F.2d 733 (1st Cir. 1979).

¹⁸ Carnes v. Tennessee, 415 F. Supp. 569 (E.D. Tenn. 1976); Darrin v. Gould, 540 P.2d 882 (Wash. 1975); Hoover v. Meiklejohn, 430 F. Supp. 164 (D. Colo. 1977); Force v. Pierce City, 570 F. Supp. 1020 (W.D. Mo. 1983).

talking in this case about eight to 12 year olds. At that age, girls and boys are about the same size, if anything girls are often bigger.¹⁹ So to the extent that you're concerned about size and safety, using sex as a proxy for body size just isn't all that helpful and isn't all that accurate. Today, similarly, using sex assigned at birth as a proxy for body size doesn't tell us what we're actually concerned with. And the focus on sex assigned at birth while ignoring different sizes among cisgender students highlights, I think, in the same way as it did 50 years ago, that maybe this isn't what is actually motivating people.

Sara Gras: This debate about trans kids and sports – it's not just about trans kids or even the trans community. What I want people to know, what I want people to really hear, is that this debate is also about women and what it means to be a woman or a girl, particularly in sport. These state statutes, which purport to be about the protection of women's opportunities and rights, put every female athlete who may not "fit" social norms of what a girl is supposed to look like, throw like, run like, in the crosshairs – at risk of being singled out and challenged as "not a real woman." And all of this reinforces an already-pervasive message of binary gender and heteronormativity in education. Here's Dara's take:

Dara Purvis: Something that I have written about recently is how schools send a lot of messages around sex and gender to children.²⁰ And this isn't all explicit teaching. I'm not saying that teachers are typically saying in the classroom, there are two genders, they are important ways that we divide people. Sometimes they can. There are some truly appalling examples from abstinence-only sex ed programs that do give these gender stereotypes and talk about how men are knights in shining armor and women are princesses who shouldn't tell a knight what to do. But most of the time, what I'm talking about is implicit messaging, that there are two genders, that we should be able to easily identify the gender of every person and that includes ourselves, that this is an important difference and that it makes sense to divide people by gender. So if you think about things like dress codes that are written differently for girls and boys, bathrooms, locker rooms at school that are labeled girls and boys, and of course, sex segregated sports, all of these communicate messages about gender. A trans child or a non-binary child who is sitting through all of that messaging, number one, maybe that child is still figuring out what their gender identity is. And they're getting a message that where they think they should be, who they think they are and who the school thinks they are may be different. So this could certainly cause internal struggle and maybe some questions for a trans or non-binary child. But let's say that this child is able to express, I am transgender, I am non-binary. They tell their parents this and their parents are supportive. Now their parents have to go to the school and say everywhere that this happens, whether it's which bathroom they use, the pronouns that you use to refer to them, what clothing they wear to school, all of these aspects of their day, we would like our child to do this differently than what you are currently expecting from them. And depending on the school and the state, the school may or may not be willing and able to do that and to allow the child to go about their day in the way that they would like.

Now, on the one hand, there is a federal statute that forbids sex discrimination in schools, Title IX, and it has been read by recent democratic administrations to forbid discrimination on the basis of gender identity. And this is consistent with the recent Supreme Court ruling in *Bostock v. Clayton County* that similar language forbidding sex discrimination in the context there of work, protects employees against discrimination on the basis of their gender identity.²¹ So there's some legal support, there's considerable legal support for a parent who says, I would like you to support my child in their gender identity. But

¹⁹ NOW v. Little League, 318 A.2d 33 (N.J. Super. Ct. App. Div. 1974)

²⁰ Dara E. Purvis, *Gender Stereotypes and Gender Identity in Public Schools*, 54 U. Rich. L. Rev. 927 (2020).

²¹ *Bostock v. Clayton County*, 140 S.Ct. 1731 (2020).

there are also many areas of the law where the Supreme Court has said that biological differences between the sexes are relevant for the law.

And they're benign in the sense that it doesn't violate the Equal Protection Clause for federal laws to make distinctions and treat people differently according to whether they're male or female. So from that point of view, treating sexes differently, treating them as important categories doesn't necessarily always mean that there's discrimination going on. And specifically in the context of children and in the context of families. The law and political arguments are often more conservative and more willing to credit gender stereotypes, more willing to see significance of sex differences. Some of the most explicit sex discrimination that the Supreme Court has set as constitutional happens in the context of parenting in deciding who is a legal mother and who is a legal father. Courts at all levels for a very long time were willing to say, we need to protect children. And all the scare quotes I can imply there around protect. We need to protect children from a gay parent or a transgender parent. And today, there is a really strong movement towards saying that parents who recognize that their child is transgender and affirm their child's gender identity are committing child abuse and parents who are being supportive of their child in this way, this should be a reason to potentially take a child away from their parents. So while there has been a lot of progress in the law to try to recognize and eliminate discrimination against trans people, it's been very imperfect progress and very uneven, depending on the context and depending on the questions involved.

So sometimes you get into the more specific contexts, like we're talking about sports, and I'm gonna talk specifically about what those arguments can look like. Sometimes it's an argument around privacy. So I've seen arguments that cisgender children have a right to privacy in the bathroom, whether it's I shouldn't be seen by someone who I am saying is a different gender than myself or my right to privacy includes the right to not see the genitals of someone else that is a different gender than myself or a different sex than myself. I will say that what that argument looks like, number one, often turns on saying that a trans child is not, again, with scare quotes, really, the gender of their gender identity. So it is often based on an assumption that a trans girl, for example, is not really a girl. So it assumes a little bit, well, it assumes a lot of the argument that it's relying on. And also these arguments are not versions of a right to privacy or an expression of a right to privacy that we've really seen very much. So we don't typically talk about a right to privacy in a public bathroom. We understand that it's not a completely public setting, and there have certainly even been cases about search and seizure and expectations of privacy in public bathrooms. But this isn't a super clear right that has been articulated many times. So it's different versions of a employed to say, this is what I want to set against the right of a trans child to have educational opportunities.

Sara Gras: But again, the question I keep coming back to is why now, why this? Why has youth athletics provided such fertile soil in which to grow support for what I characterize as an extremely conservative view of gender roles and gender identity? Given her immersion in this topic, it was one I was eager to discuss with Val:

Val Moyer: I think there are quite a few factors going on. One is definitely the idea that sports are somehow like an exception to other areas of society. So I've heard people say, you know, I'm fine with trans people in any other form of society, you know, like I wanna validate their gender when using the bathroom, you know, in day to day life with their pronouns, but sports...people just can't quite get their head around it. And because it's seen as something that's so physical and so in the realm of biology, and there are the ideals of fairness or creating a level playing field that allow people, I think, to see sports as not connected to society in this way. Of course, you know, if you're going to school and competing in

sports at that school and you identify as a certain gender throughout the day and then go compete on a team that doesn't align with that gender, that's a huge deal for a kid in school. But you know, it's potentially a safety issue besides just being a problem. But also that, and we'll get to this later, I think, but that there are other societal factors that of course shape sports already. So it's not separate from society, even though we tend to think it is. So that's definitely happening.

The other kind of factors are, I think, there's been such a slow but important progress in girls sports and girls having access to sports in schools with Title IX and you know, the work that was done in and around that. And we are still not equal in terms of sports opportunities for girls by any means, let alone equitable. And so I think people are kind of defensive and holding tightly to what they see as having been hard won. And so in that way, trans girls are kind of used as the scapegoat of that. Allowing being trans inclusive will somehow mark the end of girls sports. And of course, we know that's not true. In part, because there have been trans inclusive policies at the NCAA level, for over 10 years, and even longer at the Olympic and elite levels. So this sort of impending takeover or end to girls sports is misplaced, it's not happening. And inequity is coming from many other sources, you know, from funding, from coaching abuse, things like that. But that's not what we're kind of focusing on in this debate.

And then the last factor, which I think is really important is particularly high school sports, but I'm sure that it starts earlier, have become this really heightened competitive thing in the US as potential way to get college scholarship, right? And I personally don't think that high school sports should function like that. I think they need to continue to be a really open space where kids can afford to do sports, where they have access to try new things, where, you know, team and the experience is like the main focus. Rather than trying to compete at a high level to potentially get scholarships. And the other thing is that again focusing on the idea that trans girls are quote-unquote taking scholarships or taking spots away from cisgender girls kind of misunderstands how college recruiting works in general.

Sara Gras: Val raises a really important point here. I've hinted at my thoughts on who is behind much of this campaign against trans athletes and what is motivating the crusade. But I don't think that everyone who is concerned about trans inclusion is cut from that same cloth. I think some ARE deeply and rightfully concerned about continued gender inequity in sports and ARE deeply invested in seeing girls and women continue to grow and thrive in sport. But that passion for equity and sport has been hijacked, for lack of a better term, and misdirected towards trans women and girls. This distracts from the real issue which is that, despite the enactment of Title IX almost 40 years ago, there are still real disparities in the resources allocated to single sex sports at all levels. To really understand the significance of access to scholastic sports, for women and girls, both cis and trans, it's worth taking a step back in time to when sports were first introduced into education. In the next episode I'll look at the history of scholastic sports, including the history of exclusion, as well as how it has grown in both value and importance to educational institutions and students.

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