STATE OF MICHIGAN
IN THE COURT OF APPEALS

JANE DOE, by Next Friend GEORGEIA KOLOKITHAS,	Supreme Court Case No. 165441
Plaintiff-Appellant,	Court of Appeals No. 359190
v	Alpena Circuit Court No. 2019-009053-NZ
ALPENA PUBLIC SCHOOL DISTRICT and ALPENA BOARD OF EDUCATION,	
Defendants-Appellees.	

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 other forms of 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*, 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 7.212(H)(3), 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 of students experience sexual harassment from classmates. This abuse can derail a victim's education. Unfortunately, limited federal protections have proven ineffective at encouraging schools to address harassment or providing victims with meaningful remedies. Michigan students are lucky, though. The Elliott-Larsen Civil Rights Act ("the ELCRA") provides more robust protections: It broadly prohibits sex discrimination, including sexual harassment, at both work and school. In doing so, the law "worked an extensive expansion of the preexisting substantive provisions of civil rights legislation," and Michigan courts have construed it "liberally" to advance its broad remedial goals, *Eide v Kelsey-Hayes Co*, 431 Mich 26, 35; 427 NW2d 488 (1988): "to prevent discrimination" and "eliminate" its "effects" at both work and school, *Miller v CA Muer Corp*, 420 Mich 355, 362; 362 NW2d 650 (1984).

The ELCRA uses the same language to ban discrimination against workers and students. Under established precedent, a school is liable if it negligently fails to protect staff from sexual harassment by their co-workers and thereby creates a hostile work environment, even when the harasser does not act as the school's agent. Students deserve no less protection. This Court should hold that, just like in the workplace context, a school may be liable under the ELCRA if it negligently fails to protect students from sexual harassment by their peers and thereby creates a hostile school environment. Consistent with the Supreme Court's directions, such liability is "direct (as opposed to vicarious)." *Doe v Alpena Pub Sch Dist*, __ Mich __, __; __ NW3d __ (2024) (Docket No. 165441); slip op at 12; see also *id.* at __ (CAVANAGH, J., concurring); slip op at 2. It holds institutions accountable for their own negligence when they perpetuate discrimination.

BACKGROUND

As a fourth-grade student at Bressen Elementary School, Jane Doe experienced persistent sexual harassment by a male classmate (John Roe), who repeatedly sexually assaulted her on the bus and at school. Jane maintains that the school district failed to take reasonable steps to stop the harassment, and as a result, she had to drop out of the school.

The trial court held that Jane failed to state a claim under MCL 2.116(C)(8) because it believed the ELCRA does not cover student-on-student harassment, and it granted summary disposition under MCL 2.116(C)(10) because it believed that even if student-on-student sexual harassment were actionable under the ELCRA, the school's response to the harassment was sufficient to avoid liability. On appeal, although this Court affirmed the MCL 2.116(C)(10) ruling, it held that the trial court erred in holding that schools may not be liable for peer harassment. *Kolokithas ex rel Doe v Alpena Pub Sch Dist*, 345 Mich App 35, 42; 3 NW3d 838 (2022). Specifically, it ruled that schools "can be held *vicariously* liable for student-on-student harassment" under the doctrine of "in loco parentis." *Id.* at 47 (emphasis added). The Court "did not address [Jane's] alternative theory that she may assert a claim of direct liability against defendants under the ELCRA for creating a hostile educational environment." *Doe*, __ Mich at __ n 1; slip op at 3 n 1.

On review, the Supreme Court disagreed that schools could be "vicariously liable for the actions of its students" under the in loco parentis doctrine. *Doe*, __ Mich at __; slip op at 11. It reasoned that "[t]he ELCRA does not reference the in loco parentis doctrine or otherwise indicate . . . that all individuals or entities who have some degree of control over a third party are *vicariously liable for that party's conduct* if it violates the sexual harassment provisions of the ELCRA." *Id.* at __; slip op at 10 (emphasis added). In other words, the Court held that ELCRA did not support "indirect responsibility imposed by operation of law" on schools for the acts of their students. *Id.*

at __ (CAVANAGH, J., concurring); slip op at 4, quoting *Theophelis v Lansing Gen Hosp*, 430 Mich 473, 483, 424 NW2d 478 (1988) (opinion by GRIFFIN, J.). In contrast, the Court left open Jane's alternative theory—a "direct, non-agency, theory of liability" claiming that "the educational institution *itself*" denied Jane the full use or benefit of its programs "by allowing a hostile educational environment because of its own actions." *Doe*, __ Mich at __; slip op at 2-3. In a concurring opinion, Justice CAVANAGH concluded that students may hold schools "directly liable" on such a theory when schools "fail to take appropriate remedial action and instead create a hostile educational environment that deprives a student of receiving 'the full utilization of or benefit from the institution, or the services, activities, or programs provided by the institution . . . .'" *Id.* at __ (CAVANAGH, J., concurring); slip op at 2, quoting MCL 37.2402(a). On that theory, she reasoned, Jane "stated a claim for direct liability" under the ELCRA. *Id.* at __; slip op at 5.

The Supreme Court vacated Part IV of this Court's previous opinion—holding that Jane failed to show a genuine dispute of material fact under the ELCRA—and remanded the case to this Court to determine whether Jane could proceed on a theory of "direct (as opposed to vicarious) liability" under the ELCRA. *Doe*, __ Mich at __; slip op at 11.

ARGUMENT

I. The ELCRA protects both students and staff alike from peer harassment.

The ELCRA is modeled on Title VII of the Civil Rights Act of 1964, 42 USC 2000e *et seq*., the federal law that prohibits employment discrimination. See *Rouch World, LLC v Dep't of Civil Rights*, 510 Mich 398, 412; 987 NW2d 501 (2022). For that reason, Michigan courts have looked to Title VII precedents to interpret the ELCRA's protections—not just for employees, but also for students. See *id.* ("[I]n interpreting the ELCRA specifically, this Court has encouraged using as guidance federal precedent interpreting Title VII of the federal Civil Rights Act, the statute

on which the ELCRA was based."); *Radtke v Everett*, 442 Mich 368, 381, 397-398; 501 NW2d 155 (1993) (drawing from federal cases to set standards for claims of hostile environment sexual harassment under the ELCRA because such claims are "analogous" to harassment claims under Title VII, and the ELCRA's text "strongly parallels" federal guidance); *Fonseca v Michigan State Univ*, 214 Mich App 28, 30; 542 NW2d 273 (1995) (drawing from federal Title VII cases to interpret "the educational provisions of the [ELCRA]" because "the statutory language employs terms of art used and judicially interpreted extensively" in the "field of employment discrimination").

Like its Title VII model, the ELCRA mandates that an employer is directly liable for a hostile work environment caused by a co-worker's sexual harassment "when the employer has notice of the harassment and fails to take appropriate corrective action." *Gilbert v DaimlerChrysler Corp.*, 470 Mich 749, 791-792; 685 NW2d 391 (2004); see *Radtke*, 442 Mich at 397-398 (citing Title VII cases). As several courts have found, there is every reason to think that the statute gives students the same protection when a school fails to adequately respond to peer sexual harassment and creates a hostile school environment. See *Williams v Port Huron Area Sch Dist Bd of Educ,* unpublished opinion of the United States District Court for the Eastern District of Michigan, issued March 30, 2010 (Case No. 06-cv-14556), p 25; 2010 WL 1286306, at *14 (holding that the ELCRA holds schools liable for student racial harassment based on the same standards that apply to workers because the ELCRA does not grant "teachers . . . greater protections . . . than students"), rev'd on other grounds 455 F Appx 612 (CA 6, 2012); *Nelson v Almont Community Sch*, 931 F Supp 1345, 1356-1358 (ED Mich, 1996) (same); see also *Doe ex rel Subia v Kansas City Sch Dist*, 372 SW3d 43, 53 (Mo App, 2012) (applying state employment-law negligence standard to student-on-student harassment claims where the same state law governed both); *LW ex rel LG v Toms River Reg'l Sch Bd of Educ*, 189 NJ 381, 405-407; 915 A2d 535 (2007) (same under New Jersey law).

That conclusion flows from the ELCRA's text. The ELCRA uses the same operative language as Title VII to prohibit discrimination in employment and education: Just as an employer may not "discriminate against an individual" in employment "because of . . . sex," MCL 37.2202(1)(a), "an educational institution shall not . . . [d]iscriminate against an individual" in education "because of . . . sex," MCL 37.2402(a). As the U.S. Supreme Court has recognized in construing Title VII, those words prohibit an employer's "perpetuation of a discriminatory work environment" through their own acts or omissions. *Vance v Ball State Univ*, 570 US 421, 426-427, 446; 133 S Ct 2434; 186 L Ed 2d 565 (2013). Based on that common language, when an employer's "negligent" response to peer-on-peer sexual harassment "leads to the creation or continuation of a hostile work environment," the employer is "directly" (not "*vicariously*") liable. *Id.* at 427-428 (contrasting the two theories). Or as this Court has put it, under the ELCRA, when an employer "knew or should have known" of a co-worker's harassment and negligently "failed to stop it," the employer is liable for its "own negligence." *Chambers v Trettco, Inc*, 232 Mich App 560, 563; 591 NW2d 413 (1998) (citing Title VII cases), vacated on other grounds 463 Mich 297 (2000); accord *Danca v Kmart Corp*, unpublished per curiam opinion of the Court of Appeals, issued August 25, 2000 (Docket No. 208738), p 15 & n 20; 2000 WL 33407239 (same).

Critically here, an employer is liable for mishandling co-worker harassment even though co-workers do not act as the employer's agents when they sexually harass their peers. Somewhat confusingly, some courts have used the term "respondeat superior" to refer to an employer's liability in such cases. *Radtke*, 442 Mich at 383; *Blankenship v Parke Care Ctrs, Inc*, 123 F3d 868, 872 (CA 6, 1997). But as both this Court and the Sixth Circuit have recognized, "when the [plaintiff] alleges sexual harassment by [her] coworkers, the 'respondeat superior' label inaccurately characterizes the employer's liability," which in fact "represents direct liability" based on the

employer's "own negligence." *Danca*, unpub op at 15 n 20, quoting *Blankenship*, 123 F3d at 872. *Pierce v Commonwealth Life Ins Co*, 40 F3d 796, 804 n 11 (CA 6, 1994) ("The term 'respondeat superior'—which connotes derivative liability—is an incorrect label for co-worker harassment cases, where the employer is directly liable for its own negligence."). After all, under the common law doctrine of "respondeat superior," "an employer is not liable for the torts of its employees who act outside the scope of their employment," *Zsigo v Hurley Med Ctr*, 475 Mich 215, 217, 227, 230-231; 716 NW2d 220 (2006); Restatement Agency, 3d, § 2.04 (same), and a worker acts outside the scope of his employment when he sexually harasses his peer, see *Elezovic v Bennett*, 274 Mich App 1, 10; 731 NW2d 452 (2007) (explaining that "coworkers who do not have supervisory powers or authority" do not act as an employer's "agents" "for purposes of the [EL]CRA" when they harass co-workers; in fact, an employee "is never acting within the scope of his agency when he breaks the law by sexually harassing a subordinate"); *Zsigo*, 475 Mich at 227-231 (holding employer could not be liable for employee's on-the-job sexual misconduct under the respondeat superior doctrine because the misconduct was outside the scope of employment, but making clear that the employer could still be liable for its own "negligence" in "supervising [its] employees"). So "[i]n co-worker harassment cases, the employer" must be liable "directly, not derivatively." *Blankenship*, 123 F3d at 872; see *Danca*, unpub op at 15 n 20 (same).[2]

[2] This principle—that liability for co-worker harassment was initially mislabeled as "respondeat superior" but is actually direct liability—reflects the consensus among federal courts of appeal. See, e.g., *Huston v Procter & Gamble Paper Prod Corp*, 568 F3d 100, 105 (CA 3, 2009) ("[A]n employer is directly, not vicariously, liable for its negligent response to knowledge of sexual harassment by co-workers and the term '*respondeat superior*' may thus not be accurate; rather, in this context, 'respondeat superior' . . . connotes notice to the employer[.]"); *Hall v Gus Const Co*, 842 F2d 1010, 1016 (CA 8, 1988) ("This principle is sometimes described incorrectly as an application of respondeat superior. . . . [A]n employer is directly liable (that is, independently of respondeat superior) for those torts committed against one employee by another, whether or not committed in furtherance of the employer's business, that the employer could have prevented by reasonable care

On the same logic, schools are "directly liable when they fail to take appropriate remedial action" in response to student-on-student harassment and "instead create a hostile educational environment" that denies the victim the educational opportunities that the ELCRA protects, even if the harasser is another student and not the school's agent. *Doe*, __ Mich at __ (CAVANAGH, J., concurring); slip op at 2. Because the school's negligence "perpetuat[ed] a discriminatory [school] environment," *Vance*, 570 US at 426-427, the plaintiff can satisfy her burden to show "some fault on the part of" the school, such that "it can fairly be said that the [school] committed the violation." *Chambers*, 463 Mich at 312.

This makes sense because a school contributes to a hostile environment for workers and students alike when it tolerates sexual harassment by their peers. "When an employer knows or should know of the harassment and fails to take effective measures to stop it, the employer has joined with the harasser in making the working environment hostile." *LW*, 189 NJ at 404, quoting *Lehmann v Toys R Us, Inc*, 132 NJ 587, 623; 626 A2d 445 (1993). "The employer, by failing to take action, sends the harassed employee the message that the harassment is acceptable and that the management supports the harasser." *Id.*; *Swenson v Potter*, 271 F3d 1184, 1192 (CA 9, 2001) ("If the employer fails to take corrective action after learning of an employee's sexually harassing conduct, or takes inadequate action that emboldens the harasser to continue his misconduct, the employer can be deemed to have 'adopt[ed] the offending conduct and its results, quite as if they had been authorized affirmatively as the employer's policy.'"), quoting *Faragher v City of Boca Raton,* 524 US 775, 789; 118 S Ct 2275; 141 L Ed 2d 662 (1998). A school's acquiescence in student harassment sends an equally if not more harmful message to children. See *LW*, 189 NJ at

in hiring, supervising, or if necessary firing the tortfeasor."), quoting *Hunter v Allis–Chalmers Corp, Engine Div,* 797 F2d 1417, 1421 (CA 7, 1986) (Posner, J.).

404-405 (applying the same reasoning to schools). Given school officials' power over student conduct in the "highly regulated" school environment, children are even more likely than adult workers to see school authorities' inaction "as approval" of the harassment—not to mention that the school's tolerance for the conduct inevitably "invites escalation of the harassment and emboldens the harasser." Brake, *School Liability for Peer Sexual Harassment After* Davis*: Shifting from Intent to Causation in Discrimination Law*, 12 Hastings Women's LJ 5, 11 (2001).

To hold that the ELCRA excuses schools' own misconduct when they deny children equal access to an education by ignoring peer harassment would thus kneecap the law's goal—to protect the "civil right" to a "full and equal" education. MCL 37.2102(q). As a broad "remedial statute," the ELCRA is not so toothless. See *Eide*, 431 Mich at 36 (explaining that the ELCRA must be "liberally construed to suppress the evil and advance the remedy").

II. This Court should not adopt the federal Title IX standard for ELCRA claims.

Unlike Title VII and existing law under the ELCRA, federal law governing student harassment claims under Title IX of the Education Amendments of 1972 would be a poor model for claims under the ELCRA. The U.S. Supreme Court has adopted a parsimonious liability standard for sex-based harassment claims brought by students under Title IX. But the text of the ELCRA tracks Title VII, not Title IX. See *supra*, pp 6-7. And structural differences between the ELCRA and Title IX demonstrate that a more student-protective standard should govern ELCRA claims.

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 bans sex discrimination in work and school, among other contexts. By contrast, federal law relies on two different statutes to handle discrimination in work and education—Title VII (for work) and Title IX (for education). 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 in school.

For hostile environment harassment claims in the workplace, Title VII uses a standard similar to the one the ELCRA uses for workplace harassment claims. See *supra*, pp 6-7. An employer may be liable if it knew or should have known about workplace harassment and failed to take reasonable steps to address it. See *Burlington Indus, Inc v Ellerth*, 524 US 742, 759; 118 S Ct 2257; 141 L Ed 2d 633 (1998); *Bowman v Shawnee State Univ*, 220 F3d 456, 462-463 (CA 6, 2000). 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. The Michigan Supreme Court frequently declines to adopt federal standards in favor of more rights-protective interpretations of state law.

Michigan courts have frequently interpreted state law to provide more protection for its citizens' rights than corresponding federal laws. See e.g., *People v Bullock*, 440 Mich 15, 28 n 9; 485 NW2d 866 (1992) (collecting cases); see also *Sitz v Dep't of State Police*, 443 Mich 744, 763; 506 NW2d 209 (1993) (affirming that Michigan Courts need not accept a "major contraction of citizen protections" under Michigan law "simply because the United States Supreme Court has chosen to do so"). And state appellate courts in Missouri, New Jersey, Vermont, and Washington have expressly declined to adopt the federal Title IX standard for student-on-student harassment cases under state law. See *Doe,* 372 SW3d at 53 (Mo App, 2012) (adopting state employment law standard); *LW,* 189 NJ at 405-406 (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).[3]

This Court should do the same. In constitutional cases, the Michigan Supreme Court has identified factors—equally applicable to statutory cases—that inform whether 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 Title IX's liability standard.

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 most simply, Title VII and Title IX are separate statutes. In *Gebser*, the U.S. Supreme Court drew distinctions between the two statutes' texts, purposes, and sources of congressional authority, which (it held) rendered Title VII precedent inapplicable. See, e.g., *Gebser*, 524 US at 283, 286-287. In contrast, the ELCRA is a single statute that provides for harassment claims against both schools and workplaces, among other spheres. MCL 37.2102(1). So, while the

[3] State courts in Massachusetts 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); 2017 WL 1553440, at *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).

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 similar 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 compared this "agreement not to discriminate" to "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. The rule serves a purpose inapplicable here: to prevent federal government overreach vis-à-vis the states. See *Pennhurst State Sch & Hosp v Halderman*, 451 US 1, 17; 101 S Ct 1531; 67 L Ed 2d 694 (1981) ("By insisting that Congress speak with a clear voice, we enable the States to exercise their choice [to be regulated] knowingly, cognizant of the consequences . . . ."). *Gebser*, without much explanation, held that it meant that schools must have more than constructive knowledge of harassment to be liable under Title IX. *Gebser*, 524 US. at 287-288.

Whatever the merits of *Gebser*'s logic, it does not translate to the ELCRA, which does not depend on the state's spending powers and is not constrained by the contract analogy. See *In re Brewster Street Housing Site in Detroit*, 291 Mich 313, 333; 289 NW 493 (1939) (explaining that, unlike the federal legislature, the Michigan legislature does not act pursuant to constitutional grants of legislative power); *Blank v Dep't of Corrections*, 462 Mich 103, 157-158; 611 NW2d 530

(2000) (CAVANAGH, J., dissenting) (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); 2007 WL 201008, at *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., *Doe,* 372 SW3d at 53-54; *LW*, 189 NJ at 405; *Washington,* 179 Vt at 329-330; *Mercer Island Sch Dist*, 186 Wash App at 982-983.

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 lawsuit 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 under Title IX, unlike the ELCRA, the responsible agency must give a defendant the opportunity to come into voluntary compliance with the law before it starts an enforcement action. Compare *Gebser*, 524 US at 288 (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 "require[s] notice" and "an opportunity for voluntary compliance," liability in court should be available only where the school had actual knowledge of the harassment at the relevant time. *Gebser*, 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 be available only 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 ("the MDCR") 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 thus offer no reason for this Court to similarly weaken the ELCRA.

D. The ELCRA's text also forecloses Title IX's "severe and pervasive" standard for what constitutes 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 the Michigan Supreme 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 for student-on-student harassment, 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).

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 having "actual 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); *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); 2008 WL 5101285, at *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, 1119-1120 (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 sexually 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 Cal L Rev 1147, 1169-1187 (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*, 78 F4th 419, 425-427 (CA 8, 2023) (Kelly, J., dissenting) (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 *A Sweep As Broad As Its Promise*, *supra*, at 980-981 (collecting cases).[4]

[4] 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, 623-624 (CA 6, 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 Co Sch Dist*, 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 798-799 (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. *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"). See also *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."

(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) ; *Farmer v Kan State Univ*, 918 F3d 1094, 1103, 1106 (CA 10, 2019); *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).

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 Cal 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. *Carabello*, 928 F. Supp 2d at 643. 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 of Michigan, issued June 3, 2022 (Case No. 19-cv-10166); 2022 WL 1913074, at *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.").

Contrary to the U.S. Supreme Court's assumption, see *supra* p 17, 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 Mich 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); 2021 WL 4531082, at *5, 12.

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 these reasons, the Court should hold that, just like in the workplace context, a school may be directly (as opposed to vicariously) liable under the ELCRA if it negligently fails to protect students from sexual harassment by their peers and thereby creates a hostile school environment, and the court should reject the inapposite federal standard applicable under Title IX.

Respectfully submitted,

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WORD COUNT STATEMENT

This brief contains 8,028 words in the sections covered by MCR 7.212(C)(6)-(8).

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