

THE STATE OF SOUTH CAROLINA  
In the Supreme Court

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ON FURTHER APPELLATE REVIEW FROM A JUDGMENT OF THE  
COURT OF APPEALS

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Opinion No. 5504

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JOHN DOE 2 .....Appellant

v.

THE CITADEL .....Respondent

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BRIEF AMICUS CURIAE ON BEHALF OF THE WOMEN'S AND  
CHILDREN'S ADVOCACY PROJECT AT  
NEW ENGLAND LAW|BOSTON IN SUPPORT OF APPELLANT'S  
APPLICATION FOR FURTHER APPELLATE REVIEW

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## **INTERESTS OF AMICUS CURIAE**

The Women's and Children's Advocacy Project (WCAP) at New England Law|Boston is a project of the school's Center for Law and Social Responsibility (CLSR). The WCAP produces the Sexual Violence Legal News (SVLN) project and the Judicial Language Project and provides pro bono advocacy services, including the preparation and submission of amicus briefs, on a variety of legal matters related to violence against women and children. The issues before this Court are of great concern to victimized women, girls, and other affected by sex-based civil rights harm. This brief is offered to provide this Court with arguments not adequately raised by the parties below, in an effort to influence this Court's decision-making process consistent with the best interests of victimized women, girls, and others whose lives are affected by sex discrimination, including sexual assault, when it occurs in connection with education.

## **STATEMENT OF THE ISSUE**

Whether Title IX of the Education Amendments of 1972 applies to all "persons"?

## **STATEMENT OF THE CASE AND STATEMENT OF FACTS**

Amicus adopts and incorporates Appellant's statement of the case and statement of facts.

## ARGUMENT

### I. ALL “PERSONS” ARE PROTECTED BY TITLE IX.

The lower appellate court held that Title IX protects only “participants and students of education programs,” and that only such “students and participants” constitute the “class of persons the statute intends to protect.” *John Doe v. The Citadel*, 2017 WL3272018, at p. 6 of rescript decision. The court ruled that the Plaintiff was not a member of the protected class because he “never attended The Citadel or its summer campus ... [and] was never a student or participant in any educational program at The Citadel.” *Id.* This characterization of the scope of Title IX is not supported by law, and is contrary to public policy.

#### a. The class of people protected is “persons” subject to discrimination based on sex

The plain language of Title IX prohibits discrimination of any “person,” on the basis of sex, by a federally funded education program. 20 U.S.C.A. § 1681(a) (“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any education program or activity receiving Federal financial assistance.”). This broad directive does not limit the statute’s protections to “students” of the institution, but covers all “persons” “subject to discrimination” within a funding recipient’s

control, including nonstudents.<sup>1</sup>

That all “persons” are protected is supported by controlling precedent and federal guidelines. In *North Haven Board of Education v. Bell*, the Supreme Court held that Title IX by its statutory language, specifically Congress’ use of the word “person,” was intended to cover nonstudents. 456 U.S. 512, 520-521 (1982) (extending Title IX’s prohibition to cover employment discrimination by federally funded education programs). The Court commented, “[t]here is no doubt that ‘if we are to give Title IX the scope that its origins dictate, we must accord it a sweep as broad as its language’ ... After all, Congress easily could have substituted ‘student’ or ‘beneficiary’ for the word ‘person’ if it had wished to restrict the scope of §901(a).” *Id.* at 521. The Court noted that the legislative history of Title IX evidenced a congressional intent to broadly “prohibit those areas of traditional discrimination against women,” as a class,<sup>2</sup> and not merely to protect a narrow subcategory of women, such as students. *Id.* at 534-536. The U.S. Department of Education’s Office for Civil Rights (hereinafter “OCR”) has articulated a similarly broad scope of the statute, stating that Title IX protects not only students, but also

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<sup>1</sup> Amicus takes no position on whether Plaintiff has satisfied the criteria of “within a funding recipient’s control,” sufficient to impose liability.

<sup>2</sup> The Supreme Court has repeatedly noted “Title IX’s ‘unmistakable focus on the benefited class.’” *Davis v. Monroe County Bd. Of Educ.*, 526 U.S. 629, 639 (1999) (quoting *Cannon v. University of Chicago*, 441 U.S. 677, 691 (1977)). “Title IX’s beneficiaries plainly include all those who are subjected to ‘discrimination’ ‘on the basis of sex.’” *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 180 n.3 (2005) (quoting 20 U.S.C. §1681(a)).

“employees, applicants for admission and employment, **and other persons** from all forms of sex discrimination.” U.S. Department of Education, Office for Civil Rights, *Title IX Resource Guide* (Apr. 2015) (emphasis added).

The Supreme Court’s holding in *Davis v. Monroe County Board of Education*, 526 U.S. 629, 653 (1999), requires no different result. *Davis* arose out of a school board’s failure to remedy a prolonged pattern of sexual harassment of the plaintiff’s minor daughter by one of her fifth-grade classmates. *Id.* at 633, 635. In the landmark decision, the Supreme Court held that federal funding recipients could be liable for their deliberate indifference to known acts of student-on-student sexual harassment. *Id.* at 633. The Court noted that schools are traditionally held responsible under state law for their failure to protect students from the tortious acts of third parties, and similarly, may be held liable under Title IX when they are deliberately indifferent to harassment “where the funding recipient **has some control over the alleged harassment.**” *Id.* at 644. (emphasis added).

Since the Supreme Court’s decision in *Davis*, courts have applied its holding beyond the narrow fact pattern of the case, so long as the alleged student-on-student harassment occurs in “circumstances wherein the [funding] recipient exercises substantial control over both the harasser and the context in which the known harassment occurs.” *Id.* at 645. This includes circumstances where the harasser is a nonstudent, or where the harassment occurs off campus. *See e.g.*,

*Simpson v. Univ. of Col. Boulder*, 500 F.3d 1170 (10th Cir. 2007) (denying university's motion for summary judgment as to Title IX claim where plaintiff-student sexually assaulted on university campus by nonstudent-football recruit); *Crandell v. N.Y. Coll. Of Osteopathic Med.*, 87 F. Supp. 2d 304 (S.D.N.Y. 2000) (denying summary judgment for defendant medical school because off-campus sexual harassment of medical student by hospital resident who was not under the "direct control" of the medical school fell "within the ambit of Title IX"); *Kauhako v. State of Hawaii Bd. of Ed., et al*, No. 1300567, 2015 WL 470230, (D. Hi., Feb. 3, 2015) (denying motion for judgment on the pleadings after school failed to curtail known harassment of plaintiff-student by perpetrator-student after initial off-campus sexual assault).

**b. To hold that schools owe no duty to nonstudents would promote poor public policy and undermine the purpose of Title IX.**

The lower appellate court's narrow view of Title IX runs counter to responsible public policy, and if endorsed by this Court, would mean that even where all elements of a Title IX claim are met, schools would be free to act with deliberate indifference to sexual harassment and sexual violence on their campuses by their students and employees, so long as the victims are volunteers, visiting athletes, family members of students, guests of the school, etc. Such a narrow reading of Title IX is inconsistent with the objectives of civil rights laws generally, including Title IV of the Civil Rights Act of 1964, where "sex" has long been

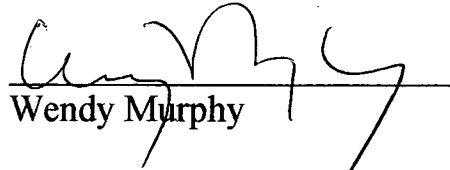
included as a protected class category, and would incentivize rather than deter the very conduct the statute is designed to prevent.

### CONCLUSION

For the foregoing reasons, this Court should reverse the ruling of the lower appellate court, and clarify that Title IX applies to all persons.

Respectfully Submitted,

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