

SECOND CIRCUIT REVIEW

Injury-in-Fact in Discrimination Cases

By Martin Flumenbaum and Brad S. Karp

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In *Soule v. Connecticut Association of Schools*, 90 F.4th 34 (2d Cir. 2023), the U.S. Court of Appeals for the Second Circuit, in a rare en banc ruling, unanimously held that plaintiffs alleging discriminatory treatment in violation of Title IX had sufficiently alleged an injury-in-fact for standing purposes. The court's unanimous finding that the denial of equal opportunity in violation of an antidiscrimination statute is a cognizable injury in fact is significant and may encourage more discriminatory treatment claims in the future.

But the court diverged on a number of other standing issues, including redressability and availability of monetary damages, with the court issuing a total of eight opinions. The splintered nature of the court's opinions illustrates the underlying tension between ensuring access to courts and enforcing appropriate limitations on judicial power.

Background

Article III limits the federal judicial power to deciding "cases" and "controversies." Under Article III, a case or controversy can exist only



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if a plaintiff has "standing to sue"—meaning a personal stake in the outcome of the litigation. The purpose of this limitation is to ensure that courts do not expound on issues that they "have no business deciding." *DaimlerChrysler v. Cuno*, 547 U.S. 332, 341 (2006) (quotation marks omitted). As Justice Elena Kagan recently put it, although standing rules "may sound technical," they enforce "fundamental limits on federal judicial power." *Biden v. Nebraska*, 143 S. Ct. 2355, 2385 (2023) (Kagan, J. dissenting).

To satisfy Article III, the U.S. Supreme Court has long held that the plaintiff, as the party invoking federal jurisdiction, must show (1) that he or she suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision. See *Spokeo v. Robins*, 578 U.S. 330, 338 (2016).

To constitute an injury in fact sufficient to sustain Article III standing, an alleged harm must be

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concrete, particularized, and actual or imminent. In 2021, in its decision in *TransUnion v. Ramirez*, – U.S. –, 141 S.Ct. 2190, the U.S. Supreme Court elaborated on standing, and in particular, the injury in fact requirement.

In *TransUnion*, the Supreme Court held that a plaintiff must demonstrate standing for each claim that they press and for each form of relief that they seek. *TransUnion*, 141 S.Ct. at 2208. It also held that whether a harm qualifies as “concrete” hinges on “whether the alleged injury to the plaintiff has a ‘close relationship’ to a harm ‘traditionally’ recognized as providing a basis for a lawsuit in American courts.” Significantly, the Supreme Court identified “discriminatory treatment” as an example of a “concrete, de facto, injury.”

The Prior Proceedings in ‘Soule’

For the last decade, the Connecticut Interscholastic Athletic Conference (CIAC) and its member high schools have followed the “Transgender Participation” Policy (the CIAC policy), which permitted high school students to compete on gender specific athletic teams consistent with the gender identity established in their school records. The plaintiffs, a group of female athletes who are cisgender, filed suit against the CIAC and its member high schools alleging that the CIAC Policy violated Title IX.

To remedy the Title IX violations, the plaintiffs requested damages and two injunctions—one to enjoin future enforcement of the policy and one to alter the records of certain prior CIAC-sponsored girls’ track events to remove the records achieved by two transgender girls.

In April 2021, in an opinion authored by Judge Robert N. Chatigny, the U.S. District Court for the District of Connecticut granted defendants’ motion to dismiss the case. See *Soule by Stanescu v. Connecticut Association of Schools*, No. 3:20-cv-00201 (RNC), 2021 WL 1617206 (D. Conn. Apr. 25, 2021).

It held, among other things, that (1) plaintiffs’ request for an injunction enjoining enforcement of the CIAC policy was moot, (2) that plaintiffs lacked standing to seek an injunction requiring changes in defendants’ records because they could not satisfy the redressability element of standing, and (3) plaintiffs’ claims for money damages were barred because defendants did not receive adequate notice that they could be liable for the conduct at issue.

The plaintiffs appealed the district court’s ruling to the Second Circuit. In an opinion authored by Circuit Judge Denny Chin, and joined by Circuit Judges Susan L. Carney and Beth Robinson, the Second Circuit affirmed the district court’s decision. See *Soule by Stanescu v. Connecticut Association of Schools*, 57 F.4th 43 (2d Cir. 2022). It agreed with the district court that plaintiffs lacked standing to assert their claim for an injunction to change the record books and that plaintiffs’ claims for monetary damages were barred for lack of adequate notice.

On the question of whether plaintiffs had suffered a concrete injury in fact such that they had standing to assert their claim for an injunction to change the record books, the court held that they had not. It rejected the plaintiffs’ argument that they had been deprived of a “chance to be champions,” holding that they had the opportunity to compete for state titles in different events and were indeed “champions” finishing first in various events. It also rejected the plaintiffs’ argument that the records could affect their prospects of future employment because it was only a possible, speculative future injury.

A majority of active Second Circuit judges voted in favor of rehearing the appeal en banc.

The Second Circuit’s En Banc Decision

On Dec. 15, 2023, the Second Circuit issued its en banc ruling. *Soule v. Connecticut Association*

of Schools, 90 F.4th 34 (2d Cir. 2023). The court unanimously concluded that plaintiffs had plausibly alleged an injury in fact. Circuit Judge Alison J. Nathan, who drafted a majority opinion in which numerous judges joined in full or in part, held that plaintiffs had alleged a concrete injury: “the denial of ‘equal athletic opportunities’ and loss of publicly recognized titles and placements in track and field competitions in violation of Title IX.”

The majority pointed to the fact that the Supreme Court had identified “discriminatory treatment” as an example of a “concrete, de facto, injury” in its 2021 decision in *TransUnion v. Ramirez*. The majority also held that the alleged injury was particularized because the plaintiffs were athletes who personally competed in CIAC-sponsored events, rather than merely being bystanders who disagreed with the policy in principle.

In his concurrence, Circuit Judge Steven J. Menashi, joined by Circuit Judge Michael H. Park noted, in agreeing that plaintiffs had alleged an injury in fact, that “the denial of an equal opportunity to compete is an injury whether or not the plaintiffs could show that the outcome of any particular race would have been different under nondiscriminatory conditions.”

Circuit Judge Myrna Pérez also noted that the unanimous agreement that plaintiffs had adequately pled an injury in fact was “an important reaffirmation of our standing precedent because, as the majority opinion notes, ‘questions of standing...have broad implications for all manner of civil rights litigation and civil rights plaintiffs,’ and ‘[p]recedent and principle require that we proceed cautiously before limiting access to courts and remedies.’”

Apart from the court’s unanimous finding on the injury-in-fact question, the court split on

a number of other standing issues, including redressability and the availability of monetary damages. But it is notable that a broad majority of the court agreed that it was appropriate to remand the case to the district court for it to resolve whether the plaintiffs had stated a claim for a Title IX violation before it resolved any further standing issues.

Conclusion

It is significant that the court spoke with one voice on whether plaintiffs had suffered an injury in fact. It was a question that was answered in the negative by both the district court and the Second Circuit prior to en banc review, but on en banc review, all members of the court found that an injury in fact had been sufficiently alleged. The plaintiffs alleging discriminatory treatment in violation of Title IX may seek to rely on this decision in the future when opposing claims they have not suffered an appropriate injury.

The otherwise splintered nature of the court’s opinions on the numerous other significant standing issues, however, illustrates the tension between ensuring access to justice but also imposing appropriate limits to ensure that courts do not wade into policy issues.

In his dissent, Chin, joined in full and in part by a number of judges, characterized the suit as plaintiffs’ “disagreement with a policy under which they previously competed” and criticized the majority for “invit[ing] courts to become arbiters of abstract social wrongs that they have no real power to redress.”

It is yet to be seen whether the majority’s opinion will open the door to more suits raising policy issues being adjudicated rather than being dismissed for lack of standing.