STATE OF MICHIGAN
IN THE SUPREME COURT
(Patel, P.J., and Cameron and Letica, JJ)

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

MOTION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF ON BEHALF OF THE NATIONAL WOMEN'S LAW CENTER

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Date: January 31, 2024

MOTION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF ON BEHALF OF THE NATIONAL WOMEN'S LAW CENTER

Amicus curiae, the National Women's Law Center (NWLC), files this Motion for Leave to File the accompanying *Amicus Curiae* Brief in the above-referenced matter for the reasons that follow:

1. NWLC is a non-profit legal advocacy organization that fights for gender justice—in the courts, in public policy, and in our society—working across the issues that are central to the lives of women and girls—especially women of color, LGBTQI+ people, and low-income women and families. Since 1972, NWLC has advocated to ensure that women can live free of sexual assault, harassment, and discrimination. The NWLC Fund administers the Legal Network for Gender Equity, which helps people facing sex-based discrimination and harassment at work, in education, and in health care find attorneys, and the TIME'S UP Legal Defense Fund, which funds select workplace sex-based harassment cases.
2. NWLC is dedicated to securing equal treatment and opportunity in all aspects of society through enforcement of laws prohibiting sex discrimination. To that end, it has participated as counsel or amicus curiae in numerous cases before state appellate courts, the U.S. Supreme Court, and federal courts of appeals.
3. NWLC is concerned with the outcome of this case because of the impact it will have on Michigan students' rights to learn free of sex-based harassment.

WHEREFORE, NWLC respectfully requests that this Honorable Court grant this Motion for leave to file the accompanying Amicus Curiae Brief on these important issues of Michigan jurisprudence.

Respectfully submitted,

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STATEMENT OF INTEREST[1]

National Women's Law Center (NWLC) is a non-profit legal advocacy organization that fights for gender justice—in the courts, in public policy, and in our society—working across the issues that are central to the lives of women and girls—especially women and girls of color, LGBTQI+ people, and low-income women and families. Since its founding in 1972, NWLC has worked to advance educational opportunities, workplace justice, health and reproductive rights, childcare, and income security. NWLC has participated as counsel or amicus curiae in a range of cases before state courts, the U.S. Supreme Court, and federal courts of appeals to secure equal treatment and opportunity in all aspects of society through enforcement of the Constitution and other laws prohibiting sex discrimination.

[1] Pursuant to MCR 7.312(H), 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.

STATEMENT OF QUESTION INVOLVED

1. Whether Plaintiff stated a cause of action under the Elliott-Larsen Civil Rights Act, MCL 37.2101 et seq., for student-on-student sexual harassment?

   NWLC Answers: Yes

SUMMARY OF THE ARGUMENT

Across the country, students are subjected to tremendously high rates of student-on-student harassment based on sex, race, and other protected traits. But too often, schools ignore or punish victims instead of giving them the support they need to learn and feel safe. The federal courts have largely failed student victims of harassment under federal civil rights laws like Title IX, Title VI, and Section 504. Fortunately for students in Michigan, the Elliott-Larsen Civil Rights Act (ELCRA) provides another source of protection against harassment in schools. For decades, this Court has assessed workplace harassment claims using a well-tested standard. A near-identical standard for harassment in schools, as Jane Doe has proposed, would serve students well too. There are no risks to Michigan extending the ELCRA workplace standard to education harassment claims, because the elements of this standard are already the majority rule in the states. Moreover, the U.S. Department of Education applied an ELCRA-like standard to sex-, race-, and disability-based harassment for nearly three decades and is set to restore that standard in the Title IX regulations by March 2024. Congress, too, has recognized the profound limitations of the current Title IX litigation standard and is considering a bill to make the education harassment standard in Title IX, Title VI, and Section 504 more similar to the ELCRA's workplace standard. Now is the time for this Court to take the opportunity to affirm the ELCRA's broad purpose to protect students from all forms of discrimination, including student-on-student harassment. As such, NWLC urges this Court to adopt the ELCRA's workplace harassment standard, with minor modifications for the education context as proposed by Jane Doe.

ARGUMENT

I. Harassment in schools is prevalent yet underreported, and student victims are deprived of education when schools fail to appropriately address harassment.

Students today experience sex-based harassment, including sexual assault, at extraordinary rates. Yet for a variety of reasons, few victims report the incidents to their schools, including because they are afraid that no one will help them or that they will face retaliation. Elizabeth Tang & Ashley Sawyer, Nat'l Women's L. Ctr. & Girls for Gender Equity, *100 School Districts: A Call to Action for School Districts Across the Country to Address Sexual Harassment through Inclusive Policies and Practices* 2 (2021), https://nwlc.org/wp-content/uploads/2021/04/100SD-report-5.3.21-vF.pdf. For example, in middle and high schools, 56% of girls and 40% of boys are sexually harassed each school year, but only 12% and 5% of them, respectively, report the incident to an adult at school. Catherine Hill & Holly Kearl, Am. Ass'n of Univ. Women, *Crossing the Line: Sexual Harassment at School* 11, 26 (2011), https://www.aauw.org/app/uploads/2020/03/Crossing-the-Line-Sexual-Harassment-at-School.pdf.

When student survivors do come forward, they are often ignored, disbelieved, or even punished by their schools for a litany of reasons. For instance, student survivors are frequently disciplined by their schools for physically defending themselves against a harasser, for "acting out" (*i.e.*, expressing age-appropriate symptoms of trauma), for telling other students about the harassment, or for engaging in what the school determines to be "consensual" sexual activity with their assailant. *See*, *e.g.*, Sarah Nesbitt & Sage Carson, Know Your IX, *The Cost of Reporting: Perpetrator Retaliation, Institutional Betrayal, and Student Survivor Pushout* 15–16, 24 (2021), https://www.knowyourix.org/wp-content/uploads/2021/03/Know-Your-IX-2021-Report-Final-Copy.pdf. Unfortunately, schools are more likely to ignore and punish girls of color (especially

Black girls), LGBTQI+[2] students, pregnant and parenting students, and disabled students due to various stereotypes that label these students as more "promiscuous" or "aggressive" and less credible or deserving of protection. *See*, *e.g.*, Shiwali Patel, Elizabeth Tang, & Hunter 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, 961–64 (2023). When schools fail to appropriately address sex-based harassment, student survivors are forced to miss class, receive lower grades, withdraw from extracurricular activities, graduate late, or leave school altogether. *Id.* at 968–69.

Many students experience other forms of harassment with similarly detrimental effects on their education. For example, race-based harassment comprises 29% of all reported harassment in K–12 schools. U.S. Dep't of Educ., Off. for Civ. Rts., *2020-21 Civil Rights Data Collection: Student Discipline and School Climate in U.S. Public Schools* 14 (Nov. 2023), https://www2.ed.gov/about/offices/list/ocr/docs/crdc-discipline-school-climate-report.pdf. Disabled students are two to three times more likely to be harassed or bullied than their nondisabled peers. C. A. Marshall *et al.*, *Disabilities: Insights from across fields around the world, Vol. 1. The experience: definitions, causes, and consequences* (2009), https://psycnet.apa.org/record/2009-11004-000. Nearly two-thirds of pregnant and parenting girls ages 14–18 report feeling unsafe in school as a barrier to attending school, and more than 83% of LGBTQ+ students ages 13–21 experience harassment based on their sexual orientation, gender identity, or gender expression each school year. Joseph G. Kosciw *et al.*, GLSEN, *The 2021 National School Climate Survey: The Experiences of LGBTQ+ Youth in Our Nation's Schools* 19–20 (2021),

[2] This brief uses "LGBTQI+" to be inclusive of intersex individuals and only uses "LGBTQ+" when discussing research that surveys LGBTQ+ respondents but does not include intersex respondents in its sample.

https://www.glsen.org/sites/default/files/2022-10/NSCS-2021-Full-Report.pdf.; Kelli Garcia & Neena Chaudhry, Nat'l Women's L. Ctr., *Let Her Learn: Stopping School Pushout for Girls Who Are Pregnant or Parenting* 12 (2017), https://nwlc.org/wp-content/uploads/2017/04/Final_nwlc_Gates_PregParenting.pdf.

All of these forms of harassment can have devastating impacts on victims' ability to access their education. Indeed, the U.S. Department of Education has recognized that when harassment based on race, color, national origin, disability, or sex is left unaddressed, student victims commonly suffer from anxiety, depression, loss of self-esteem, self-harm, lower attendance, and lower academic performance and aspirations. U.S. Dep't of Educ., Off. for Civ. Rts., *Dear Colleague Letter Harassment and Bullying (October 26, 2010) Background, Summary, and Fast Facts* 1 (2010), https://www2.ed.gov/about/offices/list/ocr/docs/dcl-factsheet-201010.pdf.

II. To achieve the ELCRA's anti-discrimination purpose, this Court should apply the ELCRA's standard for workplace harassment to student-on-student harassment, with minor adjustments for the education context, as proposed by Jane Doe.

The litigation standard applied in claims brought under Title IX of the Education Amendments of 1972 (Title IX) is tremendously protective of schools, too often enabling them to sweep harassment under the rug with impunity and punish student victims who ask for help. Rather than mirroring this inadequate protection, in order to ensure that the ELCRA actually fulfills its mission of protecting students, this Court should apply a modified version of the ELCRA's workplace harassment standard.

A. Under the federal Title IX litigation standard, many schools have evaded liability for ignoring and punishing student victims of harassment instead of helping them.

Despite Title IX's broad mandate, it has become exceedingly difficult for student survivors to meet Title IX's stringent litigation standard for sex-based harassment, rendering Title IX's protections largely illusory for many students. *N. Haven Bd. Of Educ. V. Bell*, 456 U.S. 512, 521

(1982) (declaring that courts must accord Title IX "a sweep as broad as its language" when interpreting its scope); *see also Jackson v. Birmingham Bd. Of Educ.*, 544 U.S. 167, 175 (2005) ("[B]y using such a broad term [as 'discrimination'], Congress gave the statute a broad reach."). In 1998 and 1999, the U.S. Supreme Court held in *Gebser v. Lago Vista Independent School District* and *Davis v. Monroe County Board of Education* that student victims of sex-based harassment bringing Title IX claims against their school districts must prove that: (1) they experienced "severe," "pervasive," *and* "objectively offensive" harassment; (2) the school had "actual notice" of the harassment; (3) the school exercised "substantial control" over the harasser and harassment; and (4) the school responded with "deliberate indifference." *Davis v. Monroe Cnty. Bd. of Educ*., 526 U.S. 629, 633, 645, 650 (1999); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998).

Since then, the lower federal courts have zealously applied the *Gebser-Davis* standard and often issued Title IX decisions that fly in the face of common sense, foreclosing countless student survivors from relief. For instance, the Sixth Circuit held in 2019 that sexual assault is not "pervasive" for Title IX purposes unless it occurs at least twice. *Kollaritsch v. Mich. State Univ. Bd. Of Trustees*, 944 F.3d 613, 620, 621 n.3, 623 (6th Cir. 2019); *see also*, *e.g.*, *Doe I v. Cuyahoga Cnty. Cmty. Coll.*, 655 F. Supp. 3d 669, 679 (N.D. Ohio 2023); *Doe v. Gwinnett Cnty. Sch. Dist.*, No. 1:18-CV-05278-SCJ, 2021 WL 4531082, at *1 (N.D. Ga. Sept. 1, 2021). Similarly, at least one federal court has held that forced kissing and groping do not amount to "severe" harassment. *Carabello v. N.Y.C. Dep't of Educ.*, 928 F. Supp. 2d 627, 635, 643 (E.D.N.Y. 2013).

Countless federal courts have held that schools did not have "actual notice" of sex-based harassment even when teachers, coaches, guidance counselors, or principals knew about it. *E.g.*, *Salazar v. S. San Antonio Indep. Sch. Dist.*, 953 F.3d 273, 275 (5th Cir. 2017) (principal); *Hill v.*

Cundiff, 797 F.3d 948, 971 (11th Cir. 2015) (teacher's aide); *Santiago v. Puerto Rico*, 655 F.3d 61, 66 (1st Cir. 2011) (principal); *Plamp v. Mitchell Sch. Dist. No. 17-2*, 565 F.3d 450, 457 (8th Cir. 2009) (guidance counselor, teacher); *Bostic v. Smyrna Sch. Dist.*, 418 F.3d 355, 362 (3d Cir. 2005) (principal); *Warren ex rel. Good v. Reading Sch. Dist.*, 278 F.3d 163, 173–74 (3d Cir. 2002) (guidance counselor); *Baynard v. Malone*, 268 F.3d 228, 238 (4th Cir. 2001) (principal). Many schools have also been found not to have "actual notice" of sex-based harassment even when school officials repeatedly heard "rumors" that a teacher was "dating" multiple high school students or knew that a high school teacher had married a former student. *Hansen v. Bd. of Trustees of Hamilton Se. Sch. Corp.*, 551 F.3d 599, 606 (7th Cir. 2008); *Doe v. Bradshaw*, 203 F. Supp. 3d 168, 175 (D. Mass. 2016).

In addition, schools have often been found to lack "substantial control" over off-campus sex-based harassment and therefore been allowed to ignore it and its impact on a student survivor. *E.g.*, *Roe v. St. Louis Univ.*, 746 F.3d 874, 884 (8th Cir. 2014) (school was not required to address student-on-student rape at off-campus party); *Rost ex rel. K.C. v. Steamboat Springs RE-2 Sch. Dist.*, 511 F.3d 1114, 1118 (10th Cir. 2008) (school was not required to address gang rape of disabled student by peers at off-campus location). As a result, these schools were not liable even when the victim and harasser continued to see each other in shared spaces on school grounds and the student felt unsafe or had trouble participating in school as a result.

And finally, federal courts have concluded time and time again that, despite a school's egregious response to sex-based harassment—for instance, by suspending or expelling a rape survivor in response to the survivor reporting their harassment or by intentionally closing a school investigation to protect the reported harasser or the school's reputation—the school did not act with "deliberate indifference" and therefore, did not violate Title IX. *E.g.*, *Doe v. Bibb Cnty. Sch.*

Dist., 688 F. App'x 791 (11th Cir. 2017) (school was not "deliberately indifferent" despite closing its investigation to protect its image and suspending disabled survivor of gang rape); *A.P. v. Fayette Cnty. Sch. Dist.*, No. 3:19-CV-109-TCB, 2021 WL 3399824, at *1, *4 (N.D. Ga. June 28, 2021), *aff'd*, No. 21-12562, 2023 WL 4174070 (11th Cir. June 26, 2023) (school was not "deliberately indifferent" despite suspending and later expelling victim student who reported oral rape); *Gwinnett Cnty. Sch. Dist.*, 2021 WL 4531082, at *4, *14 (school was not "deliberately indifferent" despite suspending student who reported oral rape); *Doe v. Univ. of Notre Dame Du Lac*, No. 3:17CV690-PPS, 2018 WL 2184392, at *2 (N.D. Ind. May 11, 2018) (school was not "deliberately indifferent" despite "orchestrating the closing of the Title IX investigation so that the [assailant], a football player, could transfer to another university with a clean record").

The stringent Title IX litigation standard has also been imported to Title VI of the Civil Rights of 1964 (Title VI) and Section 504 of the Rehabilitation Act of 1973 (Section 504), barring most student victims of race, color, national origin, and disability harassment from obtaining relief in the federal courts as well. For instance, the Third Circuit held in 2011 that a Black middle-school student in Pennsylvania did not experience "severe" *and* "pervasive" harassment, even though numerous classmates slapped her, spat on her, touched her hair, put chewing gum in her books, and made derogatory remarks about her skin color for one and a half years. *Whitfield v. Notre Dame Middle Sch.*, 412 F. App'x 517, 519–21 (3d Cir. 2011). In 2014, a federal district court in Alabama held that although multiple high school teachers and a bus driver all knew that a disabled girl had suffered near-daily harassment due to her weight and bowed legs, which ultimately led to the victim's death by suicide, her school district nevertheless did not have "actual notice" of the harassment and was not required to address it. *Moore v. Chilton Cnty. Bd. of Educ.*, 1 F. Supp. 3d 1281, 1286–87, 1298-300 (M.D. Ala. 2014). Similarly, three Black sisters in Texas endured

countless incidents of race-based harassment for *more than ten years*, including being called the n-word and finding a noose next to their car. *Fennell v. Marion Indep. Sch. Dist*., 804 F.3d 398, 402–06 (5th Cir. 2015). Their school district's weak responses failed to put an end to more than a decade of harassment and eventually forced the two younger sisters to withdraw from the district for their own safety, but the Fifth Circuit still concluded in 2015 that the district had not been "deliberately indifferent." *Id.* at 410–11.

Too often, students are left with no recourse for harassment in the federal courts under an overly restrictive and unfairly burdensome litigation standard. This Court should ensure that ECLRA does not similarly leave student victims without recourse in Michigan state courts.

B. The ELCRA's workplace standard, with Jane Doe's minor proposed adjustments for the education context, would properly address student-on-student harassment.

The ELCRA's workplace harassment standard requires a plaintiff to establish that (1) they "belonged to a protected group," (2) they were "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*, 501 N.W.2d 155, 162 (1993). This Court has interpreted the final element to require, in part, that an employer both have constructive notice of the harassment and "fail[] to take prompt and remedial action" to address the harassment. *Elezovic v. Ford Motor Co.*, 697 N.W.2d 851, 861 (2005); *Chambers v. Trettco, Inc.*, 614 N.W.2d 910, 916 (2000).[3] These requirements are similar to Jane Doe's proposed adjustments to the *respondeat*

[3] This Court has also held that for an employer to be liable for the conduct of its employee's conduct under the doctrine of *respondeat superior*, an employee must "commit [the conduct] within the scope of their employment." *Hamed v. Wayne Cnty.*, 409 Mich. 1, 10–11, 803 N.W.2d 237, 244 (Mich. 2011).

superior element for harassment in the education context—namely Jane Doe urges that under the ELCRA, an educational institution can be liable if it knew or should have known of the harassment and failed to take prompt and adequate remedial action to address it. With Jane Doe's minor proposed adjustments to the *respondeat superior* element for the education context, this—as opposed to the stringent federal Title IX litigation standard outlined in Part II.A—is the appropriate standard to assess a school's liability under the ELCRA for student-on-student sex-based harassment claims.

The ELCRA's workplace standard, with the final element modified to fit the education context, would be better at effectuating the ELCRA's nondiscrimination goals and more sensible to assess student-on-student harassment than the federal Title IX standard. First, this Court has recognized that the "ELCRA is remedial and should be construed broadly in order to accomplish its purpose." *White v. Dep't of Transportation*, 334 Mich. App. 98, 128–29, 964 N.W.2d 88, 103 (2020). The federal Title IX litigation standard is inconsistent with this purpose because it narrowly construes Title IX's protections in ways that tend to benefit schools rather than survivors and perversely forces students—many of whom are young children—to satisfy more a demanding standard to prove harassment than adult workers. *See supra* Part II.A. A federal district court in Michigan has agreed on this point in a case where a group of students brought a claim for student-on-student racial harassment under the ELCRA, arguing "the basis for imposing liability on schools should be the same as that for employees liable for co-worker harassment—the duty to control the environment, upon notice of harassment." *Williams v. Port Huron Area Sch. Dist. Bd. of Educ.*, No. 06-14556, 2010 WL 1286306, at *11 (E.D. Mich. Mar. 30, 2010), *rev'd on other grounds and remanded sub nom. Williams v. Port Huron Sch. Dist.*, 455 F. App'x 612 (6th Cir. 2012). Although the school district argued that the students could not establish *respondeat superior*

liability because the students were not employees of the school district, the district court rejected this argument, noting it was "not convinced that teachers have greater protections under the ELCRA than students." *Id.* at *11, *14.

Second, adopting a more protective standard than Title IX's federal litigation standard to address peer harassment under the ELCRA is consistent with the long-established principle that states may provide additional protections against discrimination beyond what federal law requires. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 491 (1977) (observing that state laws "are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law"); Jeffrey S. Sutton, 51 Imperfect Solutions: States and the Making of American Constitutional Law 16 (2018) ("As long as a state court's interpretation of its own constitution does not violate a federal requirement, it will stand, and, better than that, it will be impervious to challenge in the U.S. Supreme Court.").

Third, Jane Doe's modified ELCRA standard would be the more logical choice to address student-on-student harassment than the federal Title IX litigation standard because of "structural differences" between the two laws, which this Court has held is a factor that weighs against adopting a federal standard. Brief of *Amici Curiae* Public Justice, A Better Balance, and the American Civil Liberties Union of Michigan at 7, *Doe v. Alpena Pub. Sch. Dist.* (Mich. S. Ct. Sept. 6, 2023) (No. 165441) (citing *People v. Tanner*, 853 N.W.2d 653, 666, n. 17 (2014)). While some have defended the different litigation standards for Title VII and Title IX by noting differences in the statutes' structure and language, no such argument is available under the ELCRA. *Id.* at 8 (citing *Gebser*, 524 U.S. at 283, 286–87). This is because the ELCRA is a single statute barring

harassment in workplaces and schools: thus, it is more sensible to apply similar standards across workplace and education harassment. *Id.* at 8–9.

As Jane Doe explains, the final prong of the ELCRA's workplace harassment standard should be modified for student-on-student claims to permit liability where "the educational institution knew or should have known of the hostile environment and failed to take prompt and adequate remedial action." Brief for Plaintiff-Appellant, at 15, *Doe v. Alpena Pub. Sch. Dist.* (Mich. S. Ct. Sept. 6, 2023) (No. 165441).[4] This standard echoes the key elements of the ELCRA workplace harassment standard but recognizes that *respondeat superior* does not make sense for assessing liability for student-on-student harassment. In the employment context, to hold an employer liable for an employee-harasser's conduct, the employee must have acted "within the scope of their employment." *Hamed v. Wayne Cty.*, 803 N.W.2d 237, 244 (2011). But this standard is inapplicable in the context of student-on-student harassment, because the question of whether a harasser is acting "within the scope of [their] employment" is not relevant to harassment by a student.

Instead, the standard for student-on-student harassment must be adjusted for the education context so that it reflects Jane Doe's proposed modification: that liability attaches when a school district knows or should have known about the harassment and fails to take prompt and adequate remedial action to address it. This way, liability will not stem from whether the harasser committed the harassment "within the scope of [their] employment"—which makes no sense in the student-on-student context—but from whether the harassment was *within the scope of a school's authority*

[4] As Jane Doe points out, this alteration of the *respondeat superior* element still maintains the requirements of constructive notice and the failure to take "prompt and remedial action" to address the harassment consistent with Court's interpretation of *respondeat superior*, while jettisoning a theory of liability that is inapposite for the education context. *Id.* at 15–16.

to address it. This modification more accurately captures the authority a school has to address harassment because of the control, responsibility, and supervision it assumes over students stemming from the doctrine of *in loco parentis*. *See Mahanoy Area Sch. Dist. v. B. L. by and through Levy*, 141 S. Ct. 2038, 2046 (2021) ("The doctrine of *in loco parentis* treats school administrators as standing in the place of students' parents under circumstances where the children's actual parents cannot protect, guide, and discipline them."). This Court has held that the *in loco parentis* doctrine recognizes that a school assumes "care and custody" over students, *see Gaincott*, 275 N.W. at 231, which makes a school "the surrogate parent—which is precisely what gave Alpena Public Schools the authority to address John Roe's sexual assaults of Jane Doe. Brief for Plaintiff-Appellant, at 12, 14. Were liability to nonsensically turn on whether a student committed harassment in the scope of their employment, it is difficult to see how schools could ever be held liable for failing to address student-on-student harassment under the ELCRA—and this would certainly undermine the ELCRA's broad, remedial purpose to prevent discrimination. *White v. Dep't of Transportation*, 334 Mich. App. 98, 128–29, 964 N.W.2d 88, 103 (2020) ("ELCRA is remedial and should be construed broadly in order to accomplish its purpose").

III. Using the modified ELCRA workplace standard would be workable—as shown by the many jurisdictions that already use standards similar to the ELCRA's workplace standard for student-on-student harassment.

Experience shows that using the modified ELCRA workplace standard, as proposed by Jane Doe, is workable—and that Title IX's overly stringent standard is unnecessary—because Jane Doe's proposal is already the majority rule in the states. For nearly three decades, the U.S. Department of Education relied on regulatory standards similar to Jane Doe's proposed standard for discriminatory harassment against students in administrative enforcement of Title IX, and it has proposed rules to reinstate this standard for sex-based harassment under Title IX, which are scheduled to soon be finalized. In recognition of the shortcomings of the Title IX litigation standard,

legislation has also been proposed in Congress to change the federal litigation standards for demonstrating harassment in schools to be more aligned with the ELCRA standard for workplace harassment as modified by Jane Doe.

A. Jane Doe's proposal is already the majority rule in the states.

The overwhelming majority of U.S. states and territories use a standard with elements that are similar to—or more protective than—the elements of Jane Doe's proposed standard to prohibit harassment against students. As an initial matter, 37 of the 52 (71%) jurisdictions that define harassment[5] against students define it to include conduct based on a protected trait,[6] "unwelcome" conduct,[7] or both,[8] echoing the first, second, and third elements of Jane Doe's proposed standard.[9]

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[5] Note that some states use the terms "bullying" and "harassment" interchangeably or define "bullying" to include "harassment."

[6] Ala. Code § 16-28B-3(1); Del. Code Ann. tit. 14, § 4164(b)(2)(f); 17 G.C.A. § 3112.1(a)(2); Iowa Code Ann. § 280.28(2)(b); Md. Code Ann. Educ. § 7-424(a)(2)(i)(1); Mass. Gen. Laws Ann. ch. 71, § 37O(d)(3); Miss. Code. Ann. § 37-11-67(1); N.H. Rev. Stat. Ann. § 193-F:3(I)(b); N.J. Stat. Ann. §§ 18A:37-14; N.M. Stat. Ann. § 22-35-2(A)(1); N.Y. Educ. Law § 11(7); N.C. Gen. Stat. Ann. § 115C-407.15(a); Okla. Stat. Ann. tit. 70, § 24-100.3(A)(1); W. Va. Code Ann. § 18B-20-1(2); Wis. Admin. Code PI § 9.02(9).

[7] Ark. Code Ann. § 6-18-514(b)(5); Cal. Educ. Code §§ 212.5, 66262.5; D.C. Code Ann. § 38-952.01(5); Ky. Rev. Stat. Ann. § 158.148(1)(a) (defining "bullying" as "unwanted"); Mich. Comp. Laws Ann. § 37.2103(k); Minn. Stat. Ann. § 363A.03(43)(3); Mo. Ann. Stat. § 160.775(2); Mont. Code Ann. § 20-25-519(1)(a); Neb. Rev. Stat. Ann. § 85-608(4)(b)(ii); Va. Code Ann. § 22.1-276.01(A) (defining bullying as "unwanted"). *See also* Ky. A09.42811.

[8] Colo. Rev. Stat. Ann. § 22-1-143(1)(d)(I); Haw. Rev. Stat. Ann. § 304A-120(j); La. Stat. Ann. §§ 17:3399.12 and 17:3399.31(5); Me. Rev. Stat. tit. 20-A, §§ 6554(2)(B)(3) and § 12981 (citing tit. 14, § 6000(2-A)); Nev. Rev. Stat. Ann. §§ 388.122(1)(c) and 396.133(2); N.D. Cent. Code Ann. §§ 14-02.4-02(6) and 15-10.4-02(4)(a)(1); Or. Rev. Stat. Ann. §§ 339.351(2)(d), § 342.704(3)(b)(B), and § 350.253(2)(a); R.I. Gen. Laws Ann. §§ 16-76-1 and 16-76.1-1; Tenn. Code Ann. § 49-7-2406(b); Utah Code Ann. § 53B-27-401(1)(a)-(b); Vt. Stat. Ann. tit. 16, §§ 570f(c)(1) and 11(26)(A)-(B); Wash. Rev. Code Ann. §§ 28A.600.477(5)(b)(i) and 28A.640.020(2)(f). *See also* Haw. Code R. 8-19-2 (defining "harassment" and "sexual harassment").

[9] While other states' education statutes do not require the *plaintiff* to belong to a protected class (the first element of both *Radtke* and Jane Doe's proposal), many require the *conduct* to be based on a protected trait (the second element). In any case, this Court considers all Michigan harassment

More importantly, 42 of the 52 (81%) states and territories that define harassment against students use none of the elements of the Title IX litigation standard.[10]

Regarding the fourth element of the ELCRA's workplace standard (*i.e.*, the conduct intended to or did "substantially interfere" with the plaintiff's education), 37 states and territories (71%) use a standard equally or more protective of students. Specifically, 28 jurisdictions use the "substantially interfere" standard or an equivalent, such as an "unreasonably interfere" or "substantially harm" standard.[11] Nine jurisdictions use a standard that is more protective of victims—requiring a showing only that the harassment "interferes" with a student's education.[12]

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plaintiffs to automatically satisfy the first element. *Radtke*, 501 N.W.2d at 162 ("In fact, all employees are inherently members of a protected class in hostile work environment cases because all persons may be discriminated against on the basis of sex.").

[10] AL, AK, AR, CA, CO, DE, DC, FL, GA, GU, HI, ID, IL, IN, IA, KS, KY, ME, MD, MA, MI, MN, MS, MO, NV, NH, NJ, NM, NY, NC, OH, OR, PA, PR, RI, SC, SD, TX, VA, WA, WI, and WY.

[11] Ala. Code § 16-28B-3(1)(b); Alaska Stat. Ann. § 14.33.250(2)(B); Ark. Code Ann. § 6-18-514(b)(5); Colo. Rev. Stat. Ann. § 22-1-143(1)(d)(I)(C) ("unreasonably interfering"); D.C. Code Ann. § 38-952.01(5)(c)-(d); Fla. Stat. Ann. § 1006.147(3)(c)(2); Ga. Code Ann. § 20-2-751.4(a)(3)(B)-(C); Idaho Code Ann. § 18-917A(2)(b); Ind. Code Ann. §§ 20-33-8-0.2(a)(3)-(4), 21-39-2-2.1(b)(3)-(4); Iowa Code Ann. § 280.28(2)(b)(3)-(4); La. Stat. Ann. § 17:3399.12(5) ("unreasonably interferes"; applying to sexual harassment in higher education); Md. Code Ann., Educ. § 7-424(a)(2)(i); Mass. Gen. Laws Ann. ch. 151C, § 1(e) ("unreasonably interfering"); Mich. Comp. Laws Ann. § 37.2103(k)(iii); Minn. Stat. Ann. §§ 121A.031(2)(e), 363A.03(43)(3); Mo. Ann. Stat. § 160.775(2); Nev. Rev. Stat. Ann. § 388.122(1)(b)(2) (applying to K–12 schools); N.H. Rev. Stat. Ann. § 193-F:3(I)(a)(3); N.Y. Educ. Law § 11(7)(a); N.D. Cent. Code Ann. § 14-02.4-02(6)(c) (applying to harassment in education, employment, public accommodations, etc.); Or. Rev. Stat. Ann. § 339.351(2)(a) (applying to harassment in K–12 schools); S.C. Code Ann. § 59-63-120(1)(b); S.D. Codified Laws § 13-32-15(2); Tenn. Code Ann. § 49-6-4502(3) (applying to K–12 schools); Tex. Educ. Code Ann. §§ 37.001(b)(2) ("substantially harm"); Utah Code Ann. § 53G-9-601(2)(e) (applying to K–12 schools); Wash. Rev. Code Ann. §§ 28A.640.020(2)(f)(iii), 28A.600.477(5)(b)(i)(B)-(C); Wis. Admin. Code PI § 9.02(9).

[12] Del. Code Ann. tit. 14, § 4161(2)(b)-(c); 17 G.C.A. § 3112.1(a)(2); Haw. Code R. 8-19-2; Me. Rev. Stat. tit. 20-A, § 6554(2)(B)(2)(b); N.J. Stat. Ann. §§ 18A:37-14, 18A:3B-68(3); Okla. Stat. Ann. tit. 70, § 24-100.3(A)(1) (applying to K–12 schools); Or. Rev. Stat. Ann. § 342.704(3)(b)(B) (applying to sexual harassment in K–12 schools); 18 L.P.R.A. § 3961b(a). *See also* Cal. Educ. Code § 212.5(c) ("negative impact").

In fact, one state even explicitly provides that conduct need not be "severe" or "pervasive" to constitute harassment in schools.[13] Meanwhile, 15 jurisdictions use a severe-*or*-pervasive standard, rather than a severe-*and*-pervasive standard, although some apply the severe-*or*-pervasive standard only to harassment in higher education while using a less burdensome standard for determining what constitutes unlawful harassment of children in K–12 schools.[14] Of the nine minority states that apply the severe-*and*-pervasive standard, eight state statutes apply it only in higher education and either use a less burdensome standard in K–12 schools[15] or are silent on the standard for K–12 schools.[16] Only one state, Louisiana, applies the severe-*and*-pervasive standard in K–12 schools.[17]

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[13] While federal courts apply the stringent severe-*and*-pervasive standard when deciding education harassment cases, *see supra* Part II.A, many states apply the less stringent severe-*or*-pervasive standard instead. However, a growing number of states and localities have recognized that even the severe-*or*-pervasive standard is still too burdensome on harassment victims and have rejected this standard in employment, housing, and other settings. Cal. Gov. Code § 12923; Colo. Rev. Stat. Ann. § 24-34-402(1.3)(a); D.C. Law 24-172; Md. Code, SG § 20-601; N.Y. Exec. § 296; Vt. Stat. Ann. tit. 21, §§ 495(k), 495d(13)(B) and tit. 9, § 4501(12)(B). *See also* Montgomery County Code § 27-19; N.Y.C. Local L. No. 35, §2(c). In 2023, Colorado became the first state in the nation to reject the severe-*or*-pervasive standard for harassment in education as well. Colo. Rev. Stat. Ann. § 22-1-143(1)(d)(I).

[14] 105 Ill. Comp. Stat. Ann. 5/27-23.7(b); Kan. Stat. Ann. § 72-6147; Ky. A09.42811 (model policy); Miss. Code. Ann. § 37-11-67(1)(b); Mont. Code Ann. § 20-5-208(1)(b) (applying to K12 schools); Nev. Rev. Stat. Ann. § 396.133(2)(a) (applying only to sexual harassment in higher education); N.M. Stat. Ann. § 22-35-2(A); N.C. Gen. Stat. Ann. § 115C-407.15(a)(2); Ohio Rev. Code Ann. § 3313.666(A)(2)(a)(ii); Or. Rev. Stat. Ann. § 350.253(2)(a) (applying only to sexual harassment in higher education); 24 Pa. Stat. Ann. § 13-1303.1-A(e)(3) and (4)(i); Vt. Stat. Ann. tit. 16, § 570f(c)(2); Va. Code Ann. § 22.1-276.01(A); W. Va. Code Ann. § 18-2C-2(a)(2) (applying to K12 schools); Wyo. Stat. Ann. § 21-4-312(a)(i)(C).

[15] Mont. Code Ann. § 20-25-519(1)(a); N.D. Cent. Code Ann. § 15-10.4-02(4)(a)(1); Okla. Stat. Ann. tit. 70, § 2120(A)(2); Tenn. Code Ann. § 49-7-2406(b); Utah Code Ann. § 53B-27-401(1)(c); W. Va. Code Ann. § 18B-20-1(2).

[16] Ariz. Rev. Stat. Ann. § 15-1866; Neb. Rev. Stat. Ann. § 85-608(4)(b)(ii).

[17] La. Stat. Ann. §§ 17:416.14(A)(2)(b), 17:3399.31(5).

Only four of the 56 states and territories establish a statutory notice standard for when schools must respond to harassment (the first part of the fifth element of Jane Doe's proposal). California and the District of Columbia each apply a "knew or should have known" standard,[18] whereas Utah and Vermont apply an "actual notice" or "actual knowledge" standard.[19]

Finally, nearly all of the 32 states and territories that require a particular remedial response by schools to harassment adhere to the second part of the fifth element of Jane Doe's proposed standard—namely, that the educational institution can be liable if it failed to take prompt and adequate remedial action in response to harassment. Specifically, 31 of 32 (97%) jurisdictions require schools to respond to harassment in a "prompt" manner (or an equivalent, such as in a "timely" or "immediate" manner or in a specified number of days) and to take "appropriate remedial actions" (or an equivalent, such as taking "any necessary action" or ensuring an "equitable resolution of complaints").[20] A number of these states impose more detailed requirements for schools to end the harassment, prevent its recurrence, and remedy the effects of

[18] Cal. Educ. Code § 66281.8(b)(3)(C)(i); D.C. Code Ann. § 38-952.02(a)(1).
[19] Utah Code Ann. § 53B-27-402(1)(a); Vt. Stat. Ann. tit. 16, § 570f(a)(1).
[20] Ark. Code Ann. § 6-18-514(d); Cal. Educ. Code § 66281.8(b)(3)(C)(i); Colo. Rev. Stat. Ann. § 22-1-143(2)(d)-(g); Del. Code Ann. tit. 14, § 4164(b)(2)(f); D.C. Code Ann. § 38-952.02(a); Fla. Stat. Ann. § 1006.147(4), (4)(g); Ga. Code Ann. § 20-2-751.4(c); 17 G.C.A. § 3112.1(c)(4), (6), and (8); Haw. Code R. 8-19-30; 105 Ill. Comp. Stat. Ann. 5/27-23.7(b); Ind. Code Ann. § 20-33-8-13.5; Iowa Code Ann. § 280.28(3)(a)(2)(d), (f); Ky. A09.42811; Me. Rev. Stat. tit. 20-A, § 6554(5)(F), (I); Md. Code Ann., Educ. §§ 7-424.1(b)(2)(iv) and (viii), 7-424.3(c)(4) and (8), and 11-601(d)(3)(iii); Minn. Stat. Ann. § 121A.031(2)(i); Mo. Ann. Stat. § 160.775(4)(4)-(5); Mont. Admin. R. 10.55.719(5)(e), (h); Nev. Rev. Stat. Ann. § 388.1351(2); N.J. Stat. Ann. § 18A:37-15(b)(4), (6); N.M. Stat. Ann. § 22-35-3; N.Y. Educ. Law § 13(1)(e); N.C. Gen. Stat. Ann. § 115C-407.16(b); Okla. Stat. Ann. tit. 70, § 24-100.4(A)(12); Or. Rev. Stat. Ann. § 339.356(g), (j), (k); R.I. Gen. Laws Ann. § 16-76.1-1; S.C. Code Ann. § 59-63-140(B)(4), (6); S.D. Codified Laws § 13-32-16(4); Tenn. Code Ann. § 49-6-4503(b)(6), (8), and (9); Vt. Stat. Ann. tit. 16, § 570f(a)(1); Wyo. Stat. Ann. § 21-4-314(b)(iii) and (v).

the harassment on the victim and/or others, if appropriate.[21] Only Utah applies the "deliberate indifference" standard, and that standard applies only to harassment in higher education.[22]

In short, the Title IX litigation standard is an extreme and rare outlier when compared to the standards set out in state law to address harassment in education, and Jane Doe's proposed standard—nearly identical to the ELCRA's workplace harassment standard—reflects the overwhelming majority rule in the U.S. states and territories regarding harassment of students.

B. For nearly three decades, the U.S. Department of Education used regulatory standards similar to Jane Doe's proposed student-on-student harassment standard for administrative enforcement of Title IX and other civil rights statutes and is due to soon reinstate this standard for Title IX.

In addition to being enforced through litigation pursuant to a private right of action, Title IX, as well as other federal civil rights statutes that protect students from discrimination, are also enforced administratively by the U.S. Department of Education (ED)[23] through standards ED sets out in federal regulations and sub-regulatory guidance. Through its administrative enforcement scheme, ED has—until recently—applied consistent sub-regulatory standards to address student-on-student harassment based on sex, race, and disability under Title IX, Title VI, and Section 504, respectively. First, in 1994, ED released guidance addressing protections under Title VI which

[21] *E.g.*, Cal. Educ. Code § 66281.8(b)(3)(C)(i); Haw. Code R. 8-19-30; N.Y. Educ. Law § 13(1)(e).
[22] Utah Code Ann. § 53B-27-402(1)(b).
[23] The administrative enforcement process can be triggered by a complaint against an educational institution for a violation of Title IX, Title VI, or Section 504, or by ED conducting its own compliance review into an educational institution for potential violations of any of these civil rights statutes. *See* 34 C.F.R. § 100.7. Compliance is tied to an educational institution's federal funding: if ED investigates an educational institution and finds that it has violated any of these civil rights statutes, it will first enter into a resolution agreement with the institution to attempt to secure voluntary compliance. *Id.* If this fails, ED can then initiate proceedings to terminate the educational institution's federal funding. *Id.* § 100.8.

articulated the standard for race-based harassment.[24] That standard was consistent with the standard ED later articulated for disability-based harassment in a 2001 guidance addressing protections under Section 504,[25] as well as with the standard for sex-based harassment set out in 1997 and 2001 Title IX guidances.[26] These guidances articulated a standard that required a school

[24] U.S. Dep't of Educ., Office for Civil Rights, Racial Incidents and Harassment Against Students at Educational Institutions, 59 Fed. Reg. 11,448, 11,450 (Mar. 10, 1994) ("1994 Racial Harassment Guidance"), https://www2.ed.gov/about/offices/list/ocr/docs/race394.html (if harassment based on "race, color, or national origin" is "sufficiently severe, pervasive or persistent" such that it "interfere[s] with or limit[s]" a student's ability "to participate in or benefit from" a school's "services, activities or privileges," and in "the exercise of reasonable care" the school "knew or should have known" about it, then the school must respond in a manner that is "reasonably calculated to prevent [its] recurrence").

[25] U.S. Dep't of Educ., Office for Civil Rights, *Dear Colleague Letter on Prohibited Disability Harassment* (July 25, 2000) ("2000 Disability Harassment Guidance"), https://www2.ed.gov/about/offices/list/ocr/docs/disabharassltr.html (if harassment based on disability is "sufficiently severe, persistent, or pervasive" such that it "interfer[es] with or den[ies]" a student's ability to "participat[e] in" or receive the "benefits, services, or opportunities" of a school's program, then the school must take "prompt and effective action to end the harassment and prevent it from recurring and, where appropriate, remedy[] [its] effects").

[26] U.S. Dep't of Educ., Office for Civil Rights, *Revised Sexual Harassment Guidance; Harassment of Students by School Employees, Other Students, or Third Parties*, 2, 3, 11,12 (2001) ("2001 Sexual Harassment Guidance"), https://www2.ed.gov/offices/OCR/archives/pdf/shguide.pdf (if "unwelcome conduct of a sexual nature" "denies or limits the student's ability to participate in or benefit from the school's program on the basis of sex," and the school "knows or reasonably should know" about the harassment, then it must respond with "prompt and effective action to end the harassment, prevent it from recurring, and remedy the effects"); U.S. Dep't of Educ., Office for Civil Rights, *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 62 Fed. Reg. 12034, 12039, 12040, 12041, 12042 (Mar. 13, 1997) ("1997 Sexual Harassment Guidance"), https://www.govinfo.gov/content/pkg/FR-1997-03-13/pdf/97-6373.pdf (if "unwelcome" conduct "of a sexual nature" is "sufficiently severe, persistent, or pervasive to limit a student's ability to participate in or benefit from the education program," and the "school knows or should have known" about it, then it must take "immediate and appropriate corrective action" to "end any harassment" and "prevent the harassment from occurring again"). *See also* U.S. Dep't of Educ., Office for Civil Rights, *Questions and Answers on Title IX and Sexual Violence* 1, 3, 14, 41 (2014) ("2014 Sexual Violence Guidance"), https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf (if "unwelcome sexual conduct" is "sufficiently serious to limit or deny a student's ability to participate in or benefit from the school's educational program," and the school "knew or should have known" about it, then it

with constructive notice of harassment that creates a hostile educational environment to respond in a manner that is "prompt and effective" at ending the harassment, preventing its recurrence, and remedying its effects.[27] A "hostile educational environment," the guidances explained, is created by "unwelcome" conduct based on membership in a protected class that is so "severe, pervasive, or persistent" that it "limits" or "interferes" with a student's ability to participate in or benefit from a school's educational program.[28] These standards parallel the ELCRA's standard for workplace harassment. Both define actionable harassment as "unwelcome" conduct based on membership in a protected class that creates a "hostile environment" because it "interfer[es]" with a victim's education or employment. Both require mere constructive notice of harassment to trigger an institution's obligation to respond. And both require a response that is "prompt" and "effective" or "adequate" at remedying the harassment and preventing further harassment. *Elezovic*, 697 N.W.2d at 861; *Chambers*, 614 N.W.2d at 916, 919; *Radtke*, 501 N.W.2d at 162.

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must take "prompt and effective steps reasonably calculated to end the sexual violence, eliminate the hostile environment, prevent its recurrence, and, as appropriate, remedy its effects"); U.S. Dep't of Educ., Office for Civil Rights, *Dear Colleague Letter: Sexual Violence*, 3 (Apr. 4, 2011) ("2011 Sexual Violence Guidance"), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf (if "unwelcome conduct of a sexual nature" is "sufficiently serious that it interferes with or limits a student's ability to participate in or benefit from the school's program," and the school "knows or reasonably should know" about it, then it must take "immediate action to eliminate the harassment, prevent its recurrence, and address its effects").

[27] *See* 2014 Sexual Violence Guidance; 2011 Sexual Violence Guidance; 2001 Sexual Harassment Guidance; 1994 Racial Harassment Guidance; 2000 Disability Harassment Guidance; 1997 Sexual Harassment Guidance. *See also* U.S. Dep't of Educ., Office for Civil Rights, *Dear Colleague Letter: Harassment and Bullying* 2-3, 6 (Oct. 26, 2010), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf ("2010 Harassment and Bullying Guidance") (if "unwelcome" conduct "based on race, color, national origin, sex, or disability" is "sufficiently severe, pervasive, or persistent so as to interfere with or limit a student's ability to participate in or benefit from the services, activities, or opportunities offered by a school," and the school "knew or should have known" about it, then it must take "prompt and effective steps reasonably calculated to end the harassment, eliminate any hostile environment and its effects, and prevent the harassment from recurring").

[28] *See* notes 24-27.

However, the aforementioned Title IX guidances were rescinded in 2020 when the Trump administration issued new Title IX regulations. Those regulations ("the 2020 Rules") imported the *Gebser*/*Davis* litigation standard to ED's administrative enforcement of Title IX. However, the Trump administration left ED's longstanding standards for race- and disability-based harassment intact. For the first time in nearly three decades,[29] ED now no longer applies consistent standards to address all forms of harassment. Sex-based harassment alone is now assessed with a uniquely burdensome standard. Due to the 2020 Rules' stark reversal of decades of precedent and policy, the confusion and harm it created in schools, and its utter failure to require schools to address sex-based harassment fairly and effectively, the Biden administration has taken steps to rescind and replace the 2020 Rules imminently. Anna North, *Betsy DeVos's sexual assault rules have already hurt survivors*, VOX (Mar. 9, 2021), https://www.vox.com/2021/3/9/22319574/biden-executive-order-devos-sexual-assault-ix; Dustin Jones, *Biden's Title IX reforms would roll back Trump-era rules, expand victim protections*, NPR (June 23, 2022), https://www.npr.org/2022/06/23/1107045291/title-ix-9-biden-expand-victim-protections-discrimination.

Proposed in June 2022 and expected to become final in March 2024, the Biden administration's proposed Title IX regulations would rescind the 2020 Rules and, for agency enforcement of Title IX, restore the previous definition of actionable harassment as "severe *or* pervasive," remove the actual notice standard, and restore the "prompt and effective" remedial standard. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving

[29] ED applied standards similar to ELCRA's workplace harassment standards to address student-on-student harassment for 26 years, beginning in 1994 with its 1994 Racial Harassment Guidance up until 2020, when the Trump administration completed its rescission of the 1997, 2001, 2011, and 2014 guidances addressing sexual harassment.

Federal Financial Assistance, 87 Fed. Reg. 41390, 41569, 41572 (proposed 34 C.F.R. §§ 106.2(2), 106.44(a), 106.44(c)) (proposed July 12, 2022) (to be codified at 34 C.F.R. pt. 106), https://federalregister.gov/d/2022-13734; Office of Information and Regulatory Affairs, Office of Management and Budget, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202310&RIN=1870-AA16 (final action scheduled for "03/00/2024"). Thus, it would be impractical for this Court to adopt the *Gebser/Davis* Title IX standard, as a new federal regulation will soon require schools to adhere to a different administrative enforcement standard that is more protective of students. This Court has an opportunity to reject the harms embodied in the current Title IX standard and ease the staggering burden survivors face in getting help by adopting Jane Doe's modified ELCRA workplace harassment standard.

C. Congress is considering changing the federal education harassment standards to be more aligned with the modified ELCRA workplace harassment standard.

In December 2022, a group of federal lawmakers, including Michigan's Rep. Debbie Dingell, introduced the Students' Access to Freedom & Educational Rights Act ("SAFER Act") to strengthen protections for students against harassment based on sex, race, color, national origin, and disability. Students' Access to Freedom & Educational Rights Act, S. 5158, 117th Cong. (2022) [hereinafter "SAFER Act"]. The SAFER Act amends Title IX by undoing the Supreme Court's harmful *Gebser*/*Davis* litigation standard—as well as other harmful standards imposed by lower federal courts applying the *Gebser*/*Davis* standard—that unfairly force students, including young children, to suffer more egregious harassment than adults in the workplace to get relief in court. *Id.* § 2(17) (finding that the *Gebser*/*Davis* standard and lower courts' application of it have created standards "more onerous than those applicable to workplace harassment lawsuits under title VII,"

and, "as a result, schools may do less to address harassment against their students than to address the same harassment of their employees"). Along with Title IX, the SAFER Act would amend Title VI and Section 504 to align the standards for all forms of discriminatory harassment. *Id.* § 2(22) ("Legislative action is necessary and appropriate to restore the access to the courts that was sharply limited by *Gebser[]*, *Davis[]*… and other court opinions, [and] restore the availability of a full range of remedies for harassment based on sex, race, color, national origin, disability, or age"). This consistency in standards would also benefit the many students who experience intersecting forms of harassment (which, for example, would ensure that a Black girl who experiences both race- and sex-based harassment would not have to satisfy discordant standards). *Id.* § 2(9), (22) ("any [legislative fix] needs to take into full account the intersectionality of incidents of harassment").

The SAFER Act's changes to Title IX, Title VI, and Section 504 are similar to the ELCRA's standard for workplace harassment with Jane Doe's proposed modifications for the education context. The SAFER Act's standard for actionable harassment focuses on the impact of harassment on a student's ability to "participate[] in or receive[] any benefit, service, or opportunity" from an educational institution, "including by creating an intimidating, hostile, or offensive…environment." *Id.* §§ 101, 102(a), 103(1). It rejects both the "severe *or* pervasive" or "severe *and* pervasive" standards, making the definition of actionable education harassment more akin to the ELCRA's definition of actionable workplace harassment as conduct that "substantially interfere[s] with the employee's employment or created an intimidating, hostile, or offensive work environment." *Radtke*, 501 N.W.2d at 162. Also, like the ELCRA's workplace harassment standard, *Elezovic*, 697 N.W.2d at 861, the SAFER Act would adopt a constructive instead of actual notice standard for all forms of harassment, which would apply to a wide range of school employees and individuals,

including school employees and agents of the school. SAFER Act §§ 101B(1), 102(a), 103(1). Finally, the SAFER Act would require "reasonable care" in a school's response to harassment, meaning a school must "prevent" and "promptly remedy" the effects of harassment. *Id.* §§ 101(1),102(a), 103(1). This rejects the *Gebser/Davis* "deliberate indifference" standard and is similar to the ELCRA's remedial standard for workplace harassment, which requires an employer take "prompt and adequate remedial action," including steps to prevent further harassment of the victim. *Chambers*, 614 N.W.2d at 916, 919.

Over one hundred gender, racial, and disability justice organizations, including Public Justice, Human Rights Campaign, the National Black Justice Coalition, and the National Disability Rights Network, have endorsed the SAFER Act. Nat'l Women's Law Ctr., *The SAFER Act: Students' Access to Freedom & Educational Rights* (Dec. 1, 2022), https://nwlc.org/resource/the-safer-act-students-access-to-freedom-educational-rights. Not only would it be more practical for this Court to apply a standard for student-on-student harassment that is similar to its workplace harassment standard, but doing so would also be in line with the recommendations of scores of civil rights organizations that have concluded that the SAFER Act's changes to the standards for education harassment would more effectively protect students than the current federal Title IX standard. This Court should similarly reject the current Title IX standard and instead adopt the ELCRA's workplace harassment standard, along with Jane Doe's minor proposed modifications for the education context.

CONCLUSION

For the above reasons, the Court should apply the modified ELCRA standard for workplace harassment as proposed by Jane Doe— not the federal Title IX litigation standard—to incidents of student-on-student harassment, and it should reverse and remand for further proceedings.

Respectfully submitted,

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Dated: January 31, 2024

CERTIFICATE OF COMPLIANCE

I certify that this document contains 10,173 countable words, including all footnotes. The document is set in Times New Roman, and the text is in 12-point type with double spacing between both lines and paragraphs.

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