STATE OF MICHIGAN
IN THE SUPREME COURT

GEORGEIA KOLOKITHAS, the natural Mother and Next Friend if JANE DOE, a minor,	Michigan Supreme Court Case No. 165441
Plaintiff-Appellant	Court of Appeals Case No. 359090
vs.	
ALPENA PUBLIC SCHOOL DISTRICT and ALPENA BOARD OF EDUCATION,	Alpena Circuit Court Case No. 19-009053-NZ Hon. K. Edward Black
Defendants-Appellees	

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BRIEF OF AMICUS CURAIE

MICHIGAN ASSOCIATION OF SCHOOL BOARDS, MICHIGAN ASSOCIATION OF SUPERINTENDENTS AND ADMINISTRATORS, AND MICHIGAN ASSOCIAITION OF INTERMEDIATE SCHOOL DISTRICTS

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STATEMENT OF INTEREST OF AMICUS CURIAE[1]

The Michigan Association of School Boards (MASB) is a voluntary, non-profit association consisting of approximately 600 local and intermediate school district boards of education throughout the State of Michigan, which includes nearly all of the state's public school districts. Officially organized in 1949, MASB's goal is to advance the quality of public education in this state, promote high educational program standards, help school board members keep informed about education issues, represent the interest of boards of education, and promote public understanding about school boards and citizens involvement in schools. MASB is recognized as a major voice in influencing education issues at the state level. Consequently, for more than 70 years, MASB has worked to provide quality educational leadership services for Michigan Boards of Education and to advocate for student achievement and public education.

The Michigan Association of Superintendents and Administrators (MASA) is a voluntary, non-profit association of public school administrators. MASA provides technical and personal services in addition to a wide array of print and electronic publications, government relations, and professional development opportunities targeted especially for Michigan's top-level school leaders. MASA serves nearly 2000 members including professionals, retirees, and businesses, helping the leaders of Michigan's most important public institutions get better results for more than 1.2 million students.

The Michigan Association of Intermediate School Administrators (MAISA) is comprised of superintendents and administrators representing the 56 Intermediate School Districts (ISD's) in the State of Michigan ISD administrators provide and coordinate essential services to their

[1] Pursuant to MCR 7.312(H)(5), no counsel for any party authored this brief in whole, or in part, and no person or entity aside from *amici,* its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

constituent school districts to facilitate teaching and learning. By coordinating efforts and resources, ISDs provide specialized services to students that would not be affordable/feasible otherwise. These services can include special education, vocational training, interdisciplinary subjects, language programs, early childhood education, parent services, community involvement, transportation, extracurricular activities, lifelong learning and adult education, and other necessary and exciting benefits are shared across districts for the success of every learner.

MASB, MASA, and MAISA (*amici)* are filing this *Amicus Curaie* brief to highlight the need for an appropriate standard on which to determine claims of student-on-student sexual harassment under the Elliott-Larsen Civil Rights Act, MCL 37.2101 et. Seq.

STATEMENT OF THE QUESTIONS INVOLVED

I. **WHETHER THE PLAINTIFF STATED A CAUSE OF ACTION UNDER THE ELLIOTT-LARSEN CIVIL RIGHTS ACT, MCL 37.2101 *ET SEQ.* FOR STUDENT-ON-STUDENT SEXUAL HARASSMENT.**

II. **IF SO, WHETHER THE PLAINTIFF ESTABLISHED A GENUINE ISSUE OF MATERIAL FACT AS TO THAT CLAIM.**

ARGUMENT

The sexual harassment perpetrated against the Plaintiff/Appellant in this case, or in any case, is an anathema. In a perfect world the needs of the victim and the offender, both of whom were children attending the Defendant/Appellee school district's elementary school at the time of the incidents, would be addressed early, appropriately and as a teachable moment. As noted in the Appeals court decision on this case, the US Supreme Court has said "Courts…must bear in mind that schools are unlike the adult workplace and that children may regularly interact in a manner that would be unacceptable among adults." *Davis v Monroe Co. Bd. of Educ. 526 US 629, 651; 119 S. Ct 1661; 143 L Ed 2nd 639 (1999).* Indeed, it has been recognized by our courts that "…schools have an obligation to do more than teach students the curriculum; schools must teach students how to behave appropriately in a civilized society" *Corlett v Oakland Univ. Bd. of Trs., 958 F. Supp.2d 795, 804 (ED Mich, 2013) citing to Bethel Sch Dist. v Fraser, 478 US 675; 106 S Ct 3159; 92 L Ed 2d 549 (1986) ("The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order.").*

The case at bar attempts to address the issue of vicarious liability for peer-on-peer sexual harassment in our school systems under the Elliott-Larsen Civil Rights Act (ELCRA), which is surprisingly a matter of first impression for Michigan courts. Because of the novelty of the issue, the Court of Appeals attempted to modify the tools at hand to determine the matter, instead of crafting a new tool to fit to the unprecedented question. The end result is a test that is akin to using chalk sticks on a smartboard. Now, this Court has issued forth two questions to be briefed in considering the application for leave to appeal. For reasons stated below, *Amici* respectfully requests the leave to be granted and submits to this Court that its first question of -whether the

plaintiff stated a cause of action under the ELCRA for student-on-student sexual harassment- must be answered as no. Because the first question is answered in the negative, the second question is obviated.

WHETHER THE PLAINTIFF STATED A CAUSE OF ACTION UNDER THE ELLIOTT-LARSEN CIVIL RIGHTS ACT, MCL 37.2101 *ET SEQ.* FOR STUDENT-ON-STUDENT SEXUAL HARASSMENT.

A. **The amended hostile workplace claims test does not achieve the goal of establishing vicarious liability to the school district for the actions of students.**

Legal redress for peer-on-peer sexual harassment in a school setting has existed on the federal level since last century (*See Davis, Supra).* There is not currently a comparable redress under state law. In the instant case, the trial court relied on the test to establish a claim of a hostile work environment adopted in *Chambers v Trettco, Inc, 463 Mich 297; 614 NW2d 910 (2000) (citing to Radtke v Everett, 442 Mich 368; 501 NW2d 155 (1993))* which stated:

> In order to establish a claim of hostile environment harassment, an employee must prove the following elements by a preponderance of the evidence:
> (1) the employee belonged to a protected group;
> (2) the employee was subjected to communication or conduct on the basis of sex;
> (3) the employee was subjected to unwelcome sexual conduct or communication;
> (4) the unwelcome sexual conduct or communication 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) respondeat superior.

At issue was whether or not a student in a school can be considered to be an agent of the school such that the doctrine of *respondeat superior* would apply.

> The doctrine of respondeat superior is well established in this state: An employer is generally liable for the torts its employees commit within the scope of their employment. It follows that "an employer is not liable for the torts . . . committed by an employee when those torts are beyond the

> scope of the employer's business. This Court has defined "within the scope of employment" to mean "'engaged in the service of his master, or while about his master's business. Independent action, intended solely to further the employee's individual interests, cannot be fairly characterized as falling within the scope of employment. Although an act may be contrary to an employer's instructions, liability will nonetheless attach if the employee accomplished the act in furtherance, or the interest, of the employer's business. *Hamed v. Wayne Co*, *490 Mich 1, 10-11; 803 NW2d 237 (2011).*

To determine whether or not *respondeat superior* applies, it must be determined whether or not the master in the master/servant(agent) relationship is still in control. The test for control was outlined in *Janik v Ford Motor Co, 180 Mich. 557, 562 (1914)* as

> whether in the particular service which he is engaged or requested to perform he continues liable to the direction and control of his original master or becomes subject to that of the person to whom he is lent or hired, or who requests his services. It is not so much the actual exercise of control which is regarded, as the right to exercise such control. To escape liability the original master must resign full control of the servant for the time being, it not being sufficient that the servant is partially under control of a third person. Subject to these rules the original master is not liable for injuries resulting from acts of the servant while under the control of a third person.

The master/servant(agent) relationship differs significantly than the parent/child relationship or in the instance of schools, the educational entity/student relationship in that there is no loan out/hiring of the servant/student in a scholastic setting. The court of appeals acknowledged schools do not exercise the type of control under a master/servant(agent) relationship to qualify for *respondeat superior*. As such, it looked to replace the doctrine of *respondeat superior* with the doctrine of *in loco parentis.*

The doctrine of *in loco parentis* stems from Blackstone who explained a parent could delegate their parental authority

> to the tutor or schoolmaster of his child; who is then in loco parentis, and has such a portion of the power of the parent committed to his charge,

> [namely,] that of restraint and correction, *as may be necessary to answer the purposes for which he is employed*." 1 W. Blackstone, Commentaries on the Laws of England 441 (1765) (some emphasis added).
>
> Blackstone's explanation of the doctrine seems to treat it primarily as an implied term in a private employment agreement between a father and those with whom he contracted for the provision of educational services for his child, and therefore the scope of the delegation that could be inferred depended on 'the purposes for which [the tutor or schoolmaster was] employed.'

Mahanoy Area Sch Dist v BL, ___US___; 141 S Ct 2038, 2051; 210 L Ed 2d 403, 417-18 (2021) (J. Alito Concurring).

Recognizing that 21st century United States is markedly different from Blackstone's England, the courts have recognized that *in loco parentis* has become a doctrine of inferred parental consent to a public school's exercise of a degree of authority that is commensurate with the task that the parents ask the school to perform. (Id at 419).

In essence, the doctrine of *in loco parentis* establishes an agency relationship between the school and the parents through inferred parental consent. By inserting *in loco parentis* in place of *respondeat superior* in a standard to determine hostile work environments, parents, as principal in the relationship would be vicariously liable for the actions of their agent school administrators. Not the other way around as the court of appeals intended. Because of this, vicarious liability would not attach to the school district, and the plaintiff would not have a claim against the district.

B. **To address a case of first impression, what standard should this honorable court create to address a hostile educational environment due to student-on-student sexual harassment?**

Although Title IX, which prohibits discrimination in educational settings on the basis of sex, is viewed through the eye of federal civil rights, it is not part of the 1964 Civil Rights Act. It

was passed as part of the Higher Education Amendments of 1972 *Public Law No. 92-318, 86 Stat. 235.* However, Title IX was patterned after Title VI of the Civil Rights Act, using identical language with the only exception being the substitution of "sex" for "race, color or national origin." "The drafters of Title IX explicitly assumed that it would be interpreted and applied as Title VI had been during the preceding eight years." *Cannon v Univ of Chicago, 441 US 677,696; 99 S Ct 1946, 1957; 60 L Ed 2d 560, 575 (1979).* Title VI of the Civil Rights Act of 1964 addresses discrimination based on race, color, or national origin in the context of federally funded programs. *See Back, Christine (2020) The Civil Rights Act of 1964: An Overview (CRS Report R46534).* https://crsreports.congress.gov/product/pdf/R/R46534. In 1972 when Title IX was enacted, the critical language in Title VI had already been construed as creating a private remedy. *Cannon at 696.*

ELCRA follows a different legislative path. Initially passed in 1976, the format of it included language prohibiting educational institutions from "discriminating against an individual in the full utilization of or benefit from the institution, or the services, activities, or programs provided by the institution because of religion, race, color, national origin, or sex." *1976 PA 453.* However, it was not until 1980 that specific language to prohibit sexual harassment was added to the statute through 1980 PA 202.

In 1999 the US Supreme Court determined private damages action could lie against a recipient of Title IX funding in cases of student-on-student harassment. (*Davis).* The facts of that case somewhat parallel the current case before this court, in that they involved a prolonged pattern of sexual harassment by an elementary school classmate including inappropriate touching and statements. However, while *Davis* established private damages were allowable under Title IX for student-on-student harassment situations, it also established liability could only attach

where the district where the district acted with deliberate indifference to known acts of harassment in its programs or activities. (*Id.*). The *Davis* court based their analysis on *Gebster v Lago Vista Independent School District 524 US 274, 141 L. Ed. 2d 277 118 S. Ct. 1989 (1998)* which concluded that a recipient of federal education funds may be liable in damages under Title IX where it is deliberately indifferent to known acts of sexual harassment by a teacher. In *Gebster*, where a teacher had an inappropriate sexual relationship with an 8th grade student, the court determined "it would frustrate the purposes of Title IX to permit a damages recovery against a school district for a teacher's sexual harassment of a student based on principles of *respondeat superior* or constructive notice i.e., without actual notice to a school district official." *Gebser at 285*.

Taking into account the 24 years that have passed since the *Davis* decision, *Amici* respectfully urge this honorable court to adopt a new standard for evaluating whether a plaintiff has a claim for student-on-student sexual harassment under Article IV of ELCRA instead of trying to adapt an ill-fitting tool to meet a different purpose. The suggested test is as follows:

1. Was the alleged student-on-student activity an unwelcome sexual advance, request for sexual favors, or other verbal or physical conduct or communication of a sexual nature that had the purpose or effect of substantially interfering with a plaintiff's full utilization of or benefit from the school, or the services, activities, or programs provided by the school?

2. Did the school stand *in loco parentis* of the alleged student perpetrator?

3. Did the school have actual knowledge of the alleged harassment?

4. Did the school act in a deliberately indifferent manner to the harassment?

The first part of the proposed standard relies on language defining sexual harassment in ELCRA. The crucial aspect of this step is whether the alleged sexual harassment was intended to

or resulted in substantial interference with the plaintiff's ability to fully utilized the school, its services, activities or programs. This serves as a replacement to the requirement under *Davis* where the court concluded that an action for student-on-student sexual harassment must be so severe, pervasive and objectionably offensive that it effectively bars the victim's access to an education opportunity or benefit. *Davis at 633.*

The second part of the standard requires the plaintiff to show that the school stood *in loco parentis* to the alleged student perpetrator. This element is crucial to the standard in that it establishes a distinction from sexual harassment from a student in the school, whose parents have given at least an inferred parental consent to the school to exercise proper authority over their child. Without *in loco parentis* authority over the alleged student perpetrator, the school would be powerless to address the issue by discipline, redirection, or any other means. In light of the growing issues of off-campus activities and occurrences, such as ones highlighted by *Mahanoy,* where the Supreme Court found a school district violated a student's first amendment rights by disciplining her for transmitting a vulgar message when the school did not stand *in loco parentis*, it is crucially important to understand where a school's authority, and liability begins and ends in relation to individual pupil actions.

The third and fourth elements of the proposed standard stem from *Davis* which held in relation to student-on-student sexual harassment under Title IX that private damages could lie against a school board in cases of student-on-student harassment if the district acted with deliberate indifference to the known acts of harassment in its programs and activities. (*Davis at 633.)*

C. **Conclusion**

Based on the arguments provided above, *amici* respectfully request that this court grant leave to appeal in this case determine as to question 1 that the plaintiff did *not* state a cause for action under the Elliott Larsen Civil Rights Act, thereby obviating the second question of whether the plaintiff established a genuine issue of material fact as to that claim.

Further, *amici,* respectfully request this honorable court grant leave to appeal to consider the proposed standard in section B *supra* for evaluating whether a plaintiff has a claim for student-on-student sexual harassment under Article IV of ELCRA.

Dated: September 5, 2023

Respectfully Submitted,

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CERTIFICATION OF WORD COUNT

Amici prepared this *Amicus Curaie* brief consistent with MCL 7.312(H) which incorporates MCR 7.212(B). Inclusive of footnotes, this *Amicus Curaie* contains 3,341 countable words.

Dated: September 5, 2023

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