UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

SELINA SOULE, a minor, by Bianca Stanescu, her mother, et al.,

Plaintiffs,

v.

CONNECTICUT ASSOCIATION OF SCHOOLS d/b/a CONNECTICUT INTERSCHOLASTIC ATHLETIC CONFERENCE, et al.,

Defendants.

Case No.: 3:20-cv-00201-RNC

REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION TO DISQUALIFY

June 12, 2020

INTRODUCTION

Recusal standards do not turn on subjective feelings or good-faith attempts to enforce politeness. The issue is whether, considering "all the circumstances," *Sao Paulo State of Federative Republic of Braz. v. Am. Tobacco Co.*, 535 U.S. 229, 232 (2002), "the public might reasonably believe" that a court demonstrated possible partiality or bias. *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 860 (1988). *Accord* Pls.' Mem. in Supp. of Mot. to Disqualify, ECF No. 103-1 ("Recusal Mem."), at 4 (citing *United States v. Bayless*, 201 F.3d 116, 126 (2d Cir. 2000), and *Diamondstone v. Macaluso*, 148 F.3d 113, 120–21 (2d Cir. 1998)). And here, a disinterested observer would reasonably believe that the Court demonstrated possible partiality or bias in ordering *sua sponte* Plaintiffs' counsel not to refer to male athletes as "male" because doing so is inconsistent with science—one of the primary issues in dispute. *Id.* at 8-16.

Defendants' opposition, ECF No. 113 ("opposition brief" or "Opp'n Br."), largely dodges this legal standard. Defendants focus on (1) the Court's unquestioned ability to ask litigants for civility, (2) the alternative terms Defendants say are available to Plaintiffs, even though those terms are inconsistent with the scientific evidence Plaintiffs submit, (3) inapposite cases where courts have allowed the use of requested pronouns where a party's "sex" was not legally relevant, and (4) an offensive argument by analogy that prohibiting racist language does not violate free expression or due process interests. In so focusing, Defendants' opposition confuses two fundamentally different things: what language the Court would allow Plaintiffs to use, and what members of the public might reasonably conclude about the Court's appearance of partiality or bias after the Court's Order and comments. Because the Order and comments might reasonably lead the public to believe the Court has partiality or bias, the Court should grant the motion to recuse.

I. Defendants misstate the legal standard for recusal.

Defendants first erroneously treat the law regarding disqualification, which Plaintiffs properly covered in the opening brief. Recusal Mem. 4-5. Indeed, although they initially state the appropriate standard,[1] Defendants gloss *Liteky v. United States* to imply that recusal is required only if the moving party demonstrates that a "judicial remark" evidences "such a high degree of favoritism or antagonism as to make fair judgment impossible." Opp'n Br. 8 (quoting *Liteky v. United States*, 510 U.S. 540, 555 (1994)); *see also id*. at 8 (heading for section "II" implying applicability of same erroneous standard). They then cite *Liteky* for the unremarkable proposition that "ordinary efforts at courtroom administration—even a stern and short-tempered judge's ordinary efforts at courtroom administration—remain immune." *Id*. (quoting *Liteky*, 510 U.S. at 556). But the first point is not required for recusal, and the second point is not at issue.

To be clear, Plaintiffs do not question the Court's authority to ensure efficient and respectful courtroom administration; as discussed in the next section, Defendants' arguments about courtesy are inapposite to the issue of recusal. The question is whether, in light of the Court's Order that Plaintiffs address individual Defendants as "transgender females" because that is "consistent with science[,]" Tr. 29, ECF No. 94, the public might reasonably conclude the Court has bias in a case where Plaintiffs' arguments, claims, and expert testimony are based on the assertion that athletes born male remain male as a matter of scientific fact no matter their

[1] "The judicial recusal statute provides that '[a]ny . . . judge . . . of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.' 28 U.S.C. § 455(a). '[T]he existence of the appearance of impropriety is to be determined not by considering what a straw poll of the only partly informed man-in-the-street would show, but by examining the record facts and the law, and then deciding whether a reasonable person knowing and understanding all the relevant facts would recuse the judge.' *United States v. Bayless*, 201 F.3d 116, 126-27 (2d Cir. 2000) (cleaned up)." Opp'n Br. 7-8.

gender identity, and that as a result those athletes have "an unfair advantage to competition" in women's and girls' sports. Tr. 27.

The judicial disqualification statute does not say anything about favoritism or antagonism. Rather, it provides simply that any judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." Recusal Mem. 4 (quoting 28 U.S.C. § 455(a)). Congress adopted this standard in 1974 "to clarify and broaden the grounds for judicial disqualification and to conform with the recently adopted ABA Code of Judicial Conduct, Canon 3C." *Liljeberg*, 486 U.S. at 858 n.7; *see also* Code of Conduct for United States Judges, Canon 3C(1) (2019) ("Judicial Canon") ("A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned."). "The very purpose of § 455(a) is to promote confidence in the judiciary by avoiding even the *appearance of impropriety* whenever possible." *Liljeberg*, 486 U.S. at 865 (citing S. Rep. No. 93-419, at 5 (1973); H.R. Rep. No. 93-1453, at 5 (1974)) (emphasis supplied). Accordingly, it does not matter whether a judge has actual prejudice or bias against a party. *Id*. at 860; 13D Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure, § 3549. Rather, the question is whether "the public might reasonably believe" the judge is partial or biased. *Liljeberg*, 486 U.S. at 860. In conducting that inquiry, "all the circumstances" must be considered. *Sao Paulo*, 535 U.S. at 232.

Under all the circumstances here, reasonable members of the public might reasonably believe the Court is partial or biased because the Court's directive and remarks reflect a preconceived conclusion about the science at issue and the legal consequences of those scientific facts. Recusal Mem. 8-16. In the Order, the Court unambiguously stated that "going forward, [counsel for Plaintiffs] will not refer to the proposed intervenors as 'males'" and ordered "you must refer to them as 'transgender females'" because that status "is what the case is about"; the

Court ordered that the term is required because mandating that Plaintiffs call athletes transgender females—when Plaintiffs' own experts refer to those athletes as males—is "*consistent with science*, common practice and perhaps human decency." Tr. 26, 29 (emphasis supplied). What's more, the Court took this action *sua sponte*—with no request from Defendants—stating that the Court was "exerci[sing its] prerogative" while fairly anticipating that the Order "undoubtedly will cause some consternation[.]" Tr. 26:8-11.

Under the totality of these circumstances, a reasonable member of the public might believe the Court is partial or biased. The Court should therefore grant the motion to recuse.

II. The issues of courtesy and possible alternative terms are irrelevant.

Rather than address what a reasonable, objective observer might conclude about the Court's impartiality once the Court ordered Plaintiffs' counsel to use Defendants' preferred language based on the assertion that this is "consistent with science"—when Plaintiffs dispute that exact point—Defendants focus on what they contend is civil and polite. Plaintiffs are emphatically dedicated to civility, but "male" is not an uncivil word. And cries of "civility" cannot be used to compel Plaintiffs to speak inaccurately, nor to concede disputed issues at the very threshold of the litigation.

It does not matter that Plaintiffs would be allowed to use the phrases "transgender athletes," "male bodies," "biologically male," "physiologically male," Opp'n Br. 2-3, 7, 12 (quoting transcript of Order), or the Court's preference, "transgender females," Tr. 26:16-17. The appearance of partiality lies in the Court's preconceived conclusions—without briefing or argument—that referring to the athletes as "transgender females" rather than "males" was "*the more accurate terminology*" and was "*consistent with science*." Tr. 29:2-30:3 (emphasis supplied). On the merits, Plaintiffs contest both of those conclusions.

Defendants support their civility point with the judicial canon exhorting judges to ask all to "be patient, dignified, respectful, and courteous to litigants[.]" Judicial Canon 3(A)(3). But that same Canon demands that any civility requirement be "*consistent with [the lawyer's] role in the adversary process*." *Id*. (emphasis supplied). As explained in greater detail below, giving up the scientific terms that form the basis and justification for a legal claim is not consistent with the lawyer's role in the adversary process. And it is not even consistent with Defendants' view of these terms' importance. After all, Defendants repeatedly insist that their nomenclature is central and necessary to advancing *their case*, are mandated by *their* science, and must be considered *their* facts. Opp'n Br. notes 1, 7 & 8. These assertions clarify a simple truth: terminology is as important to Defendants' case as it is to Plaintiffs'. And the public might reasonably conclude that the Court's *sua sponte* decision not merely to adopt, but to mandate, Defendants' loaded terminology on a centrally disputed point evidences partiality and bias. Choosing to impose one side's nomenclature on the other does not promote public confidence.

III. None of Defendants' cited "pronoun" cases involved contested issues of fact or law regarding someone's sex.

Despite Defendants' protestations, the fact remains that "no authority supports the proposition that [courts] may require litigants, judges, court personnel, or anyone else to refer to gender-dysphoric litigants with pronouns [or adjectives] matching their subjective gender identity." *United States v. Varner*, 948 F.3d 250, 254-55 (5th Cir. 2020). And *Varner* remains the most searching discussion of the issue among federal courts of appeal and, as such, merits serious consideration as persuasive authority. Indeed, it is the only case cited in briefing before this Court that directly addresses the question of whether it is proper for a judicial official to order the use of preferred pronouns. *See id*. at 254-57. Conversely, Defendants' cited cases are

inapposite, as none involved both (1) an order compelling counsel to use certain pronouns or terms, and (2) a context where sex status was even a peripheral issue in a case.

For instance, *Canada v. Hall* specifically explained that the court's caution on pronoun use was "immaterial to [the] ruling" that prison officials did not unconstitutionally exhibit deliberate indifference when they put a transgender person in a cell with another male. No. 18-cv-2121, 2019 WL 1294660, at *1 n.1 (N.D. Ill. Mar. 21, 2019). Similarly, *United States v. Manning* did not implicate the ultimate issues in the case when it recognized the use of a new legal name in the military court of criminal appeals proceeding regarding dishonorable discharge. Opp'n Br., Ex. D, Army 20130739 Order (A. Ct. Crim. App. March 4, 2015). And neither of these cases involved an issue where the public might reasonably conclude that a Court's mandated terminology suggested bias on a centrally contested issue of law or fact. This case, of course, is the exact opposite.

Defendants' additional citations are even less relevant. These opinions merely used the terms of a party, without ordering any litigant to do the same. Opp'n Br. 11-12 (citing *via conferatur Johnston v. Univ. of Pittsburgh of Commw. Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 668 (W.D. Pa. 2015) (adopting the undisputed and unordered pronoun convention of a party); *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1227-28 (10th Cir. 2007) (same)). Similarly, *Lynch v. Lewis* dismissed a *pro se* plaintiff's civil rights complaint when prison officials refused to approve treatment for the inmate's alleged gender identity disorder, and the court carefully recognized that its and the defendants' use of pronoun would "*not . . . be taken as a factual or legal finding*." No. 7:14-cv-24 (HL), 2014 WL 1813725 at *2 n.2 (M.D. Ga. May 7, 2014) (emphasis supplied). And *Smith v. Rasmussen* did not involve disputed scientific or legal categories of sex, let alone mandate pronoun use, even though the court required payment of

Medicaid benefits for plaintiff's sex "reassignment" surgery; the court appreciated the courtesy of pronoun usage in spite of "whatever the legal merits on any issue may be." 57 F. Supp. 2d 736, 740 n.2 (N.D. Iowa 1999), *aff'd in part, rev'd in part on other grounds*, 249 F.3d 755 (8th Cir. 2001). Likewise, while *State v. Cantrill* observed in dicta that it was nice to use litigant's preferred pronouns, that case involved claims of structural bias/equal protection, prosecutor misconduct, ineffective assistance of counsel, and cumulative error in a criminal case, but did not mandate certain pronoun use. No. L-18-1047, 2020 WL 1528013, at ¶¶ 19-21, 30 (Ohio Ct. App., 6th Dist., March 31, 2020). Again, these cases did not involve any legal or factual disputes as to the meaning of sex, as here.

In sharp contrast, the Court's Order censors Plaintiffs' identification of intervenors in the very—indeed, only—way that is relevant and decisive under Title IX: by their sex. Even Defendants' cited cases so recognize. *E.g.*, *Johnston*, 97 F.Supp.3d at 674-75 (noting centrality of biological sex for Title IX analysis). The Order also compels Plaintiffs to describe intervenor Defendants in terms of a category (trans/gender identity) that Plaintiffs contend is irrelevant under Title IX, and in terms that Defendants on the other hand argue be substituted for the biological category of "sex" that is actually used in Title IX legal classification. Under these circumstances, it is not a neutral display of civility not merely to adopt, but to mandate the vocabulary that sings one party's song. It is to punish the lawyer's role in the adversary process to vigorously advance Plaintiffs' case. The public might reasonably conclude this Court's Order evidences partiality or bias.

"In cases like these, a court may have the most benign motives in honoring a party's request to be addressed with pronouns matching his deeply felt, inherent sense of [his] gender. Yet in doing so, the court may unintentionally convey its tacit approval of the litigant's

underlying legal position." *Varner*, 948 F.3d at 256 (cleaned up).[2] Even more so where the Court mandated pronoun usage on its own initiative, with no request from any Defendants.

IV. The Due Process and First Amendment issues the Court's Order raises are not answered by Defendants' crass comparisons to racism.

Defendants do not substantively respond to the free expression and due process problems in the Court's Order. Instead, Defendants cite inflammatory cases regarding courts' lawful but unremarkable orders that parties should refrain from using racist language. Opp'n Br. 14. There is never a need for racist language, because such language is irrelevant to any possible legal claim; it represents invidious animosity. In contrast, Plaintiffs contend—and science supports—that alluding to an individual with one Y chromosome and one X chromosome as male is both accurate and consistent with Title IX's original public meaning, as Plaintiffs previously have noted. Recusal Mem. 8-11, 13.

The little substantive argument Defendants devote on these constitutional points does not get them far. It may be true that attorney speech is "circumscribed" during a judicial proceeding. Opp'n Br. 14 (quoting *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1071 (1991)). But circumscribed does not mean nonexistent. Rights to free expression—of parties and counsel on behalf of parties—and due process are mingled, and every party is entitled to "fearless, vigorous and

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[2] Defendants attached three briefs in support of the failed *en banc* petition in *Varner* to suggest that ordered use of pronouns is uncontroversial and a matter of courtesy. Opp'n Br. n.5; *id*. at Exs. A, B, C. Denying that petition, the *en banc* Fifth Circuit reaffirmed that it is a matter of controversy not courtesy. 948 F.3d 250 (March 31, 2020) (denying petition). Indeed, professors in law and other disciplines have taken the exact opposite position on mandated pronoun use. *See* Br. for Professors of Philosophy, Theology, Law, Political Science, and Medicine as *Amici Curiae* Supporting Appellant, *Meriwether v. Trustees of Shawnee State Univ.*, No. 20-3289 (6th Cir. 2020) (attached as Ex. A). All these briefs demonstrate that ordered use of pronouns is a matter of controversy even if intended as a matter of courtesy. As *Varner* observed, choosing a side in that controversy, as here, gives the appearance that the judiciary has taken a side.

effective advocacy, no matter how unpopular the cause in which it is employed." *Offutt v. United States*, 348 U.S. 11, 13 (1954) (cleaned up) (reversing contempt conviction). "The right to be heard must necessarily embody a right to file motions and pleadings essential to present claims and raise relevant issues." *Holt v. Virginia*, 381 U.S. 131, 136 (1965) (reversing contempt conviction). That is why, even when Congress provides funding for lawyers involved in litigation, the First Amendment prohibits Congress from imposing limitations that prevent those lawyers from presenting "certain vital theories and ideas" to advance their clients' legal positions. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 548 (2001).

Finally, the Supreme Court has recognized that "gender identity" is "undoubtedly [a] matter[ ] of profound 'value and concern to the public'" in the context of free-speech rights. *Janus v. Am. Fed'n of State, Cty. & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2476 (2018) (cleaned up) (listing the "controversial subjects" public employee unions can address). Speech regarding gender identity (and other issues) is of "profound 'value and concern to the public,'" occupying "the highest rung of the hierarchy of First Amendment values" and meriting "special protection." *Id.* at 2476 (quoting *Snyder v. Phelps*, 562 U.S. 443, 452-53 (2011)). Given the Supreme Court's view, it would be strange indeed if a court could limit—and even prevent—speech regarding gender identity in a case that turns on gender identity's confluence with Title IX. At a minimum, a reasonable observer would likely view a court's attempt to limit that which the Supreme Court has declared protected to raise an appearance of partiality and bias.

CONCLUSION

No matter this Court's intentions, the Order and the Court's accompanying remarks have created objectively reasonable questions regarding whether Plaintiffs can receive an impartial and unbiased proceeding going forward. Accordingly, 28 U.S.C. § 455(a) requires recusal.

Respectfully submitted this 12th day of June, 2020.

By: *s/ Roger G. Brooks*

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CERTIFICATE OF SERVICE

I hereby certify that on June 12, 2020, a copy of the foregoing Reply Memorandum in Support of Plaintiffs' Motion to Disqualify was filed electronically with the Clerk of Court. Service on all parties will be accomplished by operation of the court's electronic filing system.

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