20-2194

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NORIANA RADWAN

Plaintiff-Appellant,

- v. -

UNIVERSITY OF CONNECTICUT BOARD OF TRUSTEES, WARDE MANUEL, LEONARD TSANTIRIS, AND MONA LUCAS, individually and in their official capacities,

Defendants-Appellees.

Appeal from the United States District Court for the District of Connecticut, No. 16-cv-2091, Hon. Victor A. Bolden

BRIEF OF *AMICI CURIAE* LEGAL MOMENTUM; NATIONAL ORGANIZATION FOR WOMEN FOUNDATION; FEMINIST MAJORITY FOUNDATION; AND CLEARINGHOUSE ON WOMEN'S ISSUES IN SUPPORT OF PLAINTIFF-APPELLANT NORIANA RADWAN

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel of record makes the following disclosure. None of the Amici is a publicly held entity. None of the Amici is a parent, subsidiary, or affiliate of, or a trade association representing, a publicly held corporation or other publicly held entity. No parent companies or publicly held companies have any ownership in any of the Amici.

This representation is made in order that the judges of this Court may evaluate possible disqualification or recusal.

s/ Christine Y. Wong
Christine Y. Wong

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IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

Pursuant to Rule 29(a)(4)(D) of the Federal Rules of Appellate Procedure, amicus Legal Momentum submits the following statement of identity and interest in this case. Legal Momentum, the Women's Legal Defense and Education Fund, is the nation's first and oldest national nonprofit organization dedicated to advancing gender equality through the law.[2] Since its inception, Legal Momentum has worked to secure equal rights for women and girls through impact litigation, legislative advocacy, education, and direct representation of clients.

Amicus Legal Momentum respectfully submits that it can provide important additional arguments relevant to the issues on appeal. Legal Momentum has a long history of fighting against sex discrimination in the employment and education contexts under Title VII and Title IX, respectively. The organization has contributed as an amicus curiae in key Title VII and IX litigation, including *Price*

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[1] All parties to this matter have consented to the filing of this amicus brief. No party's counsel authored this brief in whole or in part. No party, party's counsel, or person other than counsel for the Amici contributed money that was intended to fund the preparation or submission of this brief.

[2] This brief is joined by Legal Momentum's partner Amici, the National Organization for Women Foundation, the Feminist Majority Foundation, and the Clearinghouse on Women's Issues. As described in the accompanying appendix, these organizations are similarly dedicated to advancing equality and gender justice and preventing sex discrimination in our schools to ensure that students have meaningful protections against sex discrimination and enjoy equal educational opportunities.

Waterhouse v Hopkins, 490 U.S. 228 (1989); *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992); *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998); and *Davis ex rel. LaShonda D. v. Monroe County Board of Education*, 526 U.S. 629 (1999). Legal Momentum's significant experience defending women against sex discrimination will provide this Court with a unique perspective about the Title IX issues before the Court.

Amicus Legal Momentum and its partner Amici have a strong interest in this litigation because the district court's ruling effectively nullifies plaintiff Noriana Radwan's Title IX protections. Worse yet, affirmance by this Court would nullify Title IX protections for hundreds of thousands of student-athletes across the country, allow the imposition of discriminatory stereotyping, and subject female student-athletes to a stricter code of conduct than applies to male counterparts. Amici, therefore, have a strong interest in ensuring that the district court's ruling does not stand.

INTRODUCTION AND SUMMARY OF ARGUMENT

Immediately after plaintiff Noriana Radwan, a member of the University of Connecticut's women's soccer team, finished celebrating a once-in-a-lifetime victory, her coach pulled her aside for a private discussion. Her coach, Leonidas Tsantiris, did not do so to congratulate her; he did so to punish her.

Ms. Radwan had raised her middle finger towards a television camera for less than a second. Coach Tsantiris found that momentary gesture so deeply embarrassing that he immediately suspended Ms. Radwan from all team activities. But this disciplinary action was not enough for UConn. UConn and Coach Tsantiris next issued a public announcement apologizing for Ms. Radwan's behavior. Finally, Coach Tsantiris and UConn administrators cancelled the last half of Ms. Radwan's full-year athletic scholarship, forcing her to withdraw from UConn.

This was an unprecedented disciplinary decision. Never before had a student-athlete lost his or her scholarship based on a first-time sportsmanship issue. And never before had a student-athlete lost his or her scholarship halfway through the year for unsportsmanlike conduct.

Defendants say Ms. Radwan's scholarship was terminated because her gesture constituted "serious misconduct." What defendants mean though is that Ms. Radwan's gesture was "serious misconduct" *when committed by a woman*.

The record is replete with examples of UConn choosing to impose limited or no discipline on male student-athletes who committed more serious infractions. Four male basketball players broke curfew during an overseas tournament, but none of them lost their scholarship nor were suspended. A male soccer player who committed theft walked away with essentially a slap on the wrist. And UConn did not punish *at all* a male football player who committed unsportsmanlike conduct that endangered fans during a nationally televised broadcast.

Despite this record, the district court concluded that Ms. Radwan had not presented enough evidence to survive summary judgment on her Title IX claim because she did not share a coach with any of the male student-athletes she contended were similarly situated. That is not the test in this Circuit.

This Circuit focuses on whether male and female student-athletes were governed by the same standards of conduct and whether the plaintiff's conduct was of comparable or lesser seriousness than that of her male counterparts. If the answer to both questions is "yes," as it is here, and the plaintiff was nevertheless punished more harshly, then a jury should decide whether the defendant's decision was, at least in part, motivated by the plaintiff's sex.

That is the case here.

Moreover, adoption of a same-supervisor requirement—as the district court applied—would nullify Title IX protections for hundreds of thousands of student-

athletes across the country, allow the imposition of discriminatory stereotyping, and subject female students to a stricter code of conduct than their male counterparts. This would result in an even greater disparity in collegiate athletic and scholarship opportunities for women than already exists.

Amici respectfully submit that this Court should reverse the district court's order granting summary judgment against Ms. Radwan's Title IX claim.

ARGUMENT

I. TITLE IX PROTECTS FEMALE STUDENT-ATHLETES FROM DISCRIMINATION THAT RESULTS FROM STEREOTYPED NOTIONS OF WOMEN'S INTERESTS AND ABILITIES

A. Female Athletes Are Held To A Different Standard Of Behavior Than Male Athletes

United States legal history is replete with examples of flagrantly discriminatory stereotypes used to justify unequal treatment of women. In concurring with the decision to uphold an Illinois law denying women's admission to the bar, U.S. Supreme Court Justice Joseph Bradley explained,

> Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. . . The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother.

Bradwell v. Illinois 83 U.S. 130, 141 (1872) (Bradley, J., concurring). On similar bases, women were prohibited from serving on juries, with "supporters of the exclusion of women from juries . . . couch[ing] their objections in terms of the

ostensible need to protect women from the ugliness and depravity of trials." *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 132 (1994). This "romantic paternalism" served to "put women, not on a pedestal, but in a cage." *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973).

Consistent with these stereotypes, women's opportunities to participate in sports and other physical recreational activities were similarly circumscribed. Women were barred from playing sports because it was considered dangerous to their health and because it might exhaust their energy and impact their fertility. *See* Nancy Leong, *Against Women's Sports*, 95 WASH. U. L. REV. 1249, 1256, 1258 (2018). As one scholar noted, "[t]he persistent exclusion of females from school sports deprived young girls from being socialized in traits presumed to bring success to males in American life." L. Marlene Mawson, *Sportswomanship: The Cultural Acceptance of Sport for Women Versus the Accommodation of Cultured Women in Sport*, *in* Sport, Rhetoric, and Gender 21 (Linda K. Fuller, ed., 1st ed. 2006).

During the Victorian era, women began to participate in recreational activities like horseback riding and swimming. Even so, women were warned not to exert themselves and to only take part in informal and noncompetitive activities. Richard C. Bell, *A History of Women in Sport Prior to Title IX*, The Sport Journal (Mar. 14, 2008), https://thesportjournal.org/article/a-history-of-women-in-sport-

prior-to-title-ix. The ideal Victorian woman was "gentle, passive, and frail. . . . Exercise and sport worked in opposition to this [stereotyped] ideal." Jackie Mansky & Maya Wei-Haas, *The Rise of the Modern Sportswoman*, Smithsonian Magazine (Aug. 18, 2016), https://www.smithsonianmag.com/science-nature/rise-modern-sportswoman-180960174/.

Throughout the late nineteenth and early twentieth centuries, women in the United States began to form informal athletic clubs and to participate in sports more frequently. Leong, *supra*, at 1256. Even as this was happening, however, "women's collegiate athletics . . . tended to deemphasize competition," *id.*, and "healthful beauty, not aggression or . . . the desire to triumph over competitors, remained the watchword for active women." Bonnie J. Morris, *Women's Sports History*, National Women's History Museum (Aug. 4, 2016), https://www.womenshistory.org/articles/womens-sports-history.

Even now, women and men are held to different behavioral standards in competitive sports. While male athletes are praised for being aggressive, women are expected to embody femininity by smiling constantly and always being pleasant. Behavior that deviates from that stereotype is labeled unsportsmanlike. *See* Mawson, *supra*, at 20. Female athletes have been criticized for their "poor sportsmanship" for everything from not cheering hard enough for their teammates to frowning during a competition. Gabrielle Moss, *We Need to Talk about the*

Angry Female Athlete, Bustle (June 26, 2019), https://www.bustle.com/p/the-angry-female-athlete-stereotype-is-damaging-to-womens-sports-heres-why-it-exists-17992510.

Moreover, the threshold for "aggressive" behavior is much lower for female athletes. This gendered stereotyping is pervasive at all levels of sport. For example, in 2018 Serena Williams—one of the most successful and respected female tennis athletes of all time—received three penalties during the U.S. Open for unsportsmanlike conduct that included hitting her racket on the court and referring to the umpire as a "thief." *Id.*; Alex Abad-Santos, *Serena Williams's US Open fight with umpire Carlos Ramos, explained*, Vox (Sept. 10, 2018), https://www.vox.com/2018/9/10/17837598/serena-williams-us-open-umpire-carlos-ramos. Two male professional tennis athletes later publicly acknowledged they had each committed more serious conduct at similar levels of play and had not been penalized at all. Moss, *supra*.

In addition, media coverage of women's sports reinforces traditional female stereotypes. *Id.* Specifically, the media tend to focus on women's personal behavior rather than their athletic performance. *Id.* For example, as one commentator noted, during a recent women's softball playoff game, there was "a lot of emphasis on showing the winners in the dugout doing cheers . . . and clapping, and jumping up and down, and hugging, and less on the great plays

showing that great catch in six different ways in slow motion. Which is what they do for the men." *Id.* (internal quotation marks omitted). "Female athletes are supposed to," in the eyes of the media, "only have one story — that they're positive, supportive, and nurturing to teammates." *Id.*

B. Female Student-Athletes Continue To Have Fewer Opportunities Than Male Student-Athletes

Faced with irrefutable evidence that girls and women experienced similar and, in fact worse, discrimination in schools, Congress passed Title IX of the Education Amendments Act of 1972 ("Title IX"), which broadly prohibits federally-funded academic institutions from discriminating against any person on the basis of sex. Yet nearly 50 years later, there are still fewer athletic opportunities for women than for men.

Although participation of girls and women in high school and college sports has increased dramatically since Title IX's passage, girls have only 75% of the opportunities to play sports in high school that boys have. National Women's Law Center & The Poverty & Race Research Action Council, *Finishing Last: Girls of Color and School Sports Opportunities* 8 (2015) https://prrac.org/pdf/GirlsFinishingLast_Report.pdf. Likewise, there are fewer collegiate sports opportunities and scholarships for women. While more than half of the students at National Collegiate Athletic Association ("NCAA") schools are women, they receive only 43.5% of athletic participation opportunities. National

Women's Law Center, *The Battle for Gender Equity in Athletics in Colleges and Universities* 2 (2017), https://nwlc.org/wp-content/uploads/2015/08/Battle-for-GE-in-Colleges-and-Universities.pdf. Female athletes at Division I schools "receive only 29% of the total money spent on athletics, 28% of the recruiting dollars, and 39% of the athletic scholarship dollars." *Id.*

The fewer female athletes afforded athletic participation and scholarship opportunities are also held to a stricter standard of conduct—one that reinforces female stereotypes—than male athletes. In short, female student-athletes are subjected to discrimination in two ways. This case illustrates that problem precisely.

C. Title IX Protects Against Sex Discrimination In Education, Including Student Athletics

As part of a federal legislative effort to remedy the United States' "long and unfortunate history of sex discrimination" against girls and women, *Frontiero*, 411 U.S. at 684 (plurality op.), the House Special Subcommittee on Education held hearings that documented "evidence of pervasive discrimination against women with respect to education opportunities." *McCormick ex rel. McCormick v. Sch. Dist. of Mamaroneck*, 370 F.3d 275, 286 (2d Cir. 2004) (citation omitted). Those hearings included "[o]ver 1,200 pages of testimony document[ing] the massive, persistent patterns of discrimination against women in the academic world." *Id.* (citing 118 CONG. REC. 5804 (1972) (statement of Sen. Birch Bayh)).

In response, Congress passed (and President Richard Nixon signed) Title IX. *Id.* Section 901 of Title IX states, in no uncertain terms:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

20 U.S.C. § 1681(a).

Congress enacted Title IX with two principal objectives in mind: (1) "[T]o avoid the use of federal resources to support discriminatory practices;" and (2) "to provide individual citizens effective protection against those practices." *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 286 (1998) (internal quotation marks omitted). Seven years after it was enacted, the Court concluded that Title IX's latter purpose could only be achieved by implying a private right of action for students harmed by a university's discriminatory practices. *Cannon v. Univ. of Chi.*, 441 U.S. 677, 704 (1979).

After Title IX was passed, there were two significant efforts to limit the application of the statute to student athletics. First, an amendment was introduced to exempt "revenue producing" intercollegiate sports from Title IX's coverage. *McCormick*, 370 F.3d at 287. The proposed amendment failed. Ten years after that, the Court held in *Grove City College v. Bell* that Title IX was program-specific—the receipt of federal grants by some students at Grove City College did not trigger institution-wide coverage under Title IX. 465 U.S. 555, 575-76 (1984).

In other words, "schools could return to past practices of denying women and girls equal opportunity to 'develop their athletic talents through programs equal in quality to those provided for male students.'" *McCormick*, 370 F.3d at 287 (quoting 130 CONG. REC. 28, 289-30 (1984) (statement of Sen. Chafee)). But Congress responded to *Grove City* with the Civil Rights Restoration Act of 1987, 20 U.S.C. § 1687 (1988), which reinstated the institution-wide application of Title IX. And "[a]lthough the Restoration Act does not specifically mention sports, the record of the floor debate leaves little doubt that the enactment was aimed, in part, at creating a more level playing field for female athletes." *Cohen v. Brown Univ.*, 991 F.2d 888, 894 (1st Cir. 1993). Specifically, "[t]he congressional debate leading to the passage of this statute demonstrates concern by members of Congress about ensuring equal opportunities for female athletes." *McCormick*, 370 F.3d at 287.

D. Title IX And Title VII Jurisprudence Are Intertwined

The Court has stated repeatedly that Title IX broadly prohibits the negative or "less favorable" "differential treatment" of a person on the basis of sex. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 174 (2005) (defining discrimination); *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982) (Courts "must accord" Title IX "a sweep as broad as its language." (collecting cases)). Title IX is "understood to bar the imposition of university discipline where gender is a

motivating factor in the decision to discipline." *Doe v. Columbia Univ.*, 831 F.3d 46, 53 (2d Cir. 2016) (alterations adopted; internal quotation marks omitted); *see also Yusuf v. Vassar Coll.*, 35 F.3d 709, 715 (2d Cir. 1994) (a Title IX selective enforcement "claim asserts that, regardless of the student's guilt or innocence, the severity of the penalty and/or the decision to initiate the proceeding was affected by the student's gender.").

This Court has "long interpreted Title IX by looking to the [ ] caselaw interpreting Title VII" of the Civil Rights Act of 1964. *Menaker v. Hofstra Univ.*, 935 F.3d 20, 31 (2d Cir. 2019) (alterations adopted; internal quotation marks and duplicative word omitted). Like Title IX, Title VII prohibits, *inter alia*, discrimination based on a person's failure to conform to traditional sex stereotypes. *Bostock v. Clayton Cnty*, 140 S. Ct. 1731, 1742-43 (2020); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251-52 (1989).

In *Price Waterhouse*, the Court concluded that Title VII precluded an employer from evaluating an employee based on her failure to conform to her employer's stereotyped prescription of what a female employee should be or how a female employee should act. There, the accounting firm Price Waterhouse denied partnership to Ann Hopkins—despite being stunningly successful at bringing in business—because, according to her employer, she had qualities that did not conform to expected female stereotypes. Price Waterhouse employees and

partnership reviewers described Hopkins as "abrasive[]," "brusque[]," and "macho"; they also complained that she "overcompensated for being a woman" and that she should have "walk[ed] more femininely, talk[ed] more femininely, dress[ed] more femininely, w[orn] make-up, ha[d] her hair styled, and w[orn] jewelry." *Price Waterhouse*, 490 U.S. at 234-35. The Court affirmed the district court's finding that stereotyping based on sex played a role in Price Waterhouse's decision to deny Hopkins's partnership. "[W]e are beyond the day," the *Price Waterhouse* court explained, "when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group." *Id.* at 251.

Because it is often difficult to obtain direct evidence of discriminatory intent, courts apply the burden-shifting framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-06 (1973). Under that framework, the plaintiff is afforded a presumption if she is able to establish her *prima facie* case, which includes, as relevant here, plaintiff's production of "some minimal evidence suggesting an inference that the employer acted with discriminatory motivation." *Columbia Univ.*, 831 F.3d at 54 (quoting *Littlejohn v. New York*, 795 F.3d 297, 307-08 (2d Cir. 2015)). If the defendant rebuts that presumption with a non-prohibited justification for the adverse action, then the plaintiff must "show[] that the defendant intentionally discriminated against her." *Id.* (quoting *Littlejohn*,

supra, at 307-08). At the summary judgment stage, this only requires plaintiff to "submit admissible evidence from which a finder of fact could 'infer that the defendant's employment decision was more likely than not based in whole or in part on discrimination.'" *Menaker*, 935 F.3d at 30 (quoting *Walsh v. New York City Housing Auth.*, 828 F.3d 70, 75 (2d Cir. 2016)). And "a defendant cannot avoid liability,"—including by winning at summary judgment—"just by citing some *other* factor that contributed to its challenged employment decision. So long as the plaintiff's sex was one but-for cause of that decision, that is enough to trigger the law." *Bostock*, 140 S. Ct. at 1739 (emphasis in original).

The *Price Waterhouse* court recognized that the touchstone of the sex discrimination inquiry is common sense—not rigid requirements that undermine Title VII's broad purpose of prohibiting discrimination on the basis of sex.

> It takes no special training to discern sex stereotyping in a description of an aggressive female employee as requiring 'a course at charm school.' Nor . . . does it require expertise in psychology to know that, if an employee's flawed "interpersonal skills" can be corrected by a soft-hued suit or a new shade of lipstick, perhaps it is the employee's sex and not her interpersonal skills that has drawn the criticism.

Price Waterhouse, 490 U.S. at 256. "Common sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between" cognizable sex discrimination claims and inactionable misconduct. *Redd v. New York Div. of Parole*, 678 F.3d 166, 177 (2d Cir. 2012) (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 82 (1998) (emphasis omitted)); *see*

also Humphries v. CBOCS W., Inc., 474 F.3d 387, 405 (7th Cir. 2007) ("[C]ourts should apply a 'common-sense' factual inquiry—essentially, are there enough common features between the individuals to allow a meaningful comparison.").

Accordingly, the Second Circuit applies a flexible test to determine whether a Title VII plaintiff has produced evidence that she was treated less favorably than her comparators. *Graham v. Long Island R.R.*, 230 F.3d 34, 40, 43 (2d Cir. 2000) (admonishing district court for applying an "unduly inflexible standard"). The court should primarily consider "(1) whether the plaintiff and those [s]he maintains were similarly situated were subject to the same workplace standards and (2) whether the conduct for which the employer imposed discipline was of comparable seriousness." *Id.* at 40 (internal citation and quotation marks omitted); *see Ruiz v. Cnty. of Rockland*, 609 F.3d 486, 493-94 (2d Cir. 2010).

As applied to the university context, a Title IX plaintiff may meet her burden of proof by providing evidence that though "she was 'similarly situated in all material respects'" to a male student (a "comparator"), the university nevertheless treated her "less favorably" than the comparator. *Graham*, 230 F.3d at 39. Whether the plaintiff is "similarly situated" to proposed comparators is "a question of fact for the jury." *Id.* Thus, at summary judgment, a court should focus on whether the plaintiff has produced some minimal evidence from which a jury could infer that the plaintiff "would not have suffered similar treatment if" she were a

man, and if so, then "triable Title VII [and Title IX] claim[s] exist." *See Bostock*, 140 S. Ct. at 1744. "[P]ut differently," if the student has presented minimal evidence that "changing the [student's] sex would have yielded a different choice by the [school,] [then] a statutory violation has occurred," and the plaintiff should survive summary judgment. *See id.* at 1741. There is ample evidence in the record that, had Ms. Radwan been a male athlete, there would be no question presently before this Court.

II. UCONN'S CONDUCT WAS MOTIVATED BY IMPERMISSIBLE STEREOTYPES OF FEMALE STUDENT-ATHLETES

In November 2014, on a nationally televised broadcast, UConn's women's soccer team had just won the American Athletic Conference (the "AAC") championship game. It was the first time since 2004 that UConn had done so. JA365. Ms. Radwan, an 18-year-old college freshman, celebrated with her teammates on the field after the win. She was filmed smiling and celebrating with her teammates and showing her middle finger to the camera. JA981. The gesture lasted less than a second.

A picture of that gesture was sent to several UConn administrators, including UConn women's soccer coach Leonard Tsantiris. JA981. He immediately confronted Ms. Radwan about the incident, she apologized, but he nevertheless suspended her from all team activities. JA982. Coach Tsantiris subsequently issued a public statement apologizing for Ms. Radwan's behavior, in

which he said, "The gesture showed poor judgment and sportsmanship and does not represent what we want our program and the University to stand for." JA61.

In the weeks following the game, Ms. Radwan continued to apologize to Coach Tsantiris and the other UConn women's soccer coaches for the incident both in person and by letter. JA982-83, JA986-87. During the same time period, the AAC issued a letter of reprimand to Ms. Radwan regarding the "sportsmanship matter," which is a typical response from the AAC in such incidents. JA984. Once the letter was issued, UConn's Athletic Director, Warde Manuel, told UConn's president that Ms. Radwan's case was closed, as "[a]nything *else would be excessive*." JA820-21 (emphasis added).

However, as time went on, Coach Tsantiris became increasingly upset about the incident. *See* JA313. Coach Tsantiris testified that he was teased by coaches from other universities about Ms. Radwan's behavior, and concluded that her behavior was "devastat[ing]," "embarrassing," and that it was "a blow to the team, the program, and UConn." JA366, JA417-19.

In December 2014, Coach Tsantiris met with the UConn Sports Administrator in charge of women's soccer, Neal Eskin, and Athletic Director Manuel to discuss cancelling Ms. Radwan's scholarship. JA988. Later that

month, with the apparent support of Eskin and Athletic Director Manuel,[3] Coach Tsantiris called Ms. Radwan and notified her that he was cancelling her scholarship. JA988. Ms. Radwan then received a letter from UConn's financial aid office stating that her scholarship was being cancelled "upon recommendation of the Division of Athletics . . . due to a serious misconduct issue." JA128.

UConn's decision to terminate Ms. Radwan's scholarship was an unprecedented disciplinary decision. UConn had never terminated a male student-athlete's scholarship for a first-time incident of unsportsmanlike conduct. JA837-38. And as discussed below, UConn did not take any, or only took minor, disciplinary action against male students who committed similar, and more serious, misconduct. It is evident that UConn deeming Ms. Radwan's behavior "serious" was a result of the fact that, in that moment, she failed to conform to defendant's notion of appropriate *female* athlete behavior.

III. THE DISTRICT COURT'S INCORRECT APPLICATION OF THE SECOND CIRCUIT'S TITLE IX TEST WOULD EVISCERATE TITLE IX PROTECTIONS

The district court found that Ms. Radwan could not establish a *prima facie* case of discrimination under Title IX because she failed to show that similarly

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[3] During discovery, UConn's Athletic Director Manuel and Coach Tsantiris provided contrary explanations about why Ms. Radwan's scholarship was cancelled. *See* JA988; *see* Opening Br. 10.

situated individuals outside of her protected group were treated more favorably than she was. JA1004. The court made this determination because none of the male athletes to whom Ms. Radwan compared herself had done exactly what she had done and none of them had the same coach she had. JA1005-06. In support, the court relied primarily on an unpublished Sixth Circuit case: "[T]o be similarly situated, a player 'must have dealt with the same [coach], have been subject to the same standards, and have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or their employer's treatment of them for it.'" JA1007 (quoting *Heike v. Guevara*, 519 F. App'x 911, 920 (6th Cir. 2013) (addition in *Heike*)).

A. The District Court Incorrectly Applied The Second Circuit's Title IX Test, And Faithful Application Of That Test Requires Reversal

The district court reasoned that Ms. Radwan could not satisfy the similarly situated requirement because she did not share a coach (a "supervisor," in Title VII parlance) with any proposed comparator. JA1005-07 ("[W]here employees are disciplined by different supervisors, they are not similarly situated."). So, without any male comparator, the district court concluded that Ms. Radwan was unable, as a matter of law, to establish her *prima facie* case or rebut defendants' legitimate, non-discriminatory rational for termination. JA1009. The district court erred by applying the similarly situated test too inflexibly and ignoring the common sense nature of the inquiry.

The Second Circuit's similarly situated test focuses on fact-intensive questions that should ordinarily be left to the jury: (1) whether the plaintiff and her proposed comparators were subject to the same workplace standards and (2) whether the plaintiff's conduct and that of her proposed comparators were of comparable seriousness. *Graham*, 230 F.3d at 40. Tellingly, the district court's nearly 60-page order fails to mention, much less apply, this standard.

Rather than rely on the clear factors set forth in *Graham*, the district court relied on *Heike*, which stated—about the Equal Protection clause—"[t]o be similarly situated, a player must have dealt with the same [coach], have been subject to the same standards, and have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or their employer's treatment of them for it." *Heike*, 519 F. App'x at 920 (emphasis and internal quotation marks omitted; addition in original).

The district court's citation fails to hold up to scrutiny. First, despite *Heike's* unyielding language, published decisions in the Sixth Circuit have softened the import of that language. "[G]enerally [the factors listed by *Heike*] are all relevant considerations in cases alleging differential disciplinary action." *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 352 (6th Cir. 1998). But "[c]ourts should not assume [ ] that th[ose] specific factors . . . are relevant factors in cases arising under different circumstances, but should make an independent

determination as to the relevancy of" factors vis-à-vis the factual context. *Id.*; *Seay v. Tenn. Valley Auth.*, 339 F.3d 454, 480 (6th Cir. 2003). So in the Sixth Circuit, "[w]hether it is relevant in a particular case that employees dealt with the same supervisor depends on the facts presented." *Bobo v. United Parcel Serv., Inc.*, 665 F.3d 741, 751 (6th Cir. 2012), *abrogated on other grounds by Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338 (2013). Indeed, all that is *required* is that "the plaintiff and the employee with whom the plaintiff seeks to compare himself or herself must be similar in 'all of the relevant aspects.'" *Ercegovich*, 154 F.3d at 352 (citation omitted).

Second and more importantly, even if the Sixth Circuit did have a same-supervisor requirement, the Second Circuit has not adopted that test. In this Circuit, "the standard for comparing conduct requires a reasonably close resemblance of the facts and circumstances of plaintiff's and comparator's cases, rather than a showing that both cases are identical." *Graham*, 230 F.3d at 40. Accordingly, "[u]nder the standard set forth in *Graham*, the fact that [plaintiff] had a different supervisor from the employees [s]he cites as comparators does not appear sufficient in itself to preclude [plaintiff] from showing that [s]he was subject to the same workplace standards and disciplinary procedures." *Berube v. Great Atl. & Pac. Tea Co., Inc.*, 348 F. App'x. 684, 686 (2d Cir. 2009) (summary order).

Applying the correct standard to Ms. Radwan's case results in a different outcome. First, it is undisputed that all student-athletes, regardless of sex, were subject to the same standards, namely, all were required to comply with the same codes of conducts, including NCAA, Conference, Division of Athletics, and University rules that generally prohibited undefined "serious misconduct." JA977-79.[4]

Second, Ms. Radwan pointed to male student-athletes who committed comparable, and in fact more serious, misconduct, but were not disciplined at all or significantly less harshly than the unprecedented termination of a full-year scholarship, halfway through the school year. For example, around the same time UConn initiated disciplinary proceedings against Ms. Radwan, four male UConn basketball players missed curfew during an overseas tournament. JA837. The school sent those players home early, with no subsequent discipline, despite Athletic Director Manuel's knowledge of the incident. JA837. UConn similarly took no disciplinary action against a male football player who was penalized by game officials for unsportsmanlike conduct after he kicked a football into the

[4] It is of no import that Coach Tsantiris developed his own code of conduct for the women's soccer team. Defendants nowhere assert that Ms. Radwan lost her scholarship based on her violation of that specific code.

stands during a football game. JA837.[5] Notably, the football game was televised nationally on not one, but two different ESPN television broadcasts. *See* Duff Tittle, *BYU Announces 2015 Football Schedule*, BYU (April 30, 2015), https://byucougars.com/story/1701/111309/BYU-announces-2015-football-schedule (reporting that ESPN and ESPN2 would televise relevant football game). Yet UConn and its agents expressed no "embarrassment" about the male football player's actions. As a final example, during the same school year, when a member of the *men's* soccer team committed *theft*, UConn only gave him a warning and required him to attend a remedial behavioral workshop. JA626-28, JA996-97. In fact, according to defendants, UConn has never terminated a male student-athlete's scholarship for a first offense of unsportsmanlike conduct. JA837-38.

In short, Ms. Radwan was subject to the same standards, committed a less serious or comparable infraction, but was nevertheless punished far *more* severely than her male counterparts. "It takes no special training to discern" sex discrimination when a university takes unprecedented disciplinary steps against a

[5] As with the overseas basketball incident, UConn's Athletic Director Manuel attended the game and knew about the male football player's unsportsmanlike conduct. JA837. Accordingly, UConn's failure to treat similarly situated male and female athletes equally cannot be excused under a same-supervisor requirement—because no such requirement exists, and because male and female student-athletes at UConn do share a decisionmaker—or based on Athletic Director Manuel's decision to turn a blind eye or rubberstamp UConn's coaches' unequal treatment of male and female athletes.

female student for conduct significantly less serious than that of her male counterparts. *See Price Waterhouse*, 490 U.S. at 256. And a jury could easily infer from the evidence Ms. Radwan presented at summary judgment that UConn's disciplinary choice was at least in part motivated by Ms. Radwan's sex.[6]

B. A Same-Supervisor Requirement In The Student-Athlete Context Would Gut Title IX's Protections

Because men's and women's teams are usually led by different coaches, rigidly imposing a same-supervisor requirement, as the district court did, would undermine Title IX's twin objectives of forbidding the use of federal resources to support discriminatory practices and providing individual citizens effective protection against those discriminatory practices. Indeed, a same-supervisor requirement would strip Title IX protections from the vast majority of student-athletes.

UConn's athletic program itself shows that men's and women's collegiate teams rarely have the same coaches. Of UConn's eighteen listed teams, in only

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[6] The inference of a discriminatory motivation is strengthened by the procedural irregularities outlined in Ms. Radwan's brief and Coach Tsantiris and Athletic Director Manuel's differing post hoc explanations for the disciplinary action. *See* Opening Br. 10-13; *Menaker*, 935 F.3d at 31 ("[P]rocedural deficiencies in [a] university's investigation and adjudication" give rise to "an inference that the university was motivated, at least in part, by bias."); *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 146-47 (2000) (explaining that factfinder may infer intentional discrimination by, in part, refusing to credit employer's explanation).

four sports do female and male athletes share a coach.[7] Thus with a same-supervisor requirement, student athletes on at least fourteen teams—over 75% of the athletic opportunities—could never point to a legally sufficient comparator, no matter how egregious the discrimination. To make matters worse, eight single-sex teams at UConn do not have a corresponding team of the opposite sex. As such, even if the "similarly situated" test "only" required comparators to participate in the same sport, nearly 50% of student-athletes at UConn would be unable to point to a legally sufficient comparator.

UConn is not unique in this regard. Other current members of the AAC have similarly composed athletics departments.[8] For example, none of the University of Central Florida's fifteen teams share a coach.[9] At the University of

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[7] *Staff Directory*, University of Connecticut, https://uconnhuskies.com/staff-directory (last accessed Nov. 20, 2020). UConn lists Swimming and Men's and Women's Cross Country/Track & Field as single teams but breaks out separately Men's and Women's Tennis. *Id.* The tennis teams share a director, but they do not appear to share a coach. *Id.* (the men's team lists "associate coach" and the women's team lists a different "volunteer assistant coach"). Amici nevertheless conservatively counted the shared director as a shared coach.

[8] At the time Ms. Radwan played for UConn, it was a member of the AAC. Earlier this year, UConn joined the Big East Conference. *See* Jeff Borzello, *UConn leaving AAC in '20, will owe $17M exit fee*, ESPN (July 26, 2019), https://www.espn.com/college-sports/story/_/id/27263372/uconn-leaving-aac-20-owe-17m-exit-fee.

[9] *Staff Directory*, University of Central Florida, https://ucfknights.com/staff-directory (last accessed Nov. 20, 2020).

Cincinnati, only two out of fourteen teams share a coach.[10] And at St. John's University—a university within this Circuit and within UConn's current NCAA conference—men and women on only one out of fourteen teams share a coach.[11] So, just as Ms. Radwan experienced in this case, under the district court's incorrect analysis, the vast majority of student-athletes at these three universities (and universities across the nation) could be discriminated against based on their sex without Title IX recourse. Imposing such a barrier to a Title IX claim hardly provides student-athletes "effective protection against" sex discrimination. *Gebser*, 524 U.S. at 286 (citation omitted).

The district court's unsupported rule is also an unnecessary one. There is no inherent reason why sharing a coach is a relevant factor when determining whether the university, as an institution, treats similarly situated students of the opposite sex less favorably or holds women to a stricter standard of conduct. Although the same-supervisor factor is not required in the Title VII context either, it is easier to see why it might be a relevant factor in that context. Because very few departments or jobs are single-sex, looking to whether a plaintiff and proposed

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[10] *Staff Directory*, University of Cincinnati, https://gobearcats.com/staff-directory (last accessed Nov. 20, 2020).

[11] *Staff Directory*, St. John's University, https://redstormsports.com/staff-directory (last accessed Nov. 20, 2020).

comparators of the opposite sex share a supervisor provides information about the similarities of their job responsibilities, supervisor expectations, and disciplinary decision-making. By contrast, in the context of student-athlete discipline at issue here, the same rules ostensibly apply, regardless of sport, coach, or sex. UConn, UConn's athletic department, the NCAA, and the relevant collegiate conference set the standards of conduct to which all student-athletes, male or female, must adhere. As such, when the university disciplines a female student-athlete for an infraction, all that matters is whether the university would have meted out similar discipline against a male student-athlete who committed a comparable infraction. This factual inquiry is all that this Court requires. *See Graham*, 230 F.3d at 40.

C. The District Court's Order Puts Female Student-Athletes At Risk Of Losing Their Scholarships Or Facing Disproportionately Harsh Discipline For Failing To Adhere To Gender Stereotypes

By applying a standard that is impossible to meet for most female student-athletes, the district court's order will exacerbate the already-existing gulf between opportunities available to male and female student-athletes by allowing sports administrators to award such opportunities only to female athletes willing to conform to gender stereotypes.

One of Ms. Radwan's coaches, Zachary Shaw, testified that the coaches "wanted to reinforce that plaintiff's behavior was not acceptable and we wanted this message to be clear to the team and to the athletes that we were recruiting."

JA361. In other words, UConn and its coaches sought to ingrain stereotyped notions of femininity by encouraging pleasantness and passiveness and by punishing those female student-athletes who showed "the[ir] desire to triumph over competitors" through vigorous celebration. *See* Morris, *supra*.

UConn did not impose similar constraints on its male student-athletes, who were free to celebrate and express their competitiveness. As discussed, in one instance, a referee penalized a male student-athlete for unsportsmanlike conduct when he kicked a ball into the stands, arguably creating a dangerous situation for spectators. JA837. Like Ms. Radwan, the male student-athlete was celebrating at the time and he apologized for his behavior. *See* Desmond Conner, *UConn Football Insider: Andrew Adams Learns Lesson From Costly Boot*, BALT. SUN (Oct. 8 2015), https://www.baltimoresun.com/hc-uconn-football-insider-andrew-adams-1009-20151008-story.html ("Adams was called for unsportsmanlike conduct" when he "was in celebration mode."). Unlike Ms. Radwan, he received no discipline from UConn. That is exactly the type of discrimination that Congress prohibited by passing Title IX. *Columbia Univ.*, 831 F.3d at 53.

Worse yet, approval of UConn's decision by this Court would not solely affect Ms. Radwan. If the district court's order is allowed to stand, female student-athletes across the Circuit—and in reality across the country—will likewise have no recourse against discriminatory actions taken for their failure to conform to

gender stereotypes. Sports administrators would be free to impose a different, stricter—i.e., *discriminatory*—standard of conduct on female student-athletes than on their male counterparts, with devastating consequences for those female student-athletes who fail to comply—the cancellation of scholarships and the resulting denial of educational opportunities.

CONCLUSION

Amici respectfully submit that the district court's order granting summary judgment against the plaintiff should be reversed.

Dated: December 8, 2020

Respectfully submitted,

s/Christine Y. Wong

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Rule 29(d) of the Federal Rules of Appellate Procedure and Second Circuit Rules 29.1(c) and 32.1(a)(4)(A) because it contains 6,617 words, excluding those parts of the brief exempted by Rule 32(f).

This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2016, in 14-point Times New Roman font.

Dated: December 8, 2020 s/ Christine Y. Wong

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Second Circuit via the CM/ECF system on December 8, 2020.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: December 8, 2020 s/ Christine Y. Wong

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APPENDIX: INTERESTS OF ADDITIONAL *AMICI CURIAE*

The **National Organization for Women Foundation** ("NOW Foundation") is a 501(c)(3) organization devoted to achieving full equality for women through education and litigation. The NOW Foundation focuses on a broad range of women's rights issues, including economic justice, educational equity, pay equity, racial discrimination, women's health and body image, women with disabilities, reproductive rights and justice, family law, marriage and family formation rights of same-sex couples, representation of women in the media, and global feminist issues. Educational Equity and the enforcement of Title IX is one of the NOW Foundation's primary areas of focus.

The **Feminist Majority Foundation** ("FMF") is dedicated to eliminating sex discrimination and to the promotion of women's equality and empowerment in the U.S. and globally. The Foundation's programs focus on advancing the legal, social, economic, education, and political equality of women with men, countering the backlash to women's advancement, and recruiting and training young feminists to encourage future leadership for the feminist movement. To carry out these aims, the Foundation engages in research and public policy development, public education programs, litigation, grassroots organizing efforts, and leadership training programs.

FMF's Education Equality Program plays a leading role in compiling research on gender and intersectional equity and developing a national Title IX Action Network with Title IX Coordinators and others who support equality in education to fight the many threats to Title IX and maximize its beneficial impact on society.

The **Clearinghouse on Women's Issues** ("CWI") was established in 1974 and is a national non-profit 501(c)(3) organization. The mission of the Clearinghouse on Women's Issues is to provide information on issues relating to women, including discrimination on the basis of gender, age, ethnicity, marital status or sexual orientation with particular emphasis on public policies that affect the economic, educational, health and legal status of women; cooperate and exchange information with organizations working to improve the status of women; and take action and positions compatible with its mission.