No. A19-0461

STATE OF MINNESOTA
IN SUPREME COURT

Meagan Abel,
Petitioner/Appellant,

v.

Abbott Northwestern Hospital, Allina Health System, and St. Mary's University Minnesota,
Respondents.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Regulations

STATEMENT OF INTEREST

Gender Justice is a non-profit legal advocacy organization that has been operating in Minnesota since 2010. It advocates for gender equality through the law. Gender Justice's public interest mission includes helping courts, employers, schools, and the public better understand the causes and consequences of gender discrimination. Both through direct representation and by advising courts as *amicus curiae*, Gender Justice advocates for legal interpretations that properly account for all forms of gender bias and ensure equity.

As part of its impact litigation program, Gender Justice represents clients in Minnesota that bring sexual harassment claims under the Minnesota Human Rights Act. As an organization dedicated to gender equality, Gender Justice knows that sexual harassment in the workplace and in school damages its targets' career development and advancement and contributes to unequal pay and status. Gender Justice has an interest in opposing sexual harassment and in the proper interpretation of the Minnesota Human Rights Act.

ANALYSIS

The court of appeals incorrectly held all of Ms. Abel's claims were barred by the statute of limitations. First, it was premature for the lower court to determine whether a continuing violation occurred during the limitations period at the motion to dismiss stage. Second, the hostile environments Ms. Abel experienced at Abbott and St. Mary's constitute continuing violations that persisted into the limitations period and should not be barred.

For a hostile work environment claim based upon a continuing violation, this Court should look at whether the hostile work environment continued to exist within the limitations period, not whether there was a specific act of sexual misconduct in that time. This view of continuing violations for hostile work environment claims is proper for three reasons. First, this court should treat continuing hostile work environment claims consistently with continuing violations in other

areas of law. Second, the objectives of statutes of limitation are inapplicable to hostile work environment continuing violations claims, making a strict construction of the limitations period unnecessary. Third, this Court should base its interpretation of hostile environment continuing violations on an understanding of what social science shows about why hostile environments are particularly harmful, which is consistent with the statutory language of the Minnesota Human Rights Act. Hostile environments that persist even after the institution has notice of them are not harmful solely because of the conduct of the harasser, but also because of the conduct of the institution, where the individual expected the institution to respond appropriately, and it failed to do so.

This Court should also consider legal questions that will be raised again on remand. The Minnesota Human Rights Act has broad reach and expansive definitions for covered employers, employees, students, and educational institutions, and this Court should not go outside the statutory language to unnecessarily limit the reach of the statute. Finally, this Court should not import inapplicable case law from Title IX, but instead should rely on Title VII and employment cases under the Minnesota Human Rights Act in interpreting that statute's prohibition on educational discrimination.

I. The Hostile Environments Ms. Abel Experienced at Abbott and St. Mary's Constitute Continuing Violations That Persisted Into the Limitations Period

The Minnesota Human Rights Act ("MHRA") prohibits sex discrimination in both employment and educational institutions. Minn. Stat. § 363A.08 subd. 2; Minn. Stat. § 363A.13 subd. 1. Sexual harassment is a type of sex discrimination. Minn. Stat. § 363A.03 subd. 13. For the purposes of the MHRA, "sexual harassment" is defined to include sexual conduct or communication when "that conduct or communication has the purpose or effect of substantially interfering with an individual's employment, public accommodations or public services, education, or housing, or creating an intimidating, hostile, or offensive employment, public accommodations,

public services, educational, or housing environment." Minn. Stat. § 363A.03 subd. 43. Sexual harassment that creates a hostile environment is prohibited, "even if the sexual harassment was not directly linked to the grant or denial of an economic benefit." *Frieler v. Carlson Mktg. Grp.*, 751 N.W.2d 558, 564 n.3 (Minn. 2008) (quoting *Meritor Savings Bank FSB v. Vinson*, 477 U.S. 57, 66-68 (1986)).

Claims arising from allegations of violations of the MHRA must be brought within one year of "the occurrence of the practice." Minn. Stat. § 363A.28 subd. 3(a). But a continuing violation can bring into its scope actions both inside and outside of the limitations period. A continuing violation occurs when "the unlawful … practice manifests itself over time, rather than as a series of discrete acts." *Giuliani v. Stuart Corp.*, 512 N.W.2d 589, 595 (Minn. Ct. App. 1994). "In order to prove a continuing violation of the MHRA, [the plaintiff] must demonstrate either: (1) a series of related acts, one or more of which fell within the limitations period, or (2) the *maintenance of a discriminatory system both before and during* the limitations period." *Smith v. Ashland, Inc.*, 250 F.3d 1167, 1172 (8th Cir. 2001) (citing *Mandy v. Minnesota Mining*, 940 F. Supp. 1463, 1468 (D. Minn. 1996) (emphasis added)).

A hostile environment continues to exist until it is remedied. Due to the maintenance of discriminatory systems and institutional betrayal at both Abbott and St. Mary's, continuing violations existed at both institutions before and during the limitations period.

II. For Hostile Environment Claims Alleging a Continuing Violation, Plaintiffs Should Have the Opportunity to Prove on the Record that a Hostile Environment Continued to Exist

Procedurally, this Court should not dismiss a hostile work environment claim based on a continuing violation without giving the plaintiff an opportunity to prove on the record that a hostile environment existed that was not remedied. This is particularly true in a pleading state like Minnesota, where this Court rejected the plausibility standard and affirmed that a claim is sufficient

against a motion to dismiss if it is possible "on *any evidence* which might be produced." *Walsh v. U.S. Bank, N.A.,* 851 N.W.2d 598, 603 (Minn. 2014) (emphasis added).

Continuing violation analysis is a "socially and culturally charged inquiry" that is more appropriately decided by jury than judge. Lisa S. Tsai, Note, *Continuing Confusion: The Application of the Continuing Violation Doctrine to Sexual Harassment Law*, 79, Tex. L. Rev. 531, 556 (2000). Some courts have cautioned against dismissing sexual discrimination cases at early stages because interpreting the subtle sexual dynamics of the workplace and ambiguous acts presents an issue better suited for the jury. *See, e.g., Gallagher v. Delaney*, 139 F.3d 338, 342-44 (2d Cir. 1998). Specifically in Minnesota, a court held that a determination of whether the continuing violation doctrine applies should be made post-discovery, upon a factual record. *Whitaker v. 3M Co.,* 2005 Minn. Dist. LEXIS 112, *12. While acknowledging concerns of judicial economy, the court concluded that dismissing the plaintiff's claims "at this early stage of the proceedings" without any discovery would be inappropriate. *Id.* In the three cases where Minnesota appellate courts have specifically assessed the applicability of the continuing violation doctrine to employment discrimination claims, they did so only after trial and in light of the record evidence. *See Sigurdson v. Isanti Cty.*, 448 N.W.2d 62 (Minn. 1989); *Bhd. of Ry. & S.S. Clerks. v. State*, 229 N.W.2d 3 (1975); *Kohn v. City of Minneapolis Fire Dep't*, 583 N.W.2d 7 (Minn. Ct. App. 1998).

The narrow dismissal of Ms. Abel's claims under statute of limitations also undermines the broad remedial purposes of the MHRA. The overriding purpose of the MHRA is to "secure for persons in this state, freedom from discrimination." Minn. Stat. § 363A.02. Here, Ms. Abel was subject to ongoing sexual and racial harassment – "precisely the type of conduct that the MHRA is meant to prevent." *Abel v. Abbott Nw. Hosp.*, No. A19-0461, 2019 Minn. App. Unpub. LEXIS 942, at *22 (Sept. 30, 2019) (Klaphake, J., dissenting). The rights at issue in this case are "too fundamental to be abridged on grounds as superficial as those relied on by the majority." *Milliken v. Bradley*, 418 U.S.

717, 783 (1974) (Marshall, J., dissenting). The court of appeals incorrectly dismissed Ms. Abel's continuing hostile environment claim without giving her the opportunity to prove on the record that the hostile environment continued to exist at both Allina and St. Mary's.

III. Courts Should Evaluate Whether Hostile Environments Continued in the Limitation Period Rather Than Whether a Discrete Act of Harassment Occurred Because This Aligns With the Supreme Court's Treatment of Hostile Environments in *Morgan* and the Treatment of Continuing Violations in Other Contexts

Courts have long struggled with the problem of applying statutes of limitations to ongoing or repeated wrongs, particularly in the employment discrimination context. *See* Kyle Graham, *The Continuing Violations Doctrine*, 43 Gonzaga L. Rev. 271, 272-273 (2007-2008); Roma L. Paetzold & Anne M. O'Leary-Kelly, *Continuing Violations and Hostile Environment Sexual Harassment: When Is Enough, Enough?*, 31 Am. Bus. L.J. 365, 382 (1992) (noting that despite its long history, the continuing violations doctrine continues to be "one of the most confusing and inconsistently applied developments in employment discrimination law.")

Lower courts have inconsistently defined the scope of a hostile environment and what precisely makes it a continuing violation. Some courts have required a specific instance of harassment such as a hostile comment within the limitations period for the claim to be timely. The court of appeals in this case used that analysis, looking for "acts of discrimination" and "incidents of harassment" in the limitations period. *Abel*, 2019 Minn. App. Unpub. LEXIS 942, at *15. The court below acted on the assumption that what creates legal liability for hostile environments is not the poisoned atmosphere that enables and maintains a culture of harassment, but the individual acts of harassment that initially created the hostile environment. *See id.* at *12 (suggesting that the individual acts of harassment were "discriminatory acts" and the ongoing hostile environment was the "consequence" of the acts.).

But a hostile environment is more than, and different from, a set of discrete acts. The Supreme Court made that clear in *National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), where it attempted to clarify how statute of limitations should apply to the continuing nature of hostile environment claims under Title VII. The Court differentiated between hostile environments and discrete acts of discrimination, holding that the entire scope of a hostile work environment claim, including behavior outside the limitations period, can be considered, while discrete acts in the limitations period do not make acts that fall outside the period timely. *Id.* at 115, 122. The Court emphasized that hostile environment claims are "different in kind" from discrete acts and the unlawful employment practice "cannot be said to occur on any particular day." *Id.* at 115.

After *Morgan*, several circuit courts have held that as long as the hostile environment persisted in the limitations period, the continuing violation is timely. *See Jensen v. Henderson*, 315 F.3d. 854, 862 (8th Cir. 2002); *McFarland v. Henderson*, 307 F.3d 402, 408 (6th Cir. 2002). In *Jensen*, the court reversed summary judgment "in light of" the Supreme Court's treatment of hostile work environment claims in *Morgan*, stating the district court "misconstrued the nature of a continuing violation" by requiring the plaintiff to show a discrete act of discrimination in the limitations period. 315 F.3d. at 859. The court concluded that only the "smallest portion" of the unlawful employment practice needs to occur within the limitations period for the claim to be timely. *Id.* In explaining why reversal of summary judgment was proper, the court pointed to the plaintiff's inability to go to work due to her employer's ill treatment, the employer's failure to "take action to stop the conduct, to discipline the perpetrators, and to protect" the plaintiff, and that the hostile environment "still exist[ed]." *Id.* at 861-62. *See also McFarland*, 307 F.3d at 408 (holding that "the existence of the hostile work environment within" the limitation period is enough to enable the court to consider conduct that occurred outside the limit.)

Of course, Justice Thomas in *Morgan* said that for the whole hostile environment to be considered, at least one act must fall within the limitation period. 536 U.S. at 105. But this act does not have to be a discrete act; it merely must show that the hostile environment continued to exist in the limitations period. Here, this bar is met by the June 2016 meeting where Ms. Abel discussed the ongoing hostility at the hospital, Plaintiff's Complaint, (hereinafter Compl.) ¶ 82. It is also met by the last day of her practicum when she was "too scared to even show up" due to Abbott's inability to enforce the no contact order with Dr. Gottlieb and fix the hostile environment. Appellant Br. and Addendum 60, Apr. 19, 2019. Like the plaintiff in *Jensen*, Ms. Abel was unable to complete the practicum due to her employer's ill treatment, and Abbott and St. Mary's failed to take action to stop the conduct and protect the plaintiff from the hostile environment.

Determining whether the hostile environment continued to exist within the limitations period rather than whether there was a specific act of harassment is also consistent with the application of continuing violations in other areas of law. For instance, for continuing trespass, this Court said the statute of limitations does not run "from the initial trespass" but "as long as the offending object remains." *N. States Power Co. v. Franklin*, 122 N.W.2d 26, 30-31 (1963). This Court went on to say that whether a trespass is continuing is a problem of proof that "cannot be reached or resolved short of a motion for summary judgment or a trial." *Id.* For medical malpractice, this Court has held that the statute of limitations will be extended when a doctor's behavior is part of a continuing course of treatment, such as when a doctor fails to treat a plaintiff's injury. *Ciardelli v. Rindal*, 582 N.W.2d 910, 913 (Minn. 1998) (citing *Fabio v. Bellomo*, 504 N.W.2d 758, 762 (Minn. 1993)). For worker's compensation, a continuing violation exists where the company continues to fail to obtain worker's compensation. *State Dep't of Labor & Indus. By Special Comp. Fund v. Wintz Parcel Drivers*, 555 N.W.2d 908, 912 (Minn. Ct. App. 1996). These cases all involve the failure of the defendant to take action: the failure to remove an offending object, the failure to treat a plaintiff's

injury, the failure to obtain worker's compensation. When a violation continues to exist in the limitations period and the defendant fails to correct the violation, claims are timely.

For hostile work environment claims, this Court should similarly look at whether the defendant failed to correct the continuing violation, not whether there was a specific act of sexual misconduct. As long as the hostile environment continued and the defendants failed to correct it, the claim is timely. Just like a doctor failing to treat a plaintiff's injury or a company failing to remove an offending object, the defendants here failed to correct the hostile environments. Abbott had not fired Dr. Gottlieb for his egregious conduct; in the limitations period, he continued to work at Abbott. Compl. ¶ 94. In the limitations period, Ms. Abel met with hospital representatives to discuss "ongoing hostility." Compl. ¶ 86. In the limitations period, Dr. Solon admitted the school "had not taken action." Compl. ¶ 236. In the limitations period, Dr. Nestigen instructed Ms. Abel to apply to an internship site affiliated with Dr. Gottlieb and told her to "suck it up." Compl. ¶ 227. This provides sufficient evidence that the hostile environment continued into the limitations period and the defendants failed to remedy it at their respective institutions.

IV. Because the Purposes of Statutes of Limitations Are Not Served by Hostile Environment Continuing Violations Claims, Courts Should Treat Claims As Timely As Long As the Hostile Environment Continued in the Limitations Period

Because the hostile work environment continued to exist at Abbott and St. Mary's within the limitations period, this Court should find Ms. Abel's claims are timely. Statutes of limitations purposes are not served by hostile environment continuing violation claims, so courts should treat these claims as timely as long as the hostile environment continued to exist within the limitations period. Under Title VII of the Civil Rights Act of 1964, plaintiffs can recover for all injurious manifestations of a hostile work environment, regardless of when they occurred, "provided that the same hostile environment persisted up into the limitations period." Graham, supra, at 281.

One justification for statutes of limitations is avoiding the unfairness of exposing defendants to stale claims because memories fade, witnesses move, and documents disappear. Elad Peled, *Rethinking the Continuing Violation Doctrine: The Application of Statutes of Limitations to Continuing Torts Claims*, 41 Ohio N. Univ. L. Rev. 343, 351 (2015). Where the challenged violation is a continuing one, however, the staleness concern "disappears." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380 (1982). This is because if the last part of unlawful conduct occurred within the limitations period, then at least some of the evidence pertaining to it is "still fresh." James R. MacAyeal, *The Discovery Rule and the Continuing Violation Doctrine as Exceptions to the Statute of Limitations for Civil Environmental Penalty Claims*, 15 Va. Envtl. L. J. 589, 631 (1996).

Another justification for statutes of limitations is to encourage plaintiffs to promptly pursue their claims and not sleep on their rights. *See, e.g., United States v. Kubrick*, 444 U.S. 111, 117 (1979). This too is not served by continuing hostile work environment claims. Plaintiffs bringing hostile work environment claims have to prove that the harassment was significant enough to violate the statute, which effectively requires them to delay filing suit until the harassment is sufficiently significant. Tsai, supra, at 538.

Efficient judicial administration is another common justification for statutes of limitations, but it too is not served by a narrow view of continuing violations in the hostile work environment context. This objective aims to promote efficient court management and judicial economy because determining "distant historical facts" is more complicated and time-consuming than proving recent ones. MacAyeal, supra, at 592; Peled, supra, at 351. By recognizing continuing violations as a single violation, however, courts eliminate the need for the plaintiff to bring successive lawsuits for everything that contributes to the hostile environment.

In this case, the traditional justifications for statutes of limitations do not apply, so this Court should interpret the hostile environment claims as timely because they constitute continuing

violations. First, staleness is not a concern. Ms. Abel met with Abbott representatives in June 2016, which is in the limitations period, to discuss "ongoing hostility" within the hospital environment. Compl. ¶ 82. Within the limitations period, Dr. Solon contacted Ms. Abel to see how she was doing and the two exchanged correspondence about the harassment she experienced and the ongoing hostility. Compl. ¶¶ 229-34. The facts raised by Dr. Finch demonstrate that the hostile culture continued after Ms. Abel left and even after Dr. Gottlieb resigned. Compl. ¶¶ 160-64, 173. Because the hostile environment continued into the limitations period, supported by conversations, meetings, and emails, at least some of the evidence of the continuing violations is fresh. Nor is the concern about a plaintiff sleeping on her rights applicable. Ms. Abel raised concerns about the harassment she experienced early into her practicum and continued to do so even after she ended the practicum early due to the ongoing hostile environment. Compl. ¶¶ 46-50, 82. Both Abbott and St. Mary's had ample notice of the harassment and hostile environment; this is not a case involving surprise to the defendants. Finally, judicial economy supports interpreting the hostile environments at Abbott and St. Mary's as continuing violations so that Ms. Abel did not have to file multiple claims for each instance of harassment by actors at Abbott and St. Mary's.

V. The Nature of Hostile Environment Sexual Harassment Also Calls for a Broad Interpretation of Continuing Violations

Where a plaintiff alleges a continuing hostile work environment stemming from sexual harassment, courts should broadly interpret the continuing violation as it relates to the statute of limitations. This is proper given the nature of sexual harassment and what is known about how victims are harmed.

A. In Cases of Sexual Harassment, Where Victims Underreport and Delay Reporting, Strict Construction of the Limitations Period is Improper for Continuing Violation Claims.

A broad interpretation of a continuing violation is proper for instances of sexual harassment because empirical research and the #MeToo movement show that victims of sexual harassment wait

to report, if they report at all. While Ms. Abel reported her harassment early and often (Compl. ¶¶ 46-50, 82), this is uncommon and this Court should consider the impact on future litigants in addition to Ms. Abel when interpreting statutory language.

While sexual harassment in the workplace is common, reporting it is not.[1] *The Facts Behind the #MeToo Movement: A National Study on Sexual Harassment and Sexual Assault*, Stop Street Harassment 1 (Feb. 2018), http://www.stopstreetharassment.org/wp-content/uploads/2018/01/Full-Report-2018-National-Study-on-Sexual-Harassment-and-Assault.pdf. The #MeToo movement presented an "extraordinary moment" of awareness and willingness to listen to and believe people who tell their stories of harassment, Tristin K. Green, *Was Sexual Harassment Law a Mistake? The Stories We Tell*, 128 Y. L.J. F. 152, 167 (2018), but the movement also highlighted why victims of sexual harassment do not speak out, Natalie Dugan, Note, *#TimesUp on Individual Litigation Reform: Combatting Sexual Harassment Through Employee-Driven Action and Private Regulation,* 53 Colum. J.L. & Soc. Probs. 247, 258 (2020). The #MeToo movement made clear that victims of sexual harassment often do not go public with their claims for months or even years. Daniel Hemel & Dorothy S. Lund, *Sexual Harassment and Corporate Law*, 118 Colum. L. Rev. 1583, 1605 (2018). Victims may fear their claim will not be believed or taken seriously[2], worry about social and professional retaliation[3], doubt the

[1] A national survey in 2018 found that 38% of women experienced sexual harassment in their workplace, but only 1 in 10 women filed an official complaint. *The Facts Behind the #MeToo Movement: A National Study on Sexual Harassment and Sexual Assault*, Stop Street Harassment 1 (Feb. 2018), http://www.stopstreetharassment.org/wp-content/uploads/2018/01/Full-Report-2018-National-Study-on-Sexual-Harassment-and-Assault.pdf.

[2] In discrimination cases, fewer than 1% of claims reach trial. Lauren B. Edelman, Aaron C. Smyth, & Asad Rahim, *Legal Discrimination: Empirical Sociolegal and Critical Race Perspectives on Antidiscrimination Law*, Ann. Rev. Law. Soc. Sci. 2016 at 402.

[3] This fear is well-founded, as a study found that 75% of employees who spoke out against workplace sexual assault faced some form of retaliation. Lilia M. Cortina & Vicki J. Magley, *Raising Voice, Risking Retaliation: Events Following Interpersonal Mistreatment in the Workplace*, 8 J. Occupational Health Psych. 247, 255 (2003).

confidentiality of the internal grievance process, or think the outcomes of investigations or court proceedings will not be satisfactory[4]. *Id.* In fact, victims view reporting sexual harassment as the least desirable response available to them and only seek institutional relief as a "last resort" when all other efforts – denial, self-blame, endurance, avoidance – have failed. Louise F. Fitzgerald et al., *Why Didn't She Just Report Him? The Psychological and Legal Implications of Women's Responses to Sexual Harassment*, 51 J. of Soc. Issues 117, 121 (1995).

Adding to the delay, perpetrators often actively discourage their victims from disclosing, employing a deny, attack, reverse victim and offender strategy (DARVO). Sarah J. Harsey et al., *Perpetrator Responses to Victim Confrontation: DARVO and Victim Self-Blame*, 26 J. of Aggression, Maltreatment & Trauma 644, 644 (2017). In light of these barriers, courts take an "entirely unrealistic view" of how quickly employees should complain about harassment and how many obstacles they must overcome to do so. Joanna Grossman, *Moving Forward, Looking Back: A Retrospective on Sexual Harassment Law*, 95 B. U. L. Rev. 1029, 1045 (2015). Given what is known about how victims of sexual harassment respond, courts should not take a strict a view of the statute of limitations for claims that are based on a continuing violation.

Courts applying the continuing violations doctrine should accommodate hostile work environment claims by considering victims' difficulties in asserting their rights in due time. Courts should consider the psychological effects of sexual harassment when conducting continuing violations analysis. Tsai, supra, at 554. It is hard for victims to both psychologically comprehend the harassment they are experiencing and to realize when a series of minor events becomes sufficiently

[4] Select Task Force Meeting of June 15, 2015—Workplace Harassment: Examining the Scope of the Problem and Potential Solutions, Written Testimony of Mindy Bergman, EEOC (June 15, 2015). https://www.eeoc.gov/eeoc/task_force/harassment/testimony_bergman.cfm [https://perma.cc/V27L-P5C4] (making the point that "reporting is a gamble that is not worth taking in terms of individual well-being.").

significant to satisfy the objective requirements of the cause of action for hostile environments. Peled, supra, at 363. Postponing the limitation period due to inability or difficulty to file suit is especially justified where the plaintiff suffers from inherent weakness or inequality in an ongoing relationship she has with the defendant. *Id.* While not directly applicable to the facts of this particular case, these issues are relevant for other litigants and should be part of this Court's consideration when creating binding precedent interpreting the statute of limitations for the Minnesota Human Rights Act.

B. The Harm From Institutional Betrayal Is Independent of the Harm From Harassing Acts Themselves, Demonstrating The Need to Consider An Institution's Failure To Act As A Component of a Continuing Violation

A broad interpretation of a continuing violation is especially important in cases involving institutional betrayal, which can be part of a continuing hostile environment. Institutional betrayal refers to "wrongdoings perpetrated by an institution upon individuals dependent on that institution," including failure to "prevent or respond supportively" to wrongdoings individuals commit "within the context of the institution." Jennifer J. Freyd, *Institutional Betrayal and Institutional Courage*, https://dynamic.uoregon.edu/jjf/institutionalbetrayal/index.html (last visited Jan. 8, 2020). In other words, this phrase describes the harm an institution does to those who depend on it. Jennifer J. Freyd, *When Sexual Assault Victims Speak Out, Their Institutions Often Betray Them*, Conversation (Jan. 11, 2018), http://theconversation.com/when-sexual-assault-victims-speak-out-their-institutions-often-betray-them-87050.

The concept is consistent with betrayal trauma theory, which posits that abuse committed within a close relationship is more harmful than abuse committed by a stranger. Carly Parnitzke Smith & Jennifer J. Freyd, *Institutional Betrayal*, 69 Am. Psychologist 575, 577-78 (2014). This abuse by an institution may be as damaging to an individual as interpersonal abuse. Carly Parnitzke Smith & Jennifer J. Freyd, *Dangerous Safe Havens: Institutional Betrayal Exacerbates Sexual Trauma*, 26 J. Traumatic

Stress 119, 120 (2013). Trauma victims who experience institutional betrayal by a trusted institution like a university report exacerbated posttraumatic symptoms. Marina N. Rosenthal et al., *Still Second Class: Sexual Harassment of Graduate Students*, 40 Psychol. of Women Q. 364, 374 (2016). Institutional betrayal may be more damaging because it creates a sense that the institution could have done something to prevent the traumatic experience from occurring. Smith, *Dangerous Safe Havens*, supra, at 123.

Sexual harassment and institutional betrayal are common for female graduate students like Ms. Abel. Graduate-level female students experience significantly more sexual harassment from faculty, staff, and students than their male counterparts. Rosenthal, supra, at 364. A study that focused specifically on psychology graduate programs found that 75% of female graduates had experienced sexual harassment from a male faculty member. Margaret Schneider et al., *Sexual Harassment Experiences of Psychologists and Psychological Associates During Their Graduate School Training*, 11 Canadian J. of Hum. Sexuality 159, 160 (2002). For graduate students, harassment by faculty or staff is most strongly associated with institutional betrayal. Rosenthal, supra, at 374. This may be due to graduate students' relative dependence on faculty and staff – even those who perpetrate harassment – for professional outcomes. *Id.*

A hostile environment does not exist due to one individual. Many individuals perpetrate harassment and discrimination, and many others allow this behavior to occur with impunity. For hostile environment claims where the plaintiff continued to experience institutional betrayal into the limitations period, the hostile environment constituted a continuing violation that should not be time barred.

VI. Abel Is A Covered Employee And Student Who May Bring Claims Against The Appellees Under The Definitions In The Minnesota Human Rights Act.

If this Court reverses the Court of Appeals' decision on the statute of limitations and remands this case to the district court, it should also resolve other questions of law that will persist on remand.

Specifically, this Court should find that under the broad definitions of covered individuals under the statute, Ms. Abel is an individual who may bring Minnesota Human Rights Acts claims against the Appellees.

A. The Definitions In The Minnesota Human Rights Act Are Deliberately Broad.

The MHRA includes expansive definitions of who is protected from discrimination. The MHRA uses circular definitions to define employment. An employee is "an individual who is employed by an employer …" Minn. Stat. § 363A.03, subd. 15, and an employer is "a person who has one or more employees." Minn. Stat. § 363A.03, subd. 16. In 1986, state appellate courts adopted, without discussion, an analysis of employer/employee relationships from workers compensation law. *State by Johnson v. Porter Farms, Inc.*, 382 N.W.2d 543, 549 (Minn. Ct. App. 1986)(deciding whether a sharecrop arrangement was that of landlord/tenant or employer/employee for purposes of the MHRA). Case law specific to the MHRA has not been developed to extend to modern employment relationships including independent contractors, unpaid interns, or students in a practicum.

For the purposes of education discrimination under the MHRA, an educational institution is defined extremely broadly as a "public or private institution and includes an academy, college, elementary or secondary school, extension course, kindergarten, nursery, school system and a business, nursing, professional, secretarial, technical, vocational school, and includes an agent of an educational institution." Minn. Stat. § 363A.03, subd. 14. "It is an unfair discriminatory practice to discriminate in any manner in the full utilization of or benefit from any educational institution, or the services rendered thereby to *any person* …" Minn. Stat. § 363A.13, subd. 1 (emphasis added). "*Any person aggrieved* by a violation of this chapter may bring a civil action …" Minn. Stat. § 363A.28 (emphasis added).

These definitions are expansive, and the purpose of the statute is to broadly eradicate discrimination across the state. Minn. Stat. §§ 363A.02, 363A.03. This Court should not go outside the language of the statute to limit its reach.

B. Minnesota Courts Should Be Cautious In Applying Case Law From Private Litigation Under Title IX To The Minnesota Human Rights Act's Prohibition On Education Discrimination.

In its motion to dismiss, St. Mary's cited to Title IX case law from private litigation for the proposition that an educational institution is not responsible for the actions of even closely affiliated non-employees such as Dr. Gottlieb. Saint Mary's Reply Memorandum in Support of Rule 12 Motion, June 4, 2018, at 4 (citing *Davis v. Monroe Cty. Bd. Of Educ.*, 526 U.S. 629, 643 (1999)). But this argument based on Title IX private litigation is both inaccurate and inapplicable to a Minnesota Human Rights Act claim.

Both the federal Title IX and the Minnesota Human Rights Act prohibit sex-based discrimination in schools. 20 U.S.C. § 1681; Minn. Stat. § 363A.13, subd. 1. Minnesota courts frequently rely on interpretations of federal anti-discrimination statutes in interpreting the Minnesota Human Rights Act. *McBee v. Team Indus., Inc.*, 925 N.W.2d 222, 228 (Minn. 2019); *see also Doe v. Blake Sch.*, 310 F. Supp. 3d 969, 980 (D. Minn. 2018) ("The parties agree that '[t]he MHRA is typically construed in accordance with federal precedent concerning analogous federal statutes.'") (quoting *Mumid v. Abraham Lincoln High Sch.*, 618 F.3d 789, 793 (8th Cir. 2010)).[5]

However, in analyzing a claim of sex-based discrimination in education, applying interpretations of Title IX to the MHRA would be inappropriate. "When provisions of the [Minnesota act] are not similar to provisions of federal anti-discrimination statutes . . . we have departed from the federal rule in our interpretation of the [Minnesota act]." *McBee*, 925 N.W.2d at

[5] Note that "a federal interpretation of state law is not binding on [Minnesota state courts]." *McBee v. Team Indus., Inc.*, 925 N.W.2d 222, 228 n. 3 (Minn. 2019) (citing *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975)).

228 (citing *Kolton v. County of Anoka*, 645 N.W.2d 403, 407 (Minn. 2002) (parentheticals in original)); *see also Cummings v. Koehnen*, 568 N.W.2d 418, 423 n. 5 (Minn. 1997) (declining to follow the federal rule for interpreting Title VII claims when analyzing claims brought under the MHRA because of textual distinction's in the statute: "Title VII's statutory prohibition turns on discrimination, while Minnesota's statutory language includes the specific definition of sexual harassment."). Because the protections against sex-based discrimination under the MHRA are meaningfully different from those under Title IX, the Court should look to the plain text of the Minnesota statute and interpretations of Title VII—rather than interpretations of Title IX—to guide the standard it uses to evaluate claims raised under the MHRA.

The MHRA is enforced in part through an explicit private right of action: "The Commissioner or a person may bring a civil action seeking redress for an unfair discriminatory practice directly to district court." Minn. Stat. § 363A.33, subd. 1. That private right of action expressly includes several forms of damages available to remedy discrimination, including compensatory and punitive damages, *see* Minn. Stat. § 363A.29, injunctive relief, and attorneys' fees, *see* Minn. Stat. § 363A.33, subd. 6-7.

By contrast, Title IX contains no express private right of action; instead, one was read into the statute by the Supreme Court. *See Cannon v. University of Chicago*, 441 U.S. 677, 717 (1979) ("We . . . conclude that petitioner may maintain her lawsuit, despite the absence of any express authorization for it in the statute."). Because there is no express cause of action, courts have narrowly limited the ability to recover monetary damages. *See Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 283–84 (1998). In order to bring a successful claim for damages under Title IX, courts have set the exceptionally high bar of "actual notice." The Title IX standard of "actual notice" is based on the fact that it is a funding statute:

> Because we have repeatedly treated Title IX as legislation enacted pursuant to Congress' authority under the Spending Clause, private damages actions are available

> only where recipients of federal funding had adequate notice that they could be liable for the conduct at issues. When Congress acts pursuant to its spending power, it generates legislation 'much in the nature of a contract: In return for federal funds, the States agree to comply with federally imposed conditions.' In interpreting language in spending legislation, we thus, 'insist that Congress speak with a clear voice,' recognizing that 'there can, of course, be no knowing acceptance [of the terms of the putative contract] if a State is unaware of the conditions [imposed by the legislation] or is unable to ascertain what is expected of it.

Davis v. Monroe Cty. Bd. of Educ., 526 U.S. at 639–40 (internal citations omitted) (brackets in original); *see also Gebser*, 524 U.S. at 289 ("It would be unsound . . . for a statute's *express* system of enforcement to require notice to the recipient and an opportunity to come into voluntary compliance while a judicially *implied* system of enforcement permits substantial liability without regard to the recipient's knowledge or its corrective actions upon receiving notice.") (emphasis in original). The limitation on when an educational institution itself may be liable for the discriminatory actions of a third party are restricted for similar reasons—a fact that is directly at issue in this litigation. *Gebser*, 524 U.S. at 283–84.

The incredibly difficult standard that must be met to be awarded damages under Title IX distinguishes it from other federal statutes, such as Title VII, as well as from the MHRA. Both Title VII and the MHRA explicitly provide for a private right of action. *See* 42 U.S.C. §§ 2000e to 2000e–15 (1964); Minn. Stat. § 363A.33, subd. 1. This is largely because both statutes are intended to directly prohibit discriminatory practices, *see* Minn. Stat. § 363A.13. subd. 1. ("It is an unfair discriminatory practice to discriminate in any manner in the full utilization of or benefit from any educational institution, or the services rendered thereby to any person because of race, color, creed, religion, national origin, sex, age, marital status, status with regard to public assistance, sexual orientation, or disability, or to fail to ensure physical and program access for disabled persons."); *see also Gebser*, 526 U.S. at 286 ("[Title IX's] contractual framework distinguishes Title IX from Title VII, which is framed in terms not of a condition but of an outright prohibition. Title VII applies to all

employers without regard to federal funding and aims broadly to 'eradicate discrimination throughout the economy.'").

By contrast, Title IX is a condition on federal funding, not an outright prohibition. *Gebser*, 524 U.S. at 286. As the Court in *Gebser* explained, "whereas Title VII aims centrally to compensate victims of discrimination, Title IX focuses more on 'protecting' individuals from discriminatory practices carried out by recipients of federal funds." 524 U.S. at 287. Title IX's distinct structure and purpose are considerations which the Court has held "are pertinent not only to the scope of the implied right, but also to the scope of the available remedies." *Gebser*, 524 U.S. at 284. Thus, it would be inappropriate to impute the judicial interpretation of the standard for Title IX claims to the MHRA, as the latter is both structurally distinct (in that it explicitly includes a private right of action and the right to recover damages) and has a distinct purpose (intended to prohibit, not to define a contractual framework) from the former.

Outside of Minnesota, courts have regularly recognized that while judicial interpretations of federal civil rights statutes might be persuasive precedent for interpreting state civil rights acts, these interpretations are not binding. *See, e.g., Pippen v. State*, 854 N.W.2d 1, 18 (Iowa 2014) (disparate impact analysis under Title VII is not required when interpreting the Iowa Civil Rights Act). Ultimately, this is an acknowledgment of the fact that state courts are the final arbiters of state law. *Danforth v. Minnesota*, 552 U.S. 264, 291 (2008) ("State courts are the final arbiters of their own state law . . ."). In this case, the relevant state law is meaningfully different from the most closely analogous federal law. To reflexively adopt the standard applied in Title IX cases and apply it to claims of sex-based discrimination in education under the Minnesota Human Rights Act would be to disregard the stated purpose and paths for relief provided by the Minnesota state legislature.

In the Minnesota Human Rights Act, the explicit statutory definitions for sex discrimination and sexual harassment are located in the definitions section, (Minn. Stat. § 363A.03, subds. 13, 43)

outside the parts of the statute that apply those definitions to environments including the workplace and educational institutions. Minn. Stat. §§ 363A.08, 363A.13. The appropriate analogy, then, is to Title VII case law and MHRA employment case law, according to both the structure of the MHRA and the similarity of Title VII to the MHRA as opposed to the dissimilarity of Title IX. Under Title VII and the MHRA employment law, an employer may be responsible for harassment by a third party, as long as the employer "knew or should have known" about the harassment. *Costilla v. State*, 571 N.W.2d 587, 591 (Minn. Ct. App. 1997), 29 C.F.R. § 1604.11(e). The same standard should apply to MHRA educational discrimination cases.

CONCLUSION

The Minnesota Supreme Court should reverse the decision of the Court of Appeals and the district court, and remand this case after offering guidance on other questions of law that will be raised on remand.

Respectfully Submitted,

Dated: January 23, 2020

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with the following requirements:

1. The brief was drafted using Microsoft Word 365 word-processing software.
2. This brief was drafted using Garamond 12-point font, compliant with the typeface requirements; and
3. There are 6602 words in this brief.

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