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Episode 7: Strange Bedfellows

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Episode 7 Transcript: Strange Bedfellows

Kurt Weaver: The right looked for what is a sub demographic of our population, they could pick on that not a lot of people have proximity to, and we're going to start to then tell you falsehoods about them. We're going to scare you that they're the ones who it's, you know, your problems are their fault. And we're just going to keep harping away at it.

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. This is Episode 7: Strange Bedfellows.

One of the most unique challenges the issue of trans inclusion in youth sport presents are the unlikely coalitions that have formed in support of exclusion. I've already given a lot of attention to one of these organizations, the Alliance Defending Freedom – and I want to start by telling you a bit more about the ADF or the Alliance, as they may be called. They are, according to their own website, “one of the leading Christian law firms committed to protecting religious freedom, free speech, marriage and family, parental rights, and the sanctity of life.”¹ They are a non-profit organization, founded in 1994, who “seek to provide everyone’s First Amendment freedoms.”² This sounds relatively benign on the surface – just a group of like-minded Christian lawyers, protecting freedom of speech and freedom of religion.

Bob Boland: Conservative or fundamentalist legal issues, right? They would probably say that they were the conservative ACLU, but the power of the ACLU in some measure is that they're neither liberal or conservative, they're rights oriented and for expanded civil rights in most cases. This group is clearly cause oriented. That's one of the reasons why they've ended up on a list of hate groups by the Southern Poverty Law Center.³

Sara Gras: That was Professor Bob Boland – we talked at length about the ADF and how they appear to be using legislatures and courts to advance their causes, so much more on that in a few. But what exactly are those causes?

From its earliest days, ADF founder have openly and vigorously opposed civil rights protection for LGBTQ people. As I mentioned in an earlier episode, this included defending

¹ *About ADF*, ALLIANCE DEFENDING FREEDOM, <https://adflegal.org/about> (last visited Jan. 7, 2024).

² *Id.*

³ *Alliance Defending Freedom*, SOUTHERN POVERTY LAW CENTER, <https://www.splcenter.org/fighting-hate/extremist-files/group/alliance-defending-freedom> (last visited Jan. 7, 2024)..

the right of the Boy Scouts of America to ban gay members and leaders.⁴ Alan Sears, who was ADF president until January 2017 co-wrote a book with ADF colleague Craig Osten called, *The Homosexual Agenda: Exposing the Principal Threat to Religious Freedom Today*, which explicitly, and inaccurately, linked homosexuality and pedophilia.⁵ The ADF has litigated challenges to state anti-discrimination statutes that require businesses provide services without discriminating the basis of sexual orientation – this includes the 303 Creative case and the Masterpiece Cakeshop case.⁶ The ADF openly opposes reproductive freedom, helping to both draft and defend Mississippi’s Gestational Age Act, which was upheld by the Supreme Court in the historic reversal of *Roe v. Wade* in *Dobbs v. Jackson Women’s Health Organization*.⁷ They represented a pharmacy who challenged a federal mandate requiring pharmacies who serve patients with Medicare, Medicaid or other federally funded health coverage stock and dispense prescription birth control and emergency contraceptives, even if the use of such medications is inconsistent with their religious beliefs.⁸ They represent a group of doctors and medical groups challenging the Food and Drug Administration’s approval of mifepristone, one of two drugs used to terminate early pregnancies, and later agency actions relating to the availability of the drug in an ongoing case which will be heard by the U.S. Supreme Court.⁹

And most relevant to this show, the ADF is waging a decade-long war against trans people. In addition to the youth sports cases I’ve already mentioned – *Soule* and *Hecox* - they defended a Christian women’s shelter who was found to have violated the Anchorage municipal code by denying services to a transgender woman in crisis because she was biologically male.¹⁰ They sent letters to school districts in 2014, informing them that “(1) no federal law requires public schools to open restrooms, showers, and changing areas to opposite-sex students, and (2) providing such access violates the fundamental rights of students and parents.”¹¹ I could keep going for a very, very long time – but I don’t think

⁴ *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).

⁵ <https://www.splcenter.org/hatewatch/2017/07/24/alliance-defending-freedom-through-years>.

⁶ *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023); *Masterpiece Cakeshop Ltd. v. Colo. Civil Rights Comm’n*, 138 S.Ct. 1719 (2018).

⁷ 597 U.S. 215 (2022).

⁸ *Texas v. Beccera*, No. 7:23-cv-00022 (W.D. Tex, Feb. 7, 2023).

⁹ *Alliance for Hippocratic Med. v. FDA*, 78 F.4th 210 (N.D. Tex, 2023); petition for writ of certiorari granted 12/13/23, *Danco Lab’y LLC v. Alliance for Hippocratic Med. et al.*, No. 23-236 (Dec. 13, 2023), <https://www.scotusblog.com/case-files/cases/food-and-drug-administration-v-alliance-for-hippocratic-medicine-2/>.

¹⁰ *Downtown Hope Ctr. v. Anchorage*, No. 3:18-cv-00190-SLG (D. Ala., Aug. 16, 2018).

¹¹ Jeremy Tedesco et al., *Schools Are Not Legally Required to Allow Students to Use Opposite-Sex Restrooms, Showers, and Changing Rooms*, ALLIANCE DEFENDING FREEDOM (Dec. 4, 2014), available at https://www.splcenter.org/sites/default/files/studentphysicalprivacyletter-2014_adf.pdf (last visited Jan. 7, 2024).

that's necessary. Paul Southwick, a lawyer who participated in the ADF's summer internship program before coming out as gay and leaving the organization, said it best in an interview with Rolling Stone: "They believe that Christianity will always trump human rights. It doesn't matter how many gay people kill themselves. It doesn't matter how many trans people are beat up or brutalized."¹²

Given this ideology, it has really been a struggle for me to understand how an organization like the Women's Sports Policy Working Group, whose leadership includes prominent civil rights advocates, Martina Navratilova, Nancy Hogshead-Makar, and Reneè Richards, have aligned themselves with the ADF on this issue of trans athlete inclusion. But I suppose it's not any more jarring than seeing them listed alongside the Women's Liberation Front on the webpage of the Independent Council on Women's Sports.¹³ For those unfamiliar with the Women's Liberation Front, they are a non-partisan radical feminist organization that advocates for the total liberation of women and girls from patriarchal systems. Among their areas of focus are reproductive autonomy - they, "unapologetically support abortion on demand" - and support of "the needs of lesbian and bisexual women."¹⁴ However, in their distorted version of second-wave feminism, trans women are not included under their umbrella - they are what we've probably all heard referred to in the media recently as TERFs, trans-exclusionary feminists. In fact, not only do they support efforts to restrict access to single-sex spaces and activities based on sex assigned at birth, including prisons, where transgender women in men's facilities experience alarmingly high rates of physical and sexual assault, they have publicly opposed regulatory measures to improve access to gender-affirming care for participants in public health programs.¹⁵

So what has happened is that opposition to trans inclusion in sports is being propped up from these various interest groups that are, in many respects, ideologically in conflict. But rather than diluting their credibility, this has somehow made the issue harder to combat for advocates. Shira Berkowitz, Senior Director of Public Policy and Advocacy at PROMO, described the broad spectrum of opposition perspectives.

¹² Spencer MacNaughton, *Inside the Alliance Defending Freedom, the Anti-LGBTQ Org Where Mike Johnson Spent Almost a Decade*, ROLLING STONE (Oc. 29, 2023), <https://rollingstone.com/politics/.../mike-johnson-alliance-defending-freedom-anti-lgbtq-1234865340/> (last visited Jan. 7, 2024).

¹³ INDEPENDENT COUNCIL ON WOMEN'S SPORTS, <https://www.iconswomen.com/> (last visited Jan. 7, 2024).

¹⁴ *Our Work*, WOMEN'S LIBERATION FRONT, <https://womensliberationfront.org/our-work> (last visited Jan. 7, 2024).

¹⁵ *Wolf Submits Public Comments to U.S. Department of Health and Human Services*, WOMEN'S LIBERATION FRONT (Oct. 4, 2022), <https://womensliberationfront.org/news/fighting-gender-ideology-in-public-healthcare-public-comments-to-hhs> (last visited Jan. 7, 2024).

Shira Berkowitz: I think that it's, I mean, it's been a 40 year, very slow and intentional opposition creep that has been able to create the argument around who transgender people are without transgender individuals being able to set the tone and the narrative for themselves. So like, what we're fighting against in these past three years is years in the making of our opposition claiming that transgender people are unwell. They have mental health issues. They don't know who they are or what's best for them. And therefore there needs to be laws to make sure that however they seem to thrive as adults isn't due to irreversible changes.

Um, and I think there's just a fear around it. It's a religious argument. It's a fear around like, this is not how our God made you or you should be. And that has been, um, a drive nationally over the past century, but even more, um, of prioritizing the religious voice over a one specific religious voice over any other voices or experiences. So I think that's like the foundation that we're playing against. And it's we go back to the bathroom bills, the bathroom bans, when we talk about why we're losing our rights and being able to participate in sports. And it's one that narrative that locker rooms are not safe, that if you don't, you have more than one gender in any locker room, that there's going to be abuse or harassment that is cultivated because of that permissiveness, which is simply untrue. But there's that unknown of like, could that be happening in my school with my kid? Well, we don't want that.

So there's that argument that we never quite let slip away. And then it goes like, it's right in sync this oppositional argument with the equality that we fight for in women's sports, which is not, it does not have such a deep history beyond gaining that equality. And we're still fighting for so many equalities, just in women's sports to separate from men's competition. So the argument that there are only two genders, that there is men's sports and there's women's sports and you have to choose one and you have to play on one based off of how you're assigned at birth, um is threatening or it feels threatening to cisgendered women who have fought so hard for their own space to play in their own competition and for families who have fought for that space for their daughters um and it comes at like truly there's just misalignment or misunderstanding of what it means to be transgender because a transgender woman is a woman and a transgender by not believing that or not believing people who know intrinsically who they are, we're creating a division even further in the idea of what is equality in sports.

Sara Gras: I spoke with Professor Erin Buzuvis about the convergence of these ideologically incompatible groups at this particular moment in history. Specifically, I asked her whether, as a scholar who had been writing on gender and sports and trans inclusion

for decades, she could point to a particular moment or instigating event that forced this issue to the fore for so many special interests.

Erin Buzuvis: A moment or time that can be, you know, like a demarcation between before and after? I mean, I would say to some extent, to some extent, no, like, because there has always been some feminist basis for objecting to trans women included in women's sports since Renee Richards in the US, sued the US Open in 1977, and successfully, and was able to compete on the women's tour after that. So I don't want to risk oversimplifying this history here and saying that we were all on one side of this issue until the early 2020s when issues politically started to change. So there has always been that, that ideological conflict. That said, there is a noticeably different scale and magnitude in this conversation since the Trump administration and some things that were going on there. In particular, how the Trump administration was applying Title IX against the Athletic Association in Connecticut, which has a very inclusive policy allows trans girls to compete on the basis of their gender identity being bona fide female without requiring any kind of particular physical or medical transition milestones.

And by the way, many states up until the sort of recent backlash have had inclusive policies. At one point, the majority of states permitted trans athletes to compete. Some of them used a hormone requirement similar to the NCAA's former policy of having one-year hormone treatment, but there were many states, at least a dozen states, that had policies like Connecticut, Massachusetts, California, that permitted gender identity-based participation without any restrictions. So one of those states is Connecticut, and in Connecticut, we happen to see two highly successful trans girl athletes competing in track and field at around the same time. And so even though these state wide, these inclusive statewide policies go back to the first one promulgated in 2006, right? So plenty of trans kids have had the opportunity to compete for many years in a variety, almost all, or a majority of states and going back in some states as far as 2006, you know, at some point, you're gonna get some who are really good and notwithstanding the fact that they're also happen to be trans. They happen to be both good athletes and trans. Those two things came together for two particular athletes in a small state.

And also because that was an era of political opposition to trans rights and an administration that could use its opposition to trans rights to garner political support from its base, we saw Title IX attempted to be applied to squash Connecticut's inclusive policy. So because that was so high profile, because that was so political, I think it really amplified the conversation in this regard. I think it's not, you know, and to bring it back to the clash between, you know, different versions of feminist ideology, you know, that is also around the same time when we started to see much more formally that division playing out in the

public sphere. So the Women's Sports Policy Working Group, for example, organized and started publishing under that name, it's objections to categorically inclusive policies like Connecticut's. So I think that is a milestone in terms of the political conversation, but this issue itself and this conflict isn't necessarily.

Sara Gras: Erin is referring here to the *Soule v. Connecticut* case that I covered in Episode 2. I want to talk more about something she mentions, that this case was the product of an era where opposition to trans rights was politically beneficial. This, I think, is the forest so many people miss while they are focused on the trees. Selena Soule and her co-plaintiffs were chosen by the Alliance Defending Freedom to be the face of a case that is part of a much larger plan, as Bob and I discussed.

Bob Boland: And I think this is important to think about that the three women who ultimately became plaintiffs and then added a fourth, were really being sought out as class representatives more than maybe their own organic perception drove them to this. They were they were picked and selected as far as I know to maintain a lawsuit and a lot of times it's not unusual in class action lawsuits. We always look for a representative who's willing to put their name on the suit and be represented that they were willing to do this certainly says a lot says something about them but it also says something about why this group was doing this and why they were doing it in Connecticut, which was unique. I think that the short answer why they were doing it in Connecticut is that Connecticut's association had adopted a fairly progressive policy on gender identity and was enforcing it several years earlier. And I think the second reason, it may be more practical than legally, if they could get a win in the courts in the Second Circuit that would probably set the tone across the country. The Second Circuit's one of the more liberal circuits in the country, and I think they thought this would help propel their argument forward, or they would find a series of reasoning that would allow them to argue with splitting circuits down the road and get to the Supreme Court with jurisdiction. So it was, from a legal standpoint, this was very much a test case, and it was one to take on an association that didn't have truly state standing.

Sara Gras: This is as good a time as any to give a little update on the *Soule* case, which, as you may recall, was in limbo, pending a decision by an en banc Second Circuit court. That decision was issued on December 15, 2023, after my last episode was recorded. As Bob and I talked about in Episode 2, the original Second Circuit Court of Appeals decision addressed whether the plaintiffs had standing to sue as parties who suffered a redressable, actual injury and whether Title IX even allows this type of private cause of action. On the question of actual injury, the District Court opinion, which the Second Circuit affirmed, was no, there was no injury in fact because whether the plaintiffs had suffered any real harm was speculative. The en banc Court disagreed – they reasoned that

records showed that plaintiffs WOULD have certainly won placements and titles if the trans athletes had not competed.¹⁶ They did not consider or address the point that I raised, which was that there was really no way to know how the races would have turned out had Terry and Andrea not been running, particularly with times so closely clustered together. The en banc court also held that the alteration of the records that Plaintiffs requested as relief would, in some fashion, remedy the harm they allege to have suffered. The panel rejected the argument that such a change has no real value, stating, “that one may not deem them valuable is simply not the relevant inquiry for standing purposes. Just as an award of nominal damages partially (even if nominally) remedies the violation of a legal right, injunctive relief can partially (even if nominally) remedy the existing harms that flow from the past denial of equal opportunity.”¹⁷ I do want to highlight, as the court does, that, “the fact ‘that [a] plaintiff has standing to pursue her claim does not mean that she is entitled to the relief she seeks.’”¹⁸

As to the second part of the question, whether a claim for damages under Title IX can be made against a party who had no reason to believe their actions violated the law, the en banc panel simply did not take a position – they simply remanded the case back to the district court to first decide the case on the merits, i.e. did the CIAC eligibility policy allowing trans athletes to compete on single gender teams consonant with their gender identity, violate Title IX, then address the question of notice after, or along with, that decision. So would you call this a victory? The Alliance certainly does – and that can be hard to understand since they still haven’t even gotten to the real issue. But this isn’t all they care about.

Bob Boland: I think for the Alliance, and obviously, again, wildly speculating, it is to call attention to this issue. It is to motivate people to follow or who follow that, to draw them closer, and to make this battle a public one. This is an important forum for them, even though it's a very small forum. I think of it as a very small issue in sport.

I'll give you, this may be again a slight digression, but I think there's a very similar issue. In the back of the 1990s, a golfer by the name of Casey Martin, who had a congenital leg issue, but was a collegiate champion, sued the PGA to get on the golf tour, which he had qualified for, and then asked for an accommodation under the Americans with Disabilities Act. The Golf Association then as now, rather than embracing Martin and saying, are you a nice young man and isn't it great that you're doing this and wouldn't this expand the people

¹⁶ *Soule ex rel. Stanescu v. Conn. Assoc. Schools*, No. 21-1365 (en banc) at 22 (2nd Cir., Dec. 15, 2023), available at <https://adflegal-live-drupal-files-delivery.s3.amazonaws.com/2023-12/Soule-v-Connecticut-Association-of-Schools-2023-12-15-2nd-Circuit-Decision.pdf>.

¹⁷ *Id.* at 30.

¹⁸ *Id.* at 35-36, citing *E.M. v. N.Y.C. Dep’t of Educ.*, 758 F.3d 442, 461 (2d Cir. 2014).

who played golf, immediately attacked him and said, no, it would destroy golf as we know it. The court, the Supreme Court ultimately on a 7-2 decision ruled that the issue of a cart or carrying your own bags and Martin's chief claim was that he couldn't carry his bags was really immaterial to golf. It wasn't a time game. It wasn't endurance competition. Professional golfers smoked while playing. Golfers on the weekend drink while playing. It wasn't part of the sport. But it was such a small case and the reaction of golf was so extreme that it became such a social issue. And I think it helped to a degree fundamentally create acceptance for the Americans with Disabilities Act, an important idea.

Ultimately, Casey Martin went on the tour, won no tournaments, and was universally attacked for this. To some degree, I think this is a parallel for what the Alliance, in this case, is doing. They're trying to create the maximum attention, the maximum fear, and the maximum sense that the institutions they hold dear, that we all hold dear, the most important of those being gender is under a great assault in sports, which it isn't. And the plaintiffs who are people who might place a couple of places higher, but for certain participation, are the ones who are being hurt and stepping into this. So we need to protect them, i.e. we're protecting women. The fact that they're using an anti-discrimination statute, Title IX, to do that I find particularly interesting and maybe a little bit tragic.

Bob Boland: It's provided an uproar in states that are more conservative leaning that this is an important social issue. At least in sport, it's affecting a very small number of athletes. We're talking about two in Connecticut. We're talking about small numbers across the United States of athletes who might be affected by this. It's such a prominent issue in the political agenda and talk of the day.

Sara Gras: Yeah, and I also see it as an opportunity for the ADF, the Alliance Defending Freedom, to continue to kind of put out into the court record a rhetoric about transgender people in general, right? Like through the misgendering of athletes involved, continuously referring to them as males, boys, et cetera, and making this sort of essentialist biological argument about the athletic superior the physical supremacy of biological males over biological females that serves a broader agenda. And it's not even really about these female athletes.

Bob Boland: Well, it has very little to do with them, unfortunately. You are getting that rhetoric in this chain of cases. And then this kind of horrified reaction to it, that it's gutting Title IX, it's destroying women's sports. That practically can't be further from the truth, at least in the place that I look at more carefully, in collegiate sports, women's sports enjoyed one of their most successful seasons back after COVID. Women's basketball that had sort of not increased viewership and not had compelling matchups, had one of its most compelling matchups. If we look at name, image, and likeness earnings for female

athletes, at least one female athlete may be the highest earner in all of college athletics in terms of NIL - she's a woman's gymnast from LSU who will work very hard at it as opposed to using a high level of status to take advantage of those opportunities earning, we estimate, about \$3 to \$5 million per year in the first year or so of NIL, including the opportunities to put women on TV in different ways. So if we look at the marketplace reaction to these cases and a death of women's sports, we're seeing just the opposite in the marketplace.

Sara Gras: If you think we sound like conspiracy theorists, I assure you – we aren't. In the early 1990's, former ADF president, Alan Sears pitched a strategy to donors modeled after the black civil rights movement: "[l]ike the N.A.A.C.P., A.D.F. would find sympathetic and strategically placed plaintiffs, then seek conflicting rulings from different circuits in order to push the Supreme Court to take up a question. Along the way, A.D.F. would try to erode precedents that it opposed—for example, by supporting parental-notification requirements for minors seeking abortions."¹⁹ And this playbook is clearly still in use. According to David Kirkpatrick's reporting for the New Yorker, "A.D.F. staff in Washington are pushing for legislation that would make it easier to sue school districts for alleged violations of parental rights. Its lawyers have brought "parental-rights" cases both in appellate circuits that lean left and in others that lean right, increasing the chance that a split will compel the Supreme Court to take up the issue."²⁰

Recent profiles of the Alliance describe organized, deliberate campaigns against pronoun policies, anti-discrimination statutes, abortion laws, and gender affirming care that start with model legislation pitched to state legislators, backed by litigation support to defend them.²¹ With the donations of wealthy donors like the family of Hobby Lobby founder, David Green, the Alliance has amassed over 4900 lawyers and annual revenue of over fifty

¹⁹ David D. Kirkpatrick, *The Next Targets for the Group That Overturned Roe*, NEW YORKER (Oct. 2, 2023), <https://www.newyorker.com/magazine/2023/10/09/alliance-defending-freedoms-legal-crusade> (last visited Jan. 7, 2024).

²⁰ *Id.*

²¹ "A.D.F.—which in 2016 established an influence operation aimed at state lawmakers and last year added one focussed on Congress—has helped at least twenty-three states pass legislation barring trans athletes from girls' and women's events. Several states have introduced A.D.F. model legislation requiring schools to get parental consent for any lessons about gender identity; a lawyer affiliated with A.D.F. helped draft a Florida measure that L.G.B.T. advocates call the 'Don't Say Gay' law. Other states have adopted A.D.F.-drafted legislation restricting gender-transition medical treatment for minors. The organization's lawyers are now representing West Virginia in defending a law, written by A.D.F., that bans trans athletes. (In an internal briefing, the head of its legislative effort said that A.D.F. had 'authored' at least a hundred and thirty bills in thirty-four states last year; more than thirty were passed into law. In 2018, the organization's lawyers drafted a Mississippi law banning most abortions after fifteen weeks of pregnancy; last year, A.D.F. successfully defended that law in *Dobbs v. Jackson Women's Health Organization*, the case that overturned *Roe*.)" *Id.*

million dollars.²² This money funds, not only costly court battles, but active solicitation of plaintiffs - like "bulletins urging churches and ministries to be on the lookout for 'SOGIs' - prohibitions of discrimination on the basis of sexual orientation and gender identity." There's even a toll-free number, 1-800-TELL-ADF, for victims of the liberal agenda to request legal assistance.

This large financial reserve means the ADF can be incredibly strategic in its legal campaigns. A Washington Post investigation of plaintiffs whose right to refuse to photograph gay wedding cases the ADF defended in the years leading up to the recent 303 Creative case raised questions about whether these claims were actually manufactured. Not only did ADF lawyers draft incorporation paperwork and company policies that were later used as a basis for these lawsuits, but after the filing of the suits, the majority simply stopped photographing weddings altogether.²³ Bob and I joked about the fact that Lorie Smith, the web designer who was the plaintiff in the 303 Creative case, had never, in fact, been asked to design a wedding website for a same-sex couple - it was simply the possibility that she might be asked to so and be unable to legally refuse that formed the basis of her claim. But there's a darker side to this once you find out that she was actually approached by her pastor and told to contact the ADF before she even started making wedding websites, as she told a reporter for the New Yorker.²⁴

Ok so what does all of this have to do with the Women's Sports Policy Working Group, the Women's Liberation Front, and all the other groups and individuals advocating for the exclusion of trans kids from playing on single sex teams that align with their gender identity? Well, here's how this all plays out in my mind. I don't think the members of the Women's Sports Policy Working Group or many of their supporters are explicitly anti-queer or anti-trans. Martina Navratilova has publicly identified as queer for more than 40 years and has been a long-time advocate for gay rights issues, including same-sex marriage.²⁵ Renee Richards is a transgender woman who took her battle to compete as a woman in the U.S. Open to court and won. One of my favorite podcast hosts, Sarah Marshall, dedicated an entire episode of her show, *You're Wrong About*, to exploring Renee's history as a trans

²² *Id.*

²³ Jon Swaine and Beth Reinhard, *Inside the Tactics that Won Christian Vendors the Right to Reject Gay Weddings*, WASH. POST (Sept. 28, 2023, 8:00 AM EDT), <https://www.washingtonpost.com/investigations/2023/09/24/alliance-defending-freedom-wedding-lawsuit/> (last visited Jan. 7, 2024).

²⁴ *Supra* note 21.

²⁵ Jim Buzinski, *Martina Navratilova to Margaret Court: Don't Deny Us Same-Sex Marriage*, OUTSPORTS (Jan 30, 2012, 8:27pm PST), <https://www.outsports.com/2012/1/30/4052484/martina-navratilova-to-margaret-court-dont-deny-us-same-sex-marriage> (last visited Jan. 7, 2024).

person and her current views on trans athletes with Sports Illustrated writer, Julie Kliegman - anyone interested in learning more about her should check it out.²⁶

But their public statements and the information provided by their organization fuel anti-trans narratives and support the ADF's broader anti-trans campaign. For example, the Women's Sports Policy Working Group has a header tab on their webpage titled, Male Victories.²⁷ At the very top of that page, it reads, "273 Male* Victories in Female Sports" with an asterisk next to males clarifying this means, "Males Who Identify as Trans, or Transwomen."²⁸ The purpose of compiling this list, it goes on to state, is to counter the argument that there are so few transwomen and girls competing in sports. It's followed by a pink box purporting to tally all the losses suffered by girls as a result of Terry Miller and Andrea Yearwood competing in Connecticut – this information comes directly from plaintiffs court filings in the *Soule v. Connecticut* case. The list includes a wide range of sports, some rather obscure, like billiards, darts, dodgeball, and parkrunning, across multiple countries and periods of years, and frankly, does nothing to convince me that women and girls are suffering significant harms as a result of trans inclusion. If anything, the fact that they could only compile 273 examples suggests the opposite. Navratilova and Hogshead-Makar's identities as internationally known athletes give legitimacy to legislation and legal actions sponsored by a conservative Christian organization that paradoxically, doesn't really care about women's sports – their endgame is to eradicate trans people from participating in public life. When arguments about fairness and gender equity are offered by figures assumed to be unbiased, informed, and rational, even when originating from sources we should be highly skeptical of, the issue of inclusion in sports slips from black and white into grey – even for members of the LGBTQIA community. This is what distinguishes inclusion in sports from other trans issues, like bans on gender affirming care.

Shira Berkowitz: I would not say that it's easy to mobilize anyone around anti-trans legislation who isn't directly impacted. But the idea of can our government permiss or exclude health care for some and not others is a universal argument. This issue piggybacking on the pandemic with vaccine mandates and school mask requirements fits really well into that argument of like this is like why should the government limit health care or why should they have a state in what medical associations and boards and licensure

²⁶ You're Wrong About, *Renee Richards with Julie Kliegman*, LUMINARY (June 26, 2023), <https://luminarypodcasts.com/listen/sarah-marshall/youre-wrong-about/rene-richards-with-julie-kliegman/684462ee-18a5-4158-b9b1-db1629fd6f91>.

²⁷ WOMEN'S SPORTS POLICY WORKING GROUP, <https://womenssportspolicy.org/253-male-victories-in-female-sports/> (last visited Jan. 7, 2024).

²⁸ *Id.*

providers can do or cannot do like why would the state know better. And when it comes to Sports, I think there's one misconception that like every child is an aggressive, competitive, going to be college athlete. Whereas we forget that sports are the place where young kids learn sportsmanship and how to be a teammate and how to be a leader or eye-hand coordination. Like all of the very simple, basic, like very necessary community skills we gain are not about winning or losing. They're just about being a part of a community or being a part of a group of individuals. And so like therefore it's not really an easy argument to mobilize around. I'd say the same goes for, we haven't figured out as a movement, the messaging that resonates with people that is inclusive or encompassing of yes and women's sports and yes and equality in women's sports. And because of that, we lose a whole lot of individuals who are very like, oh, absolutely pro-trans rights and believe in the existence and the humanity of trans people. But when it encroaches on the equality in what they've fought for so long, we lose them along that way. Our trans athletes are very invisible. They don't want to be on the front lines of this because they want to continue playing their sport. They want to be a middle schooler or a high schooler and run cross-country or play baseball without being scrutinized for whatever gender they were assigned at birth.

And so we don't have a really large comrade of individuals coming together to fight against the right to participate in sports for transgender individuals. And we don't have a youth voice around it, not just in our state, I think in many, many states. We're lucky that we have professional athlete voice around it, but in order to thrive and keep your childhood, it's too dangerous to speak out or to say that might not be exactly who you are to all of your peers and all of your coaches and et cetera. So it's an incredibly like multi-level issue to organize around and to speak out against and to find it so like important and crucial and pivotal of a conversation.

And all of that is always going on in the background of these healthcare bans are also accelerating very fast through legislatures and There's almost this like well..what's, what's more dangerous? What's gonna lose more lives? What is going to? What like where do we have to give up our fight if our voice is smaller and That it's like such an incorrect platter to be dealt like, like this is just as quality of life, whether or not there's access to sports or activities that there is also to healthcare.

Sara Gras: Here Shira raises another issue – the multiple offensives levied against trans people – specifically kids – puts the organizations that advocate for them in a difficult position. Most of them are not the ADF – they don't have 50 million dollars or 4900 lawyers. And they are forced to prioritize their political, human, and economic capital to fight these

issues, like parental notification laws, bans on gender-affirming care, and athletic participation all at once, as was the case for the organization Shira represents in Missouri.

Shira Berkowitz: So like we do have two different sets of bills and I would argue that the transgender healthcare bans are a bit more dangerous than whether or not transgender youth can play sports.

And so our focus as an organization had been so like highly prioritizing, making sure that everyone has access to healthcare. Um, and it, I wouldn't say that it slipped through the cracks at all. I would say that we, we fought and, um, the negotiation at the end of the, um, argument was that if a sports ban is going to have to pass and politicians could not agree on the reasoning of why this is necessary legislation, that we needed to put a sunset on any type of legislation that passed under that vein of like, we don't know what the real problem is, but we need to do something about it. Didn't fly for our organization, doesn't fly for any LGBTQ rights organization. So we do have this really incredibly egregious sports ban that bans transgender youth from the time they are five years old all the way up through their college careers from being able to participate in sports and the silver lining is that it will be sunset in four years. Not that they not that our legislature might not go well like they could easily go back and like make it worse or remove that sunset or say like we've found the solution to this problem and it's the spill so transgender athletes can never play sports but for right now, we have four years to fight to get it to completely go away and not be a part of it.

Sara Gras: And while it's easy to say this is just sports – not work, not school – this isn't about the erosion of civil rights, I think that's naive. One of the biggest factors in ending the subjugation of any marginalized group is the empathy and familiarity developed through proximity, but as Kurt Weaver and I discussed, limiting the places where trans people, particularly kids, can exist and live safely as their true selves impedes this.

Kurt Weaver: It's, it's infuriating in time when you see any group of individuals being picked on, right? So I think that's, that's the basis of this, which I can't believe that, um, this is where we are right now, but to have a, any group of individuals being picked on who was sometimes the least of us and, you know, the, the fewest numbers that are involved in that, in that organization. I think what's been interesting to me is to see the, the right using this as a wedge issue is such an interesting thing in that they found a group that lacks proximity.

So if you look at some of the issues that the Native American population in the US had in the past, the indigenous populations across the US and Canada, some of the challenges they had was proximity to the rest of the population, which is why policies were allowed to kind of float through because there's a lack of understanding of who those people were,

culture, food, everything about them. And so of course, well, it's easy to say those over there are different and I don't know any of them. And so I'm gonna treat them differently. And I think right now, the right looked for what is a sub demographic of our population, they could pick on that not a lot of people have proximity to, and we're going to start to then tell you falsehoods about them. We're going to scare you that they're the ones who it's, you know, your problems are their fault. And we're going to then just keep harping away on it. And so we had a proximity issue right now around the trans community, where I have lots of trans friends, because I live in a city and I live in a place that welcomes that and I actively go out and, you know, and open myself to that. But many people that I know do not have that proximity and hence a lack of understanding.

My parents would be two of those individuals. And so I think having that as a basis, you get to see why when someone says, oh, well, I heard this, isn't that true? And you say that you cannot believe this, but they just don't know anyone to ask the question to or to see that's not true. They believe the news when they say, hey, listen, it's not in your state. It's some state over there where a boy dressed up as a girl and won a track meet. And it's just simply not the case, it's simply not true. I would relate to the kids in or schools putting kitty litter boxes in schools. Again, it's a completely not true story that gets told that just because it has stayed over there, we're gonna believe it. And I think that's where I'm disappointed in us that we don't have the critical thinking enough to understand that. But again, I won't live in the utopia and put my head in the ground about this. I'm gonna simply work the issue. And I think that's where, whether it be bringing proximity and for us in current times, proximity comes to your phone sometimes it comes through identity adoption comes through social media comes through education And we're gonna do all those things we can to make sure proximity is brought if not physical proximity can happen. And I think that's gonna be one of those things that helps. It's not gonna be the thing I think we have to fight through what is some irrational behavior, but I don't have the option to not do it. I think that's where we sit as an organization is - we're not powering down on this. We're not, we're not going to back off the issue and I think seeing any organizations that use, well, we're gonna take a pause here and evaluate before we then keep rolling forward. Like that youth participation in sport is too important to then take a pause on allowing anyone to participate within it.

Sara Gras: If we believe that trans lives matter, that trans rights should be protected, we need to disentangle the conversation about participation in sports as a basic benefit which all kids should enjoy from the very narrow discussion of what the rules of participation should be for individual elite sports. As Kurt highlights, conflating the two means a critical mass of likeminded people are unable to come together in support of the very real and significant needs of young people:

Kurt Weaver: I think we are fighting through currently internally, the LGBTQ plus all, you know, a big tent that we live in, are not all coming out to fervently back what is young trans athletes, especially. And I think that's where we're finding that many are, many are raising the hand and I think more every day, but I think it's a challenge to say that everyone is in lockstep with how this should go.

I think this comes from a couple of different places. There are absolutely limits that should be put into place around who participates in sport, in what category, in what way. There has to be, there's eligibility rules for every sport. I should not be playing second grade girl soccer right now. There has to be some rules in place, right? So I think there's a structure that has to be put into place, elite levels and younger levels. But certainly that structure is up for discussion as to who participates. And it does get reviewed every year in every sport, in every competition there is, is it fit for purpose or not? And I think that's where some people within our community, and even what I'd say is the big middle of, of America that says, well, listen, I, I think that everyone should be able to participate in something, but I also think it's pretty reasonable to not allow for again, a boy to throw on a wig and play girl sport, and that's a very reasonable position for someone to have, which is, I, I don't believe that sounds fair. Absolutely.

So let's, let's cede some of the crazy instance that's given by the right in this kind of discussion to say, yes, there absolutely should be some limits put into place. But then let's all get on the same page of can we make sure that there's going to be safe and welcoming spaces for kids who are able to participate in sport? Can we also agree on that? And so if I can give you this, can you give me this part of it? We have to go more down that road, which will then hopefully bring more people to the fight. Because I think right now, there's a lot of people on the sideline waiting to see what happens before they will weigh into this kind of issue readily the political weight, buying power and voice of the LGBTQ plus community in general, if put in full unison support of these issues, I have a hard time seeing the other side mobilizing anywhere near that same level. And so I think that's where I think we can do a better job of that. And I think it's up to us to educate our own internal organizations and individuals and volunteers and stakeholders and groups. As well as then what we do work most of our time on, which is that, I call that big straight participants in sports to say, listen, you're, you're being fed some information. It's inaccurate. Here's real information. Here's a real idea. And then of course, proximity, understanding who someone is goes a long way to wanting them to be part of what you're doing. And so that's, again, one of those things we have to do. So I think it's not been a, there's not an agreement.

Unfortunately, agreement as to who should be allowed on an Olympic podium or not falls down into, well, now we don't know if we agree on any part of it. And that's, that's a, that is

a lazy position to take. I don't know if someone should be allowed to participate in the Olympics at this level to do this and that, if they had this distance at their own level, is then allowed to say, well, that means I don't have to get involved in the high school athletic association challenges that are happening down the street for me. That's an irrational position to take. Kids are being harmed. Some decisions have to be made. Absolutely. Two very different things and we have to treat them that way. I think that's where I, I'm a little let down sometimes when I see the lack of advocacy here where it's, listen, this is not the same discussion to have. We have to draw the line to say, kids participate, we want all here. Let's still talk about that. Let's go through the data. Let's find out what's gonna be data-based. Let's find out what the information is telling us and let's see how some policies administrate themselves.

Sara Gras: As I said in the prologue to this season, I have never been a competitive athlete. I can't pretend to know or fully understand the emotional aspects of playing sports, so perhaps I'm missing something here. However, I am a parent who loves both my children and I want to see them succeed. But I would never, EVER, advocate for the victory of my children in any academic or extracurricular activity if it comes at the expense of a trans child's inclusion. This doesn't mean I throw fairness in competition out the window – but it DOES mean that blanket bans on trans participation are unacceptable to me. It means I refuse to entertain alarmist narratives about girls being pushed out of sports by boys “pretending” to be female to gain the upper hand. It means I will think critically about and investigate the province of “data” about trans athletes used to support any policies or legislation, and I certainly will not share them without verification. And I will continue to argue, without worrying about the implications for professional or Olympic sports, for the maximum inclusion of trans youth in interscholastic sport – because these are debates with very different implications.

The next and final episode of this season will talk about what's next – with legal challenges ongoing and federal regulations still uncertain, how do we move forward with this issue? How do we fight misinformation and selective interpretations of science and history? Where do experts see things heading? What role to we as individuals play in how it plays out and why should we care?

Sara Gras: Hearsay from the Sidelines is a collaboration of [Seton Hall Law School](#) and [Culture in Sports](#); All research and writing by Sara Gras; music by [SuperKnova](#); produced by Sara Gras and Dr. Jeremy Piasecki, Executive Director of Culture in Sports. Links to all available academic and primary legal sources, media, music, transcription, and other materials mentioned in this episode are available on the Hearsay from the Sidelines show page, hearsayfromthesidelines.com. And if you like this show, check out

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