THE STATE OF SOUTH CAROLINA
In the South Carolina Supreme Court

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S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
R. Markey Dennis, Jr., Circuit Court Judge

Appellate Case No. 2015-001505

JOHN DOE 2 ..... Appellant

v.

THE CITADEL ..... Respondent

BRIEF AMICUS CURIAE ON BEHALF OF THE WOMEN'S AND CHILDREN'S ADVOCACY PROJECT AT NEW ENGLAND LAW|BOSTON IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

McLeod Law Group, LLC
W. Mullins McLeod, Jr.
Jacqueline LaPan Edgerton
P.O. Box 21624
Charleston, SC 29413

WENDY MURPHY
Women's and Children's Advocacy Project
Center for Law and Social Responsibility
New England Law|Boston
154 Stuart Street
Boston, MA 02116
617-422-7410
Wmurphy@nesl.edu
BB0#550455 (MA)

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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 Petitioner'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.[1]

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,[2] 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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[1] Amicus takes no position on whether Plaintiff has satisfied the criteria of "within a funding recipient's control," sufficient to impose liability.

[2] 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. ß1681(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

The goal of civil rights laws such as Title IX is to prevent discrimination from happening to whole classes of persons, yet the exceedingly broad language of the court's decision below holds that only *some* protected class persons are protected, and that discrimination against others is legal, even if it occurs on campus and is committed by a school official or enrolled student, so long as the victim is not an enrolled student of the institution where the discrimination occurs. This awkward view permits absurd results, not only because it subverts the stated purpose and plain language of Title IX, but also because it prevents effective redress of even extreme discrimination. For example, if discriminatory graffiti incited Citadel students to harass a protected class category of people, and was distributed on social media to all Citadel students, or was spray-painted on the Citadel's buildings, and the directives specifically said to target victims who are "not Citadel students," school officials would have no duty under civil rights laws to take effective steps to stop the harassment, even though the conduct is forbidden under civil rights laws, and schools are obligated to prevent harassment as a condition of receiving federal funds.

For the foregoing reasons, this Court should grant Petitioner's writ of certiorari and take the opportunity to correct the lower court's decision by clarifying that Title IX applies to all persons.

Respectfully Submitted,

Counsel for Amicus

Wendy Murphy

Women's and Children's
Advocacy Project
New England Law|Boston
154 Stuart Street
Boston, MA 02116
617-422-7410
wmurphy@nesl.edu
BBO#550455

McLeod Law Group, LLC
W. Mullins McLeod, Jr.
Jacqueline LaPan Edgerton SC Bar 100920
P.O. Box 21624
Charleston, South Carolina 29413

CERTIFICATE OF SERVICE

Amicus hereby certifies that this brief complies with Rule of Appellate Practice 211(b), and that service of this brief was made on October 31, 2017, on all parties of record, by first class mail. Another copy of the foregoing was served on all parties by first class mail on December 26, 2017.

Wendy Murphy

Dated: December 26, 2017