STATE OF MICHIGAN

IN THE SUPREME COURT

JANE DOE, by Next Friend GEORGEIA KOLOKITHAS,

Plaintiff-Appellant,

v

ALPENA PUBLIC SCHOOL DISTRICT and ALPENA BOARD OF EDUCATION,

Defendants-Appellees.

Supreme Court No. 165441

Court of Appeals No. 359190

Alpena Circuit Court No. 2019-009053-NZ

AMICUS CURIAE BRIEF OF PUBLIC JUSTICE, A BETTER BALANCE, AND THE AMERICAN CIVIL LIBERTIES UNION OF MICHIGAN

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STATEMENT OF INTEREST[1]

The American Civil Liberties Union of Michigan (ACLU) is the Michigan affiliate of a nationwide nonpartisan organization of approximately 1.6 million members dedicated to protecting the liberties and civil rights guaranteed by the United States Constitution. The ACLU of Michigan regularly and frequently participates in litigation in state and federal courts seeking to protect the constitutional rights of people in Michigan. For several decades, the ACLU has advocated on behalf of the rights of students in schools to be free from all forms of harassment and discrimination, to ensure students have access to a safe environment that is conductive to learning while respecting their individual rights. The ACLU brought litigation on behalf of all Flint children after the Flint Water Crisis, advocating for systemic change of the special education system to meet the needs of children who were affected by lead in their drinking water, see *DR v Mich Dep't of Ed*, ED Mich Case No. 16-cv-13694; has long advocated for the preservation of public school funding, see *CAP v Michigan*, Supreme Court Case No. 158751;, and celebrates public schools for adopting policies that respect students' rights and identities, see *Reynolds v Talberg*, ED Mich Case No 1:18-cv-00069. The ACLU has significant experience challenging unconstitutional policies and practices under the Elliott-Larsen Civil Rights Act, including the state's archaic abortion ban, see *Planned Parenthood of Mich v Attorney General*, Court of Claims Case No. 22-000044-MM, and the narrow interpretation of sex which previously did not include sexual orientation discrimination, see *Rouch World v Mich Dep't of Civil Rights*, Supreme Court Case No. 162482.

Public Justice is a national public interest advocacy organization that fights against abusive corporate power and predatory practices, the assault on civil rights and liberties, and the

[1] Pursuant to MCR 7.312(H)(5), amici state that no counsel for a party authored this brief in whole or in part, nor did anyone, other than amici or their counsel, make a monetary contribution intended to fund the preparation or submission of the brief.

destruction of the earth's sustainability. In its Students' Civil Rights Project, Public Justice strives to create systemic change so all students can learn and thrive, and to secure justice for students who are denied educational opportunities based on their race, national origin, ethnicity, or sex, including sexual orientation, gender identity, and gender expression. Toward this end, Public Justice often represents students denied equal educational opportunities because of sexual harassment suffered at school. In Public Justice's significant experience, holding schools accountable under anti-discrimination laws is critically important to protecting students against discriminatory practices and to ensuring that students can obtain their education in a safe environment.

A Better Balance is a national legal services and advocacy organization that uses the power of the law to advance justice for workers and students so they can care for themselves and their loved ones without jeopardizing their economic security or education. A Better Balance relies on civil rights laws like Title VII and Title IX to protect the rights of all people to work and learn free from discrimination. For example, A Better Balance played an instrumental role in pregnancy discrimination class action litigation against Walmart, which settled for fourteen million dollars and benefited thousands of pregnant workers. Similarly, when governments threaten to block or repeal progressive laws, or when they are challenged in court, A Better Balance steps in to protect and defend the rights of working people and students. On its free and confidential legal helpline, A Better Balance supports pregnant and parenting students experiencing harassment and other discriminatory treatment.

INTRODUCTION

Every year, thousands and thousands of students experience sexual harassment by classmates. This abuse has the potential to derail a victim's education. Unfortunately, minimalist federal protections have proven ineffective at encouraging schools to address harassment or providing victims with meaningful remedies. Michigan students are lucky, though. They have the benefit of more robust protections under the Elliott-Larsen Civil Rights Act, which broadly prohibits sex discrimination, including sexual harassment in education. This case provides an opportunity for this Court to affirm the ELCRA's breadth and strength by adopting, for peer harassment claims against schools, a liability standard that furthers the legislature's goal: ending sex discrimination in education. To do so, this Court should build on the foundation offered by its workplace harassment case law, as proposed by the Plaintiff-Appellant Jane Doe, rather than adopting the analogous liability standard used in federal law.

ARGUMENT

I. ELCRA workplace harassment law provides a framework for peer harassment claims against schools.

As the Court of Appeals correctly noted, Michigan courts often look to employment case law to interpret the ELCRA's protections for students. *Doe v Alpena Pub Sch Dist*, __ Mich __, __; __ NW2d __ (2022) (Docket No. 359190); slip op at 7, citing *Fonseca v Mich State Univ*, 214 Mich App 28, 30; 542 NW2d 273 (1995). And ELCRA case law concerning workplace discrimination offers a well-established starting point for harassment claims: An employee can establish a claim if (1) she "belonged to a protected group," (2) she was "subjected to communication or conduct on the basis of sex," (3) the "conduct or communication" was "unwelcome," (4) the harassment "was intended to or in fact did substantially interfere with the employee's employment or created an intimidating hostile, or offensive work environment," and (5) the employer is liable

under "respondeat superior" principles. *Radtke v Everett*, 442 Mich 368, 382-383; 501 NW2d 155 (1993). As to the final element of respondeat superior, this Court has held that, for an employer to be liable for a hostile environment, it must have constructive (not actual) knowledge of the harassment, *Elezovic v Ford Motor Co,* 472 Mich 408, 426; 697 NW2d 851 (2005), and it must "fail[] to take prompt and adequate remedial action," *Chambers v Trettco, Inc*, 463 Mich 297, 313; 614 NW2d 910 (2000).

As Ms. Kolokithas has argued, consistent with the opinion below, this standard—with some minor adjustments for the education context—provides the right model for ELCRA peer sexual harassment claims against schools. See Supp Br of Plaintiff-Appellant at 15-18. If a school has constructive knowledge of sexual harassment of a student by a classmate over whom it exercised some degree of control, and the school fails to take prompt and adequate remedial action to resolve the hostile environment and so protect the victim's continued access to education, it may be liable under the ELCRA. See *id.* at 18. Consistent with the text of the ELCRA, a school would be liable if its failed response caused the victim to experience further harassment, as in this case, or where it otherwise deprived the victim of "full utilization of or benefit from the institution, or the services, activities, or programs provided by the institution." MCL 37.2402(a).

II. This Court should not adopt the U.S. Supreme Court's Title IX standard.

In sharp contrast to ELCRA workplace law, federal law governing peer sexual harassment claims would be a poor model for the design of the ELCRA's liability standard for peer harassment claims against schools. The U.S. Supreme Court has adopted a parsimonious, and ineffective, liability standard for sexual harassment claims brought against schools under Title IX of the Education Amendments of 1972, 20 USC 1681(a). And the text of the ELCRA, and structural differences

between it and Title IX, demonstrate different standards are appropriate under state and federal law.

A. The U.S. Supreme Court has adopted an unusually demanding liability standard for peer harassment claims brought under Title IX.

The ELCRA is a single statute that prohibits sex discrimination in workplaces and schools, among other contexts. By contrast, federal law relies on two separate statutes to root out discrimination in these separate arenas. The U.S. Supreme Court has adopted different liability standards for sexual harassment claims brought under each law. And, perversely, federal anti-discrimination law is more protective of adult workers who experience sexual harassment than it is of students who experience the same harms.

Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against their employees based on sex, race, and other protected characteristics. 42 USC 2000e *et seq*. For hostile environment harassment claims, Title VII uses a standard similar to the ELCRA's: If an employee is harassed by a coworker, the employer is liable if it knew or should have known about the harassment and failed to take reasonable steps to address the harassment; if an employee is sexually harassed by their supervisor, the employer is ordinarily strictly liable, regardless of whether it had any notice of the harassment. *Faragher v City of Boca Raton,* 524 US 775; 118 S Ct 2275; 141 L Ed 2d 662 (1998); *Burlington Industries, Inc v Ellerth,* 524 US 742; 118 S Ct 2257; 141 L Ed 2d 633 (1998). The U.S. Supreme Court has defined actionable sexual harassment as "unwelcome" sexual conduct that is "severe or pervasive." *Meritor Sav Bank, FSB v Vinson*, 477 US 57, 67-68; 106 S Ct 2399; 91 L Ed 2d 49 (1986); see also *Radtke*, 442 Mich at 384 (defining sexual harassment in a manner "[n]ot unlike title VII").

Yet the U.S. Supreme Court adopted a much less protective standard for sexual harassment claims brought under Title IX, which prohibits sex discrimination in education. 20 USC 1681(a).

In two cases from the late 1990s, *Gebser* and *Davis*, the Court designed a test for establishing schools' liability for sexual harassment of students by teachers or classmates. See *Davis ex rel LaShonda D v Monroe Co Bd of Ed*, 526 US 629, 650; 119 S Ct 1661; 143 L Ed 2d 839 (1999) (student-on-student sexual harassment); *Gebser v Lago Vista Indep Sch Dist*, 524 US 274, 277; 118 S Ct 1989; 141 L Ed 2d 277 (1998) (teacher-on-student sexual harassment). In *Gebser*, the Court considered importing the Title VII sexual harassment standard for Title IX, but rejected that option. *Gebser*, 524 US at 284. Instead, it designed a new liability standard, explaining it had "a measure of latitude to shape a sensible remedial scheme" "[b]ecause the private right of action under Title IX is judicially implied." *Id.* The scheme the Court created required a student to establish that her school had been deliberately indifferent to sexual harassment of which the school had actual knowledge and, at least in cases of peer sexual harassment, that the harassment was severe and pervasive. *Davis*, 526 US at 650; *Gebser*, 523 US at 277.

Collectively, these requirements make it far harder for children to establish sexual harassment claims under Title IX than for adult workers to establish sexual harassment claims under Title VII: Students must establish actual rather than constructive knowledge, deliberate indifference rather than negligence, and severe *and* pervasive harassment rather than severe *or* pervasive harassment. See Patel, Tang, & Iannucci, *A Sweep As Broad As Its Promise: 50 Years Later, We Must Amend Title IX to End Sex-Based Harassment in Schools*, 83 La L Rev 939, 973 (2023); Graves, *Restoring Effective Protections for Students against Sexual Harassment in Schools: Moving Beyond the* Gebser *and* Davis *Standards*, 2 Advance 135, 139-143 (2008).

B. This Court frequently declines to adopt federal standards in favor of more rights-protective interpretations of state law.

"This Court alone is the ultimate authority with regard to the meaning and application of Michigan law." *People v Bullock*, 440 Mich 15, 27; 485 NW2d 866 (1992). Consistent with that

principle, this Court has made clear that while it might, at times, be "guided in [its] interpretation of [the ELCRA] by federal court interpretation of its counterpart statutes," it is "not compelled to follow those federal interpretations." *Chambers v Trettco, Inc*, 463 Mich 297, 313; 614 NW2d 910 (2000) (citations omitted); see also *Haynie v State*, 468 Mich 302, 321; 664 NW2d 129 (2003) ("We cannot agree [with the dissent] that any time the Michigan Legislature creates a law that is 'similar' to a federal law, it must be made identical, and the two laws must be interpreted to mean exactly the same thing."). The Court's primary obligation when interpreting Michigan law is to always "ascertain and give effect to the intent of the Legislature, . . . 'as gathered from the act itself.'" *McJunkin v Cellasto Plastic Corp*, 461 Mich 590, 598; 608 NW2d 57 (2000), quoting *In re Ramsey*, 229 Mich App 310, 314; 581 NW2d 291 (1998).

Crucially for this case, this Court will not impose "a major contraction of citizen protections" under Michigan law "simply because the United States Supreme Court has chosen to do so." *Sitz v Dep't of State Police*, 443 Mich 744, 763; 506 NW2d 209 (1993). Consistent with that principle, this Court has frequently interpreted state law to be more rights-protective than corresponding federal laws. See, e.g., *Bullock*, 440 Mich at 29 n 9 (collecting cases). For example, in *Elezovic v Ford Motor Co*, this Court interpreted the ELCRA to permit individual liability for supervisors, even though Title VII does not, because the federal rule was "contrary to the wording of" the ELCRA. *Elezovic*, 472 Mich at 422.

In the context of constitutional litigation, this Court has identified factors—equally applicable to statutory cases—that inform whether or not it should adopt a federal standard. See *People v Tanner*, 496 Mich 199, 223 n 17; 853 NW2d 653 (2014). These factors include "the textual language of the state [law]," "significant textual differences between parallel provisions of federal and state law," and "structural differences between the state and federal" laws. *Id.* As explained

below, the text of the ECLRA and differences between it and Title IX militate against adopting *Gebser* and *Davis*'s liability standard. See *infra* Sections II(C) and II(D), pp 8-12.

This Court would not be alone in declining to adopt federal standards for peer sexual harassment claims. High and appellate state courts in Missouri, New Jersey, Vermont, and Washington have expressly declined to do so. See *Doe ex rel Subia v Kansas City, Mo Sch Dist,* 372 SW3d 43, 53 (Mo App, 2012) (adopting state employment law standard); *LW ex rel LG v Toms River Regional Sch Bd of Ed,* 189 NJ 381, 405-406; 915 A2d 535 (2007) (same); *Washington v Pierce,* 179 Vt 318, 329-333; 895 A2d 173 (2005) (crafting a wholly new standard); *Mercer Island Sch Dist v Office of Superintendent of Pub Instruction*, 186 Wash App 939, 982-983; 347 P3d 924 (2015) (adopting the standard used in federal administrative actions at the time).[2]

C. The U.S. Supreme Court's reasons for adopting actual knowledge and deliberate indifference standards are inapplicable to the ELCRA.

In designing a new liability standard for Title IX, rather than importing Title VII's, the U.S. Supreme Court relied on considerations inapplicable to claims brought under the ELCRA. These include (1) the structure of federal sex discrimination law, (2) Congress's authority for passing Title IX, and (3) Title IX's administrative enforcement scheme.

First, and perhaps most simply, Title VII and Title IX are separate statutes. In *Gebser*, the U.S. Supreme Court was attuned to differences between the two statutes' texts, purposes, and sources of congressional authority, which, in the Court's view, rendered Title VII precedent inapplicable. See, e.g., *Gebser*, 524 US at 283, 286-287. In contrast, the ELCRA is a single statute that

[2] State courts in Maine and Missouri have also explicitly rejected the *Gebser-Davis* standard for state law claims arising out of teacher-on-student harassment. See *Doe ex rel Doe v Town of Hopkinton,* unpublished opinion of the Massachusetts Court of Appeals, issued March 7, 2017 (Docket No. 1281cv03399), p 4 (applying strict liability standard to teacher-on-student harassment under state law); *MN ex rel SN v North Kan City Sch Dist,* 597 SW3d 786, 793 (Mo App, 2020) (permitting vicarious liability for harassment by substitute teacher).

provides for harassment claims against both schools and workplaces, among other spheres. MCL 37.2102 (1). So, while the liability standards for Title VII and Title IX are different because Title VII and Title IX are different, it makes sense for the ELCRA to apply analogous standards across the many contexts it reaches.

Second, and related, the U.S. Supreme Court based its Title IX decisions on the fact that Title IX—unlike Title VII, see *Fitzpatrick v Bitzer*, 427 US 445, 452-453 & n 9; 96 S Ct 2666; 49 L Ed 2d 614 (1976)—is a Spending Clause statute. The law was passed under the federal constitutional provision permitting Congress to condition federal funding on the recipient's consent to certain terms—in the case of Title IX, the term being that recipients may not discriminate on the basis of sex. See *Davis*, 526 US at 640 ("[W]e have repeatedly treated Title IX as legislation enacted pursuant to Congress' authority under the Spending Clause."). The U.S. Supreme Court has analogized this "agreement not to discriminate" to a "a contract between the Government and the recipient of funds." *Gebser*, 524 US at 286. As in a contract, it has explained, the funding recipient must have clear notice of what conduct would violate the agreement and trigger money damages. *Id.* at 287. *Gebser*, without much explanation, assumed that principle meant schools must have more than constructive knowledge of harassment to be liable under Title IX. *Id.* at 287-288.

Whatever the merits of *Gebser*'s logic, it does not translate to the ELCRA, which is not dependent on the state's spending powers and is not constrained by the contract analogy. See *Blank v Dep't of Corrections*, 462 Mich 103, 157-158; 611 NW2d 530 (2000) (noting that, unlike the U.S. Congress, the Michigan Legislature "operates pursuant to a broad grant of legislative authority"); see also *Mason v Granholm*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued January 23, 2007 (Case No. 05-cv-73943), p 2 (noting the "ELCRA is th[e] legislation" that the Michigan constitution's equal protection provision "requires

the legislature" to pass), citing *Dep't of Civil Rights ex rel Forton v Waterford Twp Dep't of Parks & Recreation*, 425 Mich 173, 188; 387 NW2d 821 (1986), and *Neal v Dep't of Corrections*, 232 Mich App 730, 739; 592 NW2d 370 (1998), opinion vacated (June 25, 1999); Norris, *A Perspective on the History of Civil Rights Law in Michigan*, 1996 Det CL Mich St U L Rev 567, 591–592 (1996) (noting the ELCRA implements the Michigan Constitution's equal protection guarantee). Multiple other state high and appellate courts have adopted more generous liability standards than *Gebser* and *Davis* on the basis that their state remedies are not limited by the federal Spending Clause. See, e.g., *Washington v Pierce,* 179 Vt 318, 329-330; 895 A2d 173 (2005); *Mercer Island Sch Dist v Office of Superintendent of Pub Instruction*, 186 Wash App 939, 982-983; 347 P3d 924 (2015); *Doe ex rel Subia v Kansas City, Mo Sch Dist,* 372 SW3d 43, 53-54 (Mo App, 2012).

Third, in adopting the actual knowledge and deliberate indifference requirements, *Gebser* relied on a quirk in federal enforcement of Title IX with no analogue in the ELCRA. Title IX, like the ELCRA, may be enforced either through a private right of action or through a complaint to a civil rights agency. *Cannon v Univ of Chicago*, 441 US 677, 683, 709; 99 S Ct 1946; 60 L Ed 2d 560 (1979) (describing Title IX's enforcement scheme); MCL 37.2602 (describing the ELCRA's enforcement scheme). But Title IX, unlike the ELCRA, includes a requirement that the responsible agency give a defendant the opportunity to come into voluntary compliance with the law before it commences an enforcement action. Compare *Gebser*, 524 US at 275 (noting Title IX's voluntary compliance provision) with MCL 37.2602 (describing Michigan Department of Civil Rights' "powers and duties"). *Gebser* reasoned that because this administrative enforcement system "re-quire[s] notice" and "an opportunity for voluntary compliance," liability in court should only be available where the school had, during the events at issue, actual knowledge of the harassment. 524 US at 289. But see *id.* at 303-304 (Stevens, J., dissenting) (critiquing *Gebser*'s analogy to

administrative remedies). *Gebser* also held that this administrative enforcement scheme meant that, in private litigation, damages should only be available when a school was deliberately indifferent to harassment. That state of mind, the Court reasoned, was most analogous to that of an obstinate school that refused to comply with the law even after being hauled before a federal agency on a civil rights complaint. *Id.* at 290.

Once again, these considerations are inapplicable to the ELCRA: The statute contains no analogous requirement that the Michigan Department of Civil Rights provide an opportunity for voluntary compliance. See MCL 37.2602. To the contrary, the MDCR is permitted "at any time after a complaint is filed" to seek preliminary or temporary injunctive relief from a circuit court. MCL 37.2603. The U.S. Supreme Court's justifications for limiting Title IX's powers offer no reason for this Court to similarly weaken the ELCRA.

D. The ELCRA's text forecloses Title IX's standard for actionable sexual harassment.

This Court should not limit the ELCRA's protections to only "severe and pervasive" sexual harassment because the ELCRA defines sexual harassment, and in a manner that looks far more like Title VII's standard than Title IX's. Under the statute's plain text, sexual harassment cognizable as illegal discrimination under the ELCRA includes "unwelcome sexual advances . . . and other verbal or physical conduct or communication of a sexual nature" that "has the purpose or effect of substantially interfering with an individuals' . . . education . . . , or creating an intimidating, hostile, or offensive . . . educational . . . environment." MCL 37.2103. As this Court has explained, it will not adopt a federal liability standard "if doing so would nullify a portion of the Legislature's enactment." *Chambers*, 463 Mich at 314.

Further, although *Davis* did not expressly explain why it adopted a severe and pervasive standard rather than a severe or pervasive standard, the Court appeared to believe that only severe

and pervasive harassment could have the effect of excluding a victim from educational opportunities. See *Davis*, 526 US at 650-652. That assumption has, sadly, proven untrue. See *infra* Section II(E), pp 12-19.

E. Title IX's liability standard discourages schools from learning about and addressing sexual harassment, with tragic consequences for students.

Dissenting from the *Gebser* majority, Justice Stevens warned that "few Title IX plaintiffs who have been victims of intentional discrimination will be able to recover damages under this exceedingly high standard." *Gebser*, 524 US at 304 (Stevens, J., dissenting). As this Court has recognized, "In the case of a divided United States Supreme Court decision, we may in some cases find more persuasive, and choose to rely upon, the reasoning of the dissenting justices of that Court ..." *Bullock*, 440 Mich at 27-28. Justice Stevens's prediction has proven true: The *Gebser-Davis* standard has shielded schools from accountability in all but the most egregious cases. And, perversely, the standard has incentivized schools to make reporting harassment as difficult as possible, to avoid obtaining knowledge of it. Importing the Title IX's liability standard into Michigan state law would incentivize schools to bury their heads in the sand, ignoring and exacerbating sexual harassment and violence in Michigan schools.

Actual Knowledge

Title IX's actual knowledge standard has led to absurd, and tragic, results. Courts applying this standard have held that teachers, coaches, guidance counselors, and sometimes principals—the very employees students are most likely to know and report to—are not appropriate persons sufficient to vest a school with actual knowledge of harassment. See, e.g., *Ross v Univ of Tulsa*, 859 F3d 1280, 1283, 1289 (CA 10, 2017) (holding that "a reasonable fact-finder could not infer that campus-security officers were appropriate persons for purposes of Title IX"); *Hill v Cundiff*, 797 F3d 948, 971 (CA 11, 2015) (same, for teacher's aide, who, notably, devised plan to use eighth

grade student as "bait" in sting operation to catch classmate in the act of sexual misconduct, resulting in the student's anal rape); *Plamp v Mitchell Sch Dist No 17-2*, 565 F3d 450, 457–458 (CA 8, 2009) (same, for teachers and guidance counselor); *Baynard v Malone*, 268 F3d 228, 238–239 (CA 4, 2001) (same, for school principal); *Halvorson v Indep Sch Dist No I-007*, unpublished opinion of the United District Court for the Western District of Oklahoma, issued on November 26, 2008 (Case No. CIV-07-1363-M), p 2 (same, for coaches). Under such an exacting standard, "even if every teacher at the school knew about the harassment but did not have 'authority to institute corrective measures on the district's behalf,'" a plaintiff could not prevail under Title IX. *Gebser*, 524 US at 301 (Stevens, J., dissenting).

Not only must a student-victim disclose their assault to just the right person, they must also ensure that person has just the right information. See, e.g., *Doe v St Francis Sch Dist*, 694 F3d 869, 872 (CA 7, 2012) (holding school lacked actual knowledge of teacher's sexual abuse of student, despite other teachers "suspect[ing] an improper relationship," because "to know that someone suspects something is not to know the something," and Title IX requires more than "mere[] knowledge that would cause a reasonable person to investigate further"); *Baynard*, 268 F3d at 238, 242 (holding school lacked actual knowledge of teacher's abuse of student, despite (i) witnessing student-victim "sitting on [teacher's] lap" with "their faces . . . almost touching," (ii) receiving allegation from former student of teacher's molestation, and (iii) hearing complaint by colleague that teacher was "a pedophile"); *AW v Humble Ind Sch Dist*, 25 F Supp 3d 973, 992–993 (SD Tex, 2014) (school lacked actual knowledge, despite mother's complaint about "improper relationship" between teacher and student, as well as other parents' and students' complaints about the "obsessive and unusual relationship" between the two). "Favoritism towards the student; inordinate time spent with the student; unprofessional conduct towards the student; and vague complaints about

the teacher's behavior toward the student (which do not *expressly* allege sexual abuse of that student) fall short of creating actual notice." *KD v Douglas Co Sch Dist No 001*, 1 F4th 591, 598 (CA 8, 2021).

The actual knowledge standard leaves disabled students and younger students, who may struggle to communicate the information required to place their school on notice, particularly vulnerable to ongoing abuse. In *Rost ex rel KC v Steamboat Springs RE-2 Sch Dist*, for example, the Tenth Circuit held that a school district did not have actual knowledge when the victim—a special education student with learning disabilities—told her school counselor that a group of boys were "bothering" her. 511 F3d 1114, 1119–20 (CA 10, 2008). Had anyone bothered to inquire further, they would have learned the boys were orally raping her. *Id.* at 1117; *id.* at 1126 (McConnell, J., concurring in part, dissenting in part). "While it is tragic that [the student] did not clearly communicate that she was being sexual harassed," the Tenth Circuit wrote, the student's statement that boys were "bothering" her was insufficient to establish the requisite knowledge. *Id.* at 1120. Concurring in part, Judge McConnell agreed with the majority that the school lacked "actual knowledge" while lamenting the "disturbing" result that such a standard produces:

> [The victim] was attempting to communicate what was happening to the counselor but did not have the words. One would think a trained middle school counselor, faced with a mildly retarded young student who was severely distressed about being 'bothered' by some boys in her class, would ask the obvious follow-up question—in what way are they bothering you?—especially since one of the boys had previously been disciplined for engaging in sexual harassment. . . . [But] [t]hat is not the duty imposed by Title IX . . . [and] to impose liability on the school district would effectively hold it responsible for what it "should have known."

Id. at 1127–1128 (McConnell, J., concurring in part, dissenting in part); see also Suski, *Title IX Paradox*, 108 Ca L Rev 1147, 1169–87 (2020) (documenting the cognitive heuristics that "make the kinds of sexual harassment reporting required for a successful Title IX claim challenging for

anyone" but especially for children whose immature "brain development make those decisions particularly unrealizable").

The actual knowledge standard does not merely shelter a school retrospectively from liability for harassment of which it should have known; it also *incentivizes* schools to actively "insulate themselves from knowledge" going forward. *Gebser*, 524 US at 300–301 (Stevens, J., dissenting). Because a school can only be held liable for harassment of which it actually knows, it is in a school's interest to "discourage[] efforts to identify situations of potential abuse." *Baynard*, 268 F3d at 241 (Michael, J., dissenting). In *Baynard*, for instance, a school principal ignored repeated warning signs of sexual abuse by a teacher of a sixth-grade student, including reports by a former student and his mother that the same teacher sexually abused him, a separate report that the teacher had "sexually molested a student," and a report by the school librarian that she had witnessed the student-victim sitting on the teacher's lap. 268 F.3d at 233. The Fourth Circuit held that no reasonable jury could find actual knowledge of the abuse—a standard, the dissent reasoned, that does "little to prevent sexual abuse from occurring in the first place," encouraging a school to look the other way each time it receives a report just shy of actual knowledge: "The appropriate official can simply wait until she gains actual knowledge of current abuse"—if she ever does. *Id*. at 241 (Michael, J., dissenting). After all, if the school had investigated the concerns raised by the former student and current staff, it might well have obtained information requiring it to act and thus potentially subjecting it to liability. See generally Cantalupo, *Burying Our Heads in the Sand: Lack of Knowledge, Knowledge Avoidance, and the Persistent Problem of Campus Peer Sexual Violence*, 43 Loyola Univ Chicago L J 205, 227 (2011) (explaining how the actual knowledge standard "encourages both passive unawareness and active avoidance of knowledge").

Deliberate Indifference

Even if a student somehow manages to divine who to tell, what, and when, the "deliberate indifference" standard shields schools from liability unless their actions (or lack thereof) were "clearly unreasonable in light of the known circumstances." *Davis*, 526 US at 648. "That is a high bar, and neither negligence nor mere unreasonableness is enough." *Sanches v Carrollton-Farmers Branch Indep Sch Dist*, 647 F3d 156, 167 (CA 5, 2011). Applying this standard, multiple courts have held that a school need not institute reasonable measures to stop the harassment and protect the victim's ongoing access to education, for example. See, e.g., *Doe v Bd of Trustees of the Neb State Colleges*, __ F4th __ (CA 8, 2023) (Case No. 22-1814) (Kelly, J., dissenting), pp 4-6 (dissenting from majority holding no deliberate indifference where student admitted to raping a classmate and the school refused the student-victim's requests for protections so she could feel safe attending class); *King v Conroe Indep Sch Dist*, 289 F Appx 1, 2–4 (CA 5, 2007) (holding no deliberate indifference to sexual abuse of student where principal did nothing more than "question[]" coach and "warn[] her to keep her relationships with students professional"); *Doe ex rel Doe v Dallas Indep Sch Dist*, 220 F3d 380, 388 (CA 5, 2000) (holding no deliberate indifference to sexual abuse of student where school failed to monitor teacher or require additional training, failed to report allegation to Child Protective Services, and told victim's parent that their child's abuser was a "good teacher"); *see also* Patel, *supra*, at 980–981 (collecting cases).[3]

[3] Indeed, the Sixth Circuit has gone so far as to require a plaintiff alleging deliberate indifference to plead "post-actual-knowledge *further* harassment" attributable to the school's response to the initial harassment, even where the deliberate indifference excludes the victim from educational opportunities. *Kollaritsch v Mich State Univ Bd of Trustees*, 944 F3d 613, 623–24 (CA 6, 2019) (emphasis added). Thankfully, other circuits have declined to adopt this extreme approach. See, e.g., *Doe v Fairfax Co Sch Bd*, 1 F4th 257, 274 (CA 4, 2021), cert den 143 S Ct 442 (2022); *Fitzgerald v Barnstable Sch Comm*, 504 F3d 165, 171 (CA 1, 2007), rev'd and remanded on other grounds 555 US 246 (2009); *Williams v Bd of Regents of Univ Sys of Ga,* 477 F3d 1282, 1296 (CA 11, 2007); *Farmer v Kan State Univ*, 918 F3d 1094, 1103, 1106 (CA 10, 2019).

The deliberate indifference standard has invited courts to excuse schools that not only fail to take action to address hostile environments but affirmatively harm victims' educations. For example, some courts have held—wrongly, in amici's view, but not inexplicably—that a school may discipline the *victim* of the abuse. In *Doe v Bibb County School District*, for instance, an Eleventh Circuit panel concluded that no reasonable juror could find a school deliberately indifferent to the gang rape of a special education student despite issuing misconduct charges against her, suspending her, and recommending her expulsion. 688 F Appx 791, 798 (CA 11, 2017); *id.* at 798–99 (Martin, J., concurring). A Second Circuit panel held a school may also push the victim out of school, encouraging her to transfer to a worse school while allowing her tormenters to remain. See, e.g., *KF ex rel CF v Monroe Woodbury Central Sch Dist*, 531 F Appx 132, 133–134 (CA 2, 2013) (holding no deliberate indifference where school recommended that student victim of repeated sexual assaults transfer to "an out-of-district program . . . attended by students with serious disciplinary records"); *Doe v Round Valley Unified Sch Dist*, 873 F Supp 2d 1124, 1138 (D Ariz, 2012) (holding no deliberate indifference where school failed to discipline harassers while recommending rape victim leave school and enroll at "alternative" school for "at-risk" students).

Severe and Pervasive

The U.S. Supreme Court's rule that Title IX liability will attach only when a victim experiences severe, pervasive, and objectively offensive harassment has also wrought terrible results. The U.S. Court of Appeals for the Sixth Circuit, for example, has held that a single rape is not actionable because, even if it is "severe," an isolated incident cannot, in its view, be "pervasive." *Kollaritsch v Michigan State Univ Bd of Trustees*, 944 F3d 613, 620-621 (CA 6, 2019). But see, e.g., *Fairfax Co*, 1 F4th at 274 (taking contrary view). A judge in the Eastern District of New York acknowledged that a single incident may meet *Davis*'s standard, "but only where the conduct

consists of *extreme* sexual assault or rape." *Carabello v NY City Dep't of Ed*, 928 F Supp 2d 627, 643 (EDNY, 2013) (emphasis added); see also Scharfen, *Peer Sexual Harassment in School: Why Title IX Doctrine Leaves Children Unprotected*, 24 S Ca Rev L & Soc Just 81, 95 (2014) (noting that courts applying the severe and pervasive standard have treated sexual touching other than "rape or other serious sexual assault" as unactionable). Accordingly, the court held, a high school freshman whose classmate "touch[ed] her breasts, stomach and legs" and "bit[] her neck hard enough to leave a mark" while "putting all his weight on her" could not establish actionable harassment. *Id.* Students have also struggled to convince courts that verbal harassment, without accompanying physical violence, is severe. See, e.g., *Doe v Plymouth-Canton Community Sch*, unpublished opinion of the United States District Court for the Eastern District, issued June 3, 2022 (Case No. 19-cv-10166), p 8 ("Although it is possible to assert a Title IX claim based exclusively on verbal harassment, it is uncommon, because courts tend to consider verbal harassment to be less severe than physical harassment."), app dis sub nom *Doe ex rel EL v Plymouth-Canton Community Sch*, unpublished opinion of the United States Court of Appeals for the Sixth Circuit, issued August 25, 2022 (Case No. 22-1555).

Contrary to the U.S. Supreme Court's assumption, see *supra* pp 11-12, harassment that falls short of the "severe and pervasive" standard can still have a dramatic effect on students' educations. One plaintiff unable to convince the Sixth Circuit her rape was severe and pervasive "took leaves of absences from [her school] and did not take classes" because she was too afraid to remain on campus with her assailant without any protections. *Kollaritsch v Michigan State Univ Bd of Trustees*, 298 F Supp 3d 1089, 1102 (WD Mich, 2017), rev'd and remanded 944 F3d 613 (CA 6, 2019). A Georgia high school student was forced to transfer to a new school due to a sexual assault and subsequent harassment that was not, a district court held, severe and pervasive. *Doe v*

Gwinnett Co Sch Dist, unpublished opinion of the United States District Court for the Northern District of Georgia, issued September 1, 2021 (Case No. 18-cv-05278) pp 5, 12, app dis sub nom *Doe v Gwinnett Co Pub Sch*, unpublished opinion of the United States Court of Appeals for the Eleventh Circuit, issued February 23, 2022 (Case No. 21-cv-13379).

Not all courts have treated Title IX cases so harshly after *Gebser* and *Davis*. But many—perhaps most—have taken the U.S. Supreme Court's invitation to tolerate all but the worst harassment and all but the worst institutional responses. This Court has the opportunity to learn from Title IX's failures and do better by Michigan students.

CONCLUSION

For the reasons explained above, the Court should adapt the ELCRA standard for workplace harassment for peer harassment claims brought by students, rather than adopting the federal standard for Title IX claims, and it should reverse and remand for further proceedings.

Respectfully submitted,

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WORD COUNT STATEMENT

This brief contains 5,650 words in the sections covered by MCR 7.212(C)(6)-(8).

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