Episode 1 Transcript

Erin Buzuvis: We have decided as a nation, and we are a bit unique in this regard, that schools are a place where athletic access happens. We fund this with our taxpayer dollars, we have an expectation that students who go to school have opportunities for extracurricular enrichment through athletics. And we do that without contemplating the reasons why, but when you do contemplate the reasons why I think there's a very compelling connection there.

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 season will focus on the important topic of trans inclusion in youth sports and how kids have become the battleground for a war about gender equity and unfair advantage.

Maybe you're an athlete, now or once upon a time. Maybe you're a parent or a coach. Maybe you're a lawyer, an educator, an activist, or all of those things. But if you are someone who believes that trans lives matter and want to know more about this debate surrounding trans athletes that has dominated so many news cycles – I'm glad you're here.

I get it – this is not an easy issue to wrestle with. Many of us may not have close friends, family members, or colleagues who identify as trans or non-binary, let alone know any trans or non-binary kids. And for those who do, it can also be hard to prioritize sports as an issue when trans people are facing attacks on so many other rights. A school administrator once told me, when I asked how the district would support my daughter, who has a physical disability, if she wanted to play a sport someday - "well, she can do some other activity – like yearbook or the newspaper." It's not that important, in other words. Some kids can play, some kids can't - focus on something that matters.

But sports do matter, particularly for young people, because they are a huge part of the complex educational eco-system they inhabit for most of each day. Sports loom large in American culture and they are inextricably linked to the K-12 educational experience. And clearly many adults care deeply about school sports, so much so that they've proposed and supported dozens of state bills aimed at limiting or excluding trans kids from playing sports, in most cases without any discernable controversy over trans inclusion in their state.¹

I spoke with Shira Berkowitz, Senior Director of Public Policy and Advocacy at PROMO, a Missouri nonprofit focused on protecting and improving equality for LGBTQ+ Missourians, about the impact of these new laws. Missouri, the place I consider my home state, passed one of the country's most restrictive bans on trans participation in youth athletics. The law, which went into effect just in time for the start of school, prohibits public, private, and charter schools from allowing students from kindergarten through high school to participate in a single gender team that does not align with the gender listed on their birth certificate.

¹ Valerie Moyer, *GSI Poll: So You Think You Know About Transgender Athletes...*, GLOBAL SPORT MATTERS (June 11, 2021), https://globalsportmatters.com/research/2021/06/11/transgender-athletes-poll-data-legislation-ohpiglobal-sport-institute/

Shira Berkowitz: In summary, sports are no different from any different piece of life you want to pull out from, it's whether or not everyone has access to everything else. so that exclusionary idea that, yeah you can go to school and we believe you that you are a boy or we believe you that you are a girl. But you can only go to school up until the time when there are activities, afterwards or beforehand. It's too exclusionary. It's carving out a space where trans youth cannot belong. And that idea of, how do trans youth spend their school day with emotional and mental wellness knowing they can only participate in school up to a point – how do we care for them? It's an egregious idea that we would exclude anyone from any part of their childhood day.

Sara Gras: Exclusion from any aspect of education affects kids, and trans kids are already a particularly vulnerable population. A 2019 article looking at data from the Centers for Disease Control's Youth Risk Behavior Survey found that fewer than 2% of the high school students surveyed identified as transgender, but that more than 1/3 of them reported attempting suicide in the prior year.² Data shows that playing sports can have a positive effect on young people facing challenges like bullying and feelings of shame or isolation,³ and transgender athletes report that participation in sports has given them an escape from some of the negative feelings they wrestle with.

In the second episode of his podcast, Schuyler Bailar, a trans athlete and activist, sat down with his friend and fellow athlete, Lia Thomas to talk about their experiences. If you've heard of Lia Thomas and seen any of the popular media coverage of her first place finish in the 500 freestyle at the NCAA's 2022 Swimming and Diving Championship, I strongly recommend taking 30 minutes to hear this conversation between Schulyer and Lia. ⁴ Schulyer has been a swimmer since childhood, Schuyler describes how, for him, throughout his life, the water has been a way to connect with his body and detach from it at the same time. Lia says she struggled with gender dysphoria and body image issues while swimming in college on the men's team, but delayed transitioning so she could continue to swim. When she reached a point of depression so low that she describes herself as suicidal and finally began hormone replacement therapy, she reconciled herself with possibly losing the opportunity to participate in a sport she loved – but knew it was necessary to save her life.

Prof. Erin Buzuvis is a professor of law at Western New England School of Law who has been writing on Title IX, athletics, and gender inclusion against an administrative law backdrop for two decades. We spoke at length about what she has learned over the years as someone who has examined these issues extensively, including the unique and specific harm exclusion causes trans youth.

Erin Buzuvis: The harm of being excluded from athletics for a trans athlete...First of all you've got the same kinds of harms you could imagine when any student would be excluded from athletics. So the lost opportunity to engage in those enriching opportunities that I mentioned earlier. But in addition to that,

²MM Johns et al., Transgender Identity and Experiences of Violence Victimization, Substance Use, Suicide Risk, and Sexual Risk Behaviors Among High School Students — 19 States and Large Urban School Districts, 2017. 68 Morb Mortal Wkly Rep 67–71 (2019), DOI: http://dx.doi.org/10.15585/mmwr.mm6803a3.

³ Erin E. Buzuvis, *Including Transgender Athletes in Sex-Segregated Sport*, in Sexual Orientation and Gender Identity in Sport: Essays from Activists, Coaches, and Scholars 23 (George B. Cunningham ed., 2012).

⁴ Dear Schuyler, *Should Trans Women Be Included in Women's Sports?* (Apr. 24, 2023), https://diversionaudio.com/podcasts/dear-schuyler/.

⁵ See e.g., Erin Buzuvis, "As Who They Really Are": Expanding Opportunities for Transgender Athletes to Participate in Youth and Scholastic Sports, 34 L. & INEQ. 341 (2016); Erin Buzuvis et. al., Sport Is for Everyone: A Legal Roadmap for Transgender Participation in Sport, 31 J. Legal Aspects of Sport 212 (2021).

particular for transgender athletes, there is the harm of having your gender identity rejected and denied by important key players in your life. Other than your families acceptance, acceptance by your school community is the most important venue for affirmation to take place, and when that affirmation is withheld, it is seriously damaging from a social and psychological aspect. Social science has demonstrated that the biggest risk for trans youth in terms of mental health issues, in terms of a variety of harms, going up to and including the risk of suicidality, is the withholding of affirmation and acceptance of one's gender identity

Sara Gras: When Erin presents the issue this way, it seems simple, doesn't it? Exclusion causes real harm to trans kids so we should be inclusive. Well, if it were that easy, there'd be no debate – no court cases, no protests, no scholarly conversation to be had. But it's not – far from it. The next episode will go into greater detail about recent state and federal legislation seeking to ban trans kids from sports, as well as some of the recent court cases challenging both their inclusion and exclusion. But what I want to zoom out for a moment and really think about is how we as a nation have become so polarized by this issue of which kids can play sports with who when similar attempts to marginalize trans youth, like the bathroom bans of the mid-2010s, were so easy for most of us to reject? Particularly when the narrative is advanced by many of the same players with the same underlying beliefs and agendas, has this campaign made so much progress without the same outcry? One key difference is that proponents of trans exclusion from school sports were able to recruit an unlikely ally in the form of cisgender female athletes and their supporters. While it stretched the limits of common sense to argue that trans kids using the single sex bathroom aligned with their gender identity caused any actual harm to anyone else, trans inclusion in sports – some could conceivably argue – has a negative impact on other athletes. Because that's the nature of competition – the more able competitors, the tougher it becomes to claim a win.

But do we really believe that the most important aspect of sports for kids is winning? It's certainly not what we tell our kids – in fact, we often say the opposite, that it's how you play the game that matters. Particularly in the context of publicly funded education, sports are part of a bigger and more wholistic mission, one component of the lengthy process of educating and socializing our children and adolescents, to give them a solid foundation for the rest of their lives.

While there are many reasons for sports at all levels to be inclusive of transgender people, Erin and I agree that the conversation about trans inclusion in scholastic sports is distinct and separate from inclusion in elite sports.

Erin Buzuvis: We have decided as a nation, and we are a bit unique in this regard, that schools are a place where athletic access happens. We fund this with our taxpayer dollars, we have an expectation that students who go to school have opportunities for extracurricular enrichment through athletics. And we do that without contemplating the reasons why, but when you do contemplate the reasons why I think there's a very compelling connection there. Sports assist students in the maturation process, they learn how to respond to instructions, how to receive feedback and coaching. They learn how to get along well with others, all kinds of leadership and character education, all kinds of physical education. You can learn through your experience with scholastic sport how to have a lifelong relationship with fitness, with exercise, with all kinds of healthy physical habits. The socio-emotional benefits are overwhelming and compelling. All these things help students create the right kind of mentality and framework and interest in and commitment to their curricular education as well as providing an

education in their own right. So when you accept that athletics is not just some second-tier not so important afterthought or component of what it is that our public schools are about and the education they are delivering, but they actually play an integral role, we realize that they too, there is as compelling a reason to make sure there isn't discrimination excluding people from athletics as we are concerned about discrimination excluding people from the classroom. In other contexts, in the elite athletic context, there are important reasons for elite athletics to be inclusive – you can look to that as a mirror, you can look to that for role models – but that expectation of participation, that factor does not weigh as strongly in the elite athletic context. In fact, it's called elite for a reason because the vast majority of people are already excluded. So in contrast, to me, it matters so much for to focus attention and energy and conversation on the scholastic context because participation is an expectation, because participation has a value that's linked to another fundamentally important context – education – that we have already decided civil rights should apply.

Sara Gras: This framing of sports as a component of education is critical and one I will return to repeatedly over the course of this season. But in thinking about sports AND education, it's important that we consider the broader social purposes of each institution. If we continue to debate the inclusion of transgender youth athletes in terms of the harms and benefits to individuals on both sides, we risk getting stuck in the weeds.

<u>Kim Yuracko</u> is a professor of law at Northwestern Pritzker School of Law. Her substantial body of scholarship has focused on nondiscrimination and sex-segregation, including in the context of sports, and she recently published two articles on transgender inclusion and girls sports. Kim's scholarly perspective is focused on moving the debate about transgender inclusion in sports forward, away from rhetoric and emphasis on individual experiences. Without discounting or invalidating the pain experienced by transgender youth, she highlights the problem of basing the argument for inclusion solely on pain.⁶

Kim Yuracko: One of things I was struck by when I first came to this topic and really began to read broadly and listen to arguments was how much of the discussion focused on pain. And it's not that I don't care about pain, people's pain is really important and it matters, but as a lawyer and as a legal scholar it struck me as strange because we don't as a general matter assign rights in response to pain. So we assign rights to protect against particular kinds of wrongs that we identify as social harms in some way. But they are not...it is almost never that the right is created because of a subjective harm, the religious context is the kind-of closest to doing so. But as a general matter we define rights because someone has behaved in a particular way that as a society we want to discourage. So I found the focus on pain surprising and something I wanted to delve into and at least think about. There's a reason that pain doesn't form a good basis for legal rights.

And some of the reasons for that are what you were alluding to which is - pain measures are highly subjective, they are highly variable, and also suggestive. They change over time. they change depending upon context, if one is told that something is a "bad". So after sexual harassment was created as a legal wrong, women experienced sexual harassment as more painful. That's not to say that sexual harassment beforehand was not a bad thing that should have been outlawed, and it was good that it

⁶ Kimberly Yuracko, *The Culture War Over Girls' Sports: Understanding the Argument for Transgender Girls' Inclusion*, 67 VILL. L. REV. 717 (2022).

was outlawed even though it created more pain. The fact that there is an increase in pain doesn't mean we should get rid of the bad, get rid of the cause of action, but the creation of the legal right should be, and really I think needs to be, for reasons that are independent of subjective measures of pain. And you were getting at too, if we created rights only based on pain, not only do we have these measurement problems, but are we being purely utilitarian? And often we don't want to be purely utilitarian in the way we create rights and this is one of those contexts where we don't want to be. Because if we are thinking about creating right to inclusion because transgender girls exclusion creates tremendous pain for that group, if we really care about pain then we either have to count the pain that comes from cisgender girls from their inclusion and not just cisgender girls, but to all other people who experience pain from seeing their inclusion, or we have to justify not giving any weight to that pain, and sometimes we do.

Sara Gras: Kim's work acknowledges that the individual interests of transgender and cisgender women may not always be aligned in the athletic space which is part of what makes this issue so fraught. But she offers a framework through which we can, perhaps with the objectivity the law requires, consider the categories of benefits associated with sports and craft participation rules at the various levels of competition that align with the benefits that should be prioritized at each stage.⁷

Kim Yuracko: There's a lot at stake for individuals, certainly opportunities, rewards, recognition, both for individual athletes, but really importantly also for whole groups – groups of individuals who are identified with those who those with participate and more so with those who win. There's a lot at stake for individuals and for groups in terms of the outcomes. I think what's also really important about this issue is that it should push us into a social discussion about sports and about what matters with sports because I think it's very difficult to have a conversation about resources should be allocated without identifying what the resources or benefits are and why they matter to us. And that was a part of the conversation I wasn't really seeing happening, at least not explicitly, it was sometimes sort of under the surface. But that's part of why this is such an important discussion to be having. It really has to push us to be thinking about why we as a society care about sports, particularly at the school level, and what we want the benefits to be, and that's got to guide us then in thinking about what the fair and just allocation of those resources and benefits are.

One of the things I try to do in my work is to try to categorize the range of benefits that I see sports kind of delivering, the reasons why we as a society care about sports, and I reduce them to three categories. The first category of benefits that I identify and focus on I call basic benefits, and it's not my term, it's a term that has been used by others as well. And basic benefits refers to the sort of physical, emotional, psychological benefits that participants get just from playing. So everyone who plays regardless of whether they win or don't win, the outcome doesn't really matter, one gets sort-of physical health benefits from running around, learning skills, coordination. One also...at least a lot of the evidence also suggests, that people get a lot of emotional and psychological and cognitive benefits that come from playing – people may learn leadership skills, they may learn teamwork. There's also connection to sort of mental health benefits. There's a range of physical, psychological, emotional benefits that come just from participating. So the idea is there's a good that comes playing sports everyone gets them just from

⁷ Kimberly Yuracko, *Transgender Inclusion and Girls' Sports: A Look at What's at Stake*, 3 AM. J. L. & EQUITY 1 (forthcoming 2023).

playing you may not get them to equal degrees, but sort of everyone gets those benefits from playing. So those are the basic benefits.

But there's another level of benefit that's also really important to this discussion of girls' sports and transgender inclusion and those are the benefits that really go to winners. And so those are benefits like prizes, recognition, but also things like preferred acceptance to colleges, colleges often give preferential admissions to student athletes – also scholarship money. So there's these recognition-type benefits, but some of those benefits are also really tangible that go to a subset of participants and those are the winners.

And then there's a third type of benefit that I think is perhaps the most important one, and it's the one that I think is kind-of underlying a lot of conversations and debates about this topic but is I think often the least articulated, at least explicitly named. And that is that sports conveys benefits to groups, and it conveys benefits even to non-participants who see their group, a group with which they socially identify, being recognized and rewarded. And this was, sort-of very clearly a benefit that was identified and anticipated and trying to be fostered through the passage of Title IX. That is part of what Title IX was supposed to do, it was meant to get girls to play sports, but it was meant to encourage younger girls to play sports by seeing older girls and women recognized for their athletic performance. And even taking it one step further, there was this sort of goal of changing the way girls and womens' bodies are seen and socially viewed and understood and recognized...creating a social image of womens bodies that is strong and autonomous and physical in a way that is not hypersexualized. And so there's, I think, a real benefit that comes through sports that comes through seeing the winners recognized and rewarded that goes, not just to the winners, but the group that identifies with those winners.

Sara Gras: In taking steps to protect the civil rights of groups in our society who have been denied them, those who have traditionally enjoyed these rights may experience some loss of individual opportunity. This has been the case with ending discrimination and improving access to employment, education, and places of public accommodation. But we recognize that prioritizing the rights of groups over the interests of specific individuals has a broader and more important social purpose. Not only is it critical to creating a more just society, but there are other benefits like the one Kim mentions with Title IX. When barriers are removed and groups who have been excluded are finally welcomed into spaces, those spaces evolve – for the better.

Advocates of Title IX recognized that improving access to education and athletics for women would facilitate a cultural shift in how women were perceived and treated in all aspects of life. The same is true of access to sports for all members of the LGBTQ+ community – inclusion will benefit society as a whole, not just by creating new athletes and fans, but by encouraging the transformation that happens when our spaces become more diverse and groups who were once unfamiliar become our colleagues and teammates and friends.

Here's Kurt Weaver, Executive Director of the <u>You Can Play Project</u>, a non-profit organization focused on ensuring safety and inclusion for members of the LGBTQ+ community at all levels of sport. We spoke at length about why inclusion in sports is about much more than who gets to play the game.

Kurt Weaver: So if you look at the stats about 24% of LGBTQ+ youth participate in sports versus about 68% of straight youth. So that's a number that I see obviously as a problem, but also as an opportunity for those sports. You're looking for more kids, you're looking for more access, you're looking for more

engagement, and frankly, pro sports teams are looking for more ticket buyers and for more people that show up, more eyes on broadcasts. It's a ready-made community if you are going to engage them in a real way and bring the value of sport to that community. And I think to your point of why specifically do we need to go after [inclusion] in sport, and maybe specifically welcome the LGBTQ community in sport - you know, to have a history of not being welcome at a table, it takes somebody saying, hey come sit with me in order to then be welcome at the table. We don't just assume that, hey now it's a different time, I'm just going to plop down there.

The good news is that almost every athlete we hear from with a coming out story while within sports so they're on a team, they come out to their teammates, to their coach, to their friends – has been positive. It's amazing to see, OUT sports did a real big study around this, for what is the experience of athletes who have come out, not for those athletes who are still closeted or who are not yet comfortable coming out, but the experience was almost...almost all athletes have a positive experience from those teammates, coaches, community around them and it was a good experience once they did feel comfortable enough to come out. The problem of course being that this is a fraction of the individuals who are out there, who are playing sport, who are part of the community because before you come out, the group chat is still going on, on your team that you are a part of, where there are going to be some jokes made, there are going to be terms used. There's still going to be the coach who is going to be motivating us through using, you know, some terms like pansy, sissy, fairy, things like that, that are still being used consistently within sport. And again, is sport homophobic? Absolutely not, but for some reason when you're talking trash back and forth it ends up in this space a lot of times because of how we learn from our coaches, our parents, and so on and so forth, and so it's a cycle we have to break. For the athletes who are not yet out, it's certainly an anxiety to think - how will I be treated? Because all the evidence right now – group chat, coaches comments, all the things I see happening, the terms I hear on the bus on an away trip - add up to, I am not going to be welcomed here. Equally though, it's great to hear that when they are coming out, they are being welcomed with open arms, with love and acceptance, but again that's....I don't ever begrudge anybody saying they aren't comfortable because of this evidence I'm seeing. So it's very difficult for me to say, ignore all the evidence in front of you that all your friends are showing you to then hop over that big fence to then come out and let them know your true self. So it's a challenge and an opportunity certainly within that space. So I think the numbers are good to know what happens when an athlete does come out, but it's still a difficult space before that.

Sara Gras: As Kurt observes, things are better. Kids are more accepting and coaches are more aware of the need to treat issues of sexual orientation and gender identity more thoughtfully than perhaps they once were. But the culture of sports is still not a welcoming space for LGBTQ+ youth. When Mack Beggs was forced by state athletic rules to wrestle in the high school girls' league in Texas despite identifying as male, he was loudly taunted with slurs from spectators.8 Andraya Yearwood, a transgender woman who was able to run high school track in the girls division based on the Connecticut Interscholastic Athletic Conference's now-challenged participation policy recalled a frightening incident from the 2018

⁸ Mack Beggs: 'Change the laws and then watch me wrestle the boys', ESPN (Mar. 2, 2017), https://www.espn.com/espn/otl/story/_/id/18802987/mack-beggs-transgender-wrestler-change-laws-watch-wrestle-boys.

State Open in an interview with The Bleacher Report.9 Just before she competed in an event, she overheard two parents discussing her:

"He shouldn't be running!" one of the women says.

"I know!" the other says. "Why is he running on the girls' team? HE IS A BOY!"

And then the two women turn around. They look at Andraya. She looks at them. It is as if months pass between blinks.

"Why are you on the team?!" one of the women shouts at Andraya. "Why are you here?!"

Athlete Ally reports that when over 9000 sports fans were surveyed, the majority believed spectator stands were the most dangerous and unwelcoming of all places for LGBTQ+ people in sports¹⁰, a statistic illustrated by the crowds of anti-trans protestors who gathered at the 2022 NCAA Women's Swimming and Diving Championships. Georgia Tech students, whose school was hosting the event, reported to a news outlet that protesters were both frustrating and upsetting.¹¹ So while it may be true that trans acceptance has grown, we clearly have a very long way to go.

As I discussed with Dr. Jeremy Piasecki, Culture in Sports Executive Director, athletic organizations don't exist in a silo, they are a mirror of the communities in which they exist and of our society more broadly. They reflect existing values and beliefs but also have the ability to influence and change values and beliefs.

Jeremy Piasecki: One of the things that I've noticed in the military and I've read about a lot over time – the military, and in this case the U.S. military, reflects the population of the U.S., and reflects the values of the population of the U.S. And I believe that sports is solely a reflection of the community that that sports organization is in. So if you have a small town in the Midwest and you have different sports teams, those sports teams have, we'll just use youth sports for example, those youth sports teams have kids from the local community and those perceptions and biases and values that are learned within the home and within local communities and families, those athletes are on those teams. And they also have coaches with similar values and beliefs and perceptions and biases and the parents are the ones that instill those into the youth athletes. So you have these communities of people that believe certain things - whether its positive or negative or indifferent, and even that positive or negative is perception itself. So you do that not only in small towns, but in large cities or in the US as a whole or in other countries or even on the world stage. Sports definitely reflects all the positives and the negatives we deal with in the world, in each individual country and each individual community. So if there's a country that's plagued by scandals, you'll see a lot of scandals that are also in sports in that area of the world or in that country. If you have a country that is focused on equality and equity and the benefit of all people, like the true benefit of all people, you are going to see that in their sports programs. So it's very reflective, sports are

⁹ Mirin Fadar, *Andraya Yearwood Knows She Has the Right to Compete*, BLEACHER REPORT (Dec. 17, 2018), https://bleacherreport.com/articles/2810857-andraya-yearwood-knows-she-has-the-right-to-compete.

¹⁰ Athletic Equality Index, ATHLETE ALLY, https://aei.athleteally.org/ (last visited Sept. 15, 2023).

¹¹ Delaney Parks and Emi Tuyethhi Tran, *Groups Protesting Lia Thomas' Participation in NCAA Championships Met with Counter-Demonstrations*, The Daily Pennsylvanian, https://www.thedp.com/article/2022/03/penn-swimmer-lia-thomas-ncaa-championship-atlanta-protests (March 17, 2022, 11:24 pm).

very reflective of the societies and the cultures and the country and the regions of the world. And so that's the great thing about sports. And sports on the flipside also has the opportunity to influence change within those societies or communities or countries or regions. You can have athletes that stand up for others and speak out about things that are right or wrong and to help influence, not only change, but for people to think about what is important in their lives as individuals and as parts of communities. And that's extremely important – what sports can bring and how sports can influence positive change.

Sara Gras: In other words, sports are so much more than just a game. This is just the start of the discussion. But hopefully I've set the stage to do exactly what Kim suggests, which is to think about why we as a society care about sports, particularly when it's part of education. What do we want the benefits to be and how can the law facilitate equitable distribution of those benefits? And does the inclusion of a marginalized group in sharing those benefits in fact displace another historically disadvantaged group in a way that defeats the broader purpose? Or is the loss of special benefits for a few an acceptable cost for continuing to create a more just and equitable country?

The next episode of *Hearsay from the Sidelines* drops in two weeks and will focus on the specific cases, state, and federal legislation at the heart of this debate. Thanks for listening.

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 cultureinsports.com where you'll find more articles, shows, webinars, summits, and courses for sports leaders of all levels.