UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

K.R., a minor, by and through his parent and natural guardian, Kali Proctor, P.K., a minor, by and through his parent and natural guardian, Roynetter Birgans, and L.G., a minor, by and through her parent and natural guardian, Desmond Gilbert,

Plaintiffs,

v.

Duluth Public Schools Academy d/b/a Duluth Edison Charter Schools,

Defendant.

Court File No. 19-CV-00999 (DWF/LIB)

BRIEF OF *AMICUS CURIAE* GENDER JUSTICE, IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

IDENTITY AND INTEREST OF *AMICUS CURIAE*

Gender Justice files this brief in support of Plaintiffs' opposition to Defendant's motion for summary judgment (ECF 109).[1] 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.

[1] No portion of this brief was prepared by counsel for a party, and no monetary contribution was received. See Fed. R. Civ. App. P. 29(a)(4)(E).

As part of its impact litigation program, Gender Justice represents clients in Minnesota that bring hostile environment claims under the Minnesota Human Rights Act. Gender Justice has litigated several hostile environment cases on behalf of students, including the recent *N.H. v. Anoka-Hennepin School District No. 11*, 950 N.W.2d 553, 560-61 (Minn. Ct. App. 2020), which established a state-wide precedent for Minnesota schools. As an organization dedicated to gender equality, Gender Justice knows that a hostile environment in school deprives students of educational opportunities. Gender Justice has an interest in opposing hostile environments in school and in the proper interpretation of the Minnesota Human Rights Act.

ANALYSIS

Minnesota courts interpret the Minnesota Human Rights Act to provide more expansive protections to Minnesotans than federal law. Within the MHRA, Minnesota appellate courts have ruled that the law is even more protective of students than it is of employees. This Court should not import inapplicable case law from Title VI, but instead should rely on Title VII and employment cases under the Minnesota Human Rights Act in interpreting the MHRA's prohibition on educational discrimination.

Hostile environment doctrine first developed in the federal courts interpreting Title VII, which prohibits discrimination on many bases, including both race and sex, in employment. Courts held that racially hostile work environments, where employees were subjected to racial slurs and hostility, violated civil rights law. The Supreme Court in 1986

concluded that a sexually hostile work environment constituted discrimination "on the basis of … sex" under Title VII. Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986).

In the context of employment, courts created the legal standards for hostile environments as follows: to be actionable discrimination, an employer "knew or *should have known*" of the hostile environment. To incur liability, the employer need only fail to end the harassment. A hostile environment is bad enough for a plaintiff to survive summary judgment if it is severe *or* pervasive, a sliding scale that includes both single extreme instances of harassment as well as relatively minor but frequent harassment. Hostile environments created by co-workers or even customers are actionable. When a hostile environment is created by a supervisor, the employer is subject to strict liability unless the employer proves an affirmative defense. In addition, an action can be considered discriminatory even without proving an intent to discriminate, if the action has a disparate impact based on race or sex.

But as courts considered similarly-worded prohibitions on race and sex discrimination in the education context, the standards that the courts created were much different. To be responsible for a hostile educational environment under federal law, a school needs actual notice of the hostile environment, and schools are only held liable for the school's own actions, so a plaintiff must prove that education administrators showed "deliberate indifference." The hostile environment must be exceedingly bad: so severe *and*

pervasive *and* so objectively offensive that it deprived the student of access to the educational opportunities or benefits provided by the educational institution.

Federal courts sometimes neglect any analysis of the Minnesota Human Rights Act when a claim is litigated under both federal and state anti-discrimination law. *See Mumid v Abraham Lincoln High School*, 618 F.3d 789, 793 (8th Cir. 2010) (noting that "neither party argues that the federal and state standards should differ in this case."). In those circumstances, federal courts often simply assume that the analysis will be the same. But the Minnesota Human Rights Act is a single statute that prohibits both employment discrimination and education discrimination. Minn. Stat. §§ 363A.08, 363A.13. To determine which of these two sets of very different standards applies to the Minnesota Human Rights Act, it is critical to look at the reasons that different standards developed under federal employment anti-discrimination law and other federal civil rights laws.

I. Title VI and Title IX Were Enacted Pursuant to Spending Clause Authority And Without Explicit Private Rights of Action

Title VI and Title IX are enacted pursuant to Congress' authority under the Spending Clause. *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 639–40 (1999). Title IX, for example, rather than outright prohibiting sex discrimination in education as a whole, instead conditions the receipt of federal funds on eliminating sex discrimination. "No person in the United States shall, on the basis of sex . . . be subjected to discrimination *under any education program or activity receiving Federal financial assistance*." 20 U.S.C. § 1681 (emphasis added). Title VI, similarly, conditions the receipt of federal funds in any area on eliminating race discrimination. "No person in the United States shall, on the ground of race, color, or national origin . . . be subjected to discrimination *under any program or activity receiving Federal*

financial assistance." 42 U.S.C. § 2000d (emphasis added). Using its power under the Spending Clause permitted Congress to reach into areas such as education, which have historically been the province of state and local governments.

In addition to this contract-like prohibition on discrimination, neither Title VI nor Title IX contain an explicit private right of action. The enforcement mechanism explicitly included in the statutes calls for federal agency enforcement through Offices for Civil Rights. If OCR finds entities to be out of compliance with Title VI or Title IX, the entities receive notice of that violation and then have the ability to voluntarily come into compliance prior to losing any federal funding. See 20 U.S.C. § 1682. Private lawsuits are only permitted under Title VI and Title IX because of Supreme Court rulings that Congress implied a private right of action. *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 for private plaintiffs to recover monetary damages. *See Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 283–84 (1998).

These two distinct features, the reliance on Spending Clause power and the lack of an explicit private right of action, connect to form much of the basis for idiosyncratic standards in these statutes. *See id.* 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).

When refusing to adopt Title VII standards for Spending Clause civil rights laws, courts have explicitly pointed to these two textual differences. *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.

These textual features of Spending Clause-based civil rights laws such as Title VI and Title IX have determined the doctrinal differences between these laws and non-Spending Clause-based civil rights laws such as Title VII. A few of these doctrinal differences are highlighted below.

II. Doctrinal Differences Between Spending Clause Civil Rights Laws and Others Can Be Traced To These Textual Distinctions

For entities to be liable under Title VI or Title IX, they must first have had "actual notice" of a violation of the law. This standard can be directly traced to the fact that these are Spending Clause statutes.

> 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 issue. 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.
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> *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. In contrast, Title VII permits liability when entities "knew or should have known" about a violation. 29 C.F.R. § 1604.11(d). Minnesota courts have expressly adopted this standard for employment discrimination under the MHRA. *Continental Can Co., Inc. v. State*, 297 N.W.2d 241, 249 (Minn. 1980) (superseded by the legislature incorporating the standards of harassment into the statute).

In cases of student-created hostile environments, under Title IX and Title VI, entities are not vicariously liable for harassment committed by others. Instead, schools are only held liable in private lawsuits for money damages for their own misconduct in showing "deliberate indifference" to known harassment. *Gebser*, 524 U.S. at 290. This standard can be directly traced to the fact that these Spending Clause statutes have no explicit private right of action, and that therefore a lawsuit seeking money damages is limited. "We agree with respondents that a recipient of federal funds may be liable in damages under Title IX only for its own misconduct." *Davis*, 526 U.S. at 640. This means that schools may not be held vicariously liable under agency principles for harassment committed by a teacher. *Gebser*, 524 U.S. at 285 ("[I]t 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* ….") (emphasis in original). Title VII, however, permits strict liability

under agency principles for the conduct of supervisors because employers have provided them with authority. *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 760-65 (1998). Employers may even be held liable for the actions of non-employees. 29 C.F.R. § 1604.11(e). Minnesota courts have expressly adopted this standard for employment discrimination under the MHRA. *Frieler v. Carlson Marketing Group, Inc.*, 751 N.W.2d 558, 567 (Minn. 2008).

Under the Spending Clause statutes, plaintiffs must show a hostile environment for students that is "so severe, pervasive, *and* objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities." *Davis*, 526 U.S. at 651 (emphasis added). For a hostile environment to be actionable under Title VII, however, it need only be "severe *or* pervasive." *Meritor Sav. Bank, FSB, v. Vinson*, 477 U.S. 57, 67 (1986) (emphasis added). Minnesota courts have adopted this standard for employment discrimination under the MHRA, though the Minnesota Supreme Court has explicitly disavowed some 8th circuit case law restricting what can be considered severe or pervasive and has cautioned that this is typically a question for a jury. *Kenneh v. Homeward Bound, Inc.*, 944 N.W.2d 222, 230-32 (Minn. 2020).

Under Title VI, a plaintiff cannot prove a claim of discrimination using a disparate impact analysis. *Alexander v Sandoval*, 532 U.S. 275 (2001). Instead, only intentional discrimination is prohibited under Spending Clause anti-discrimination laws. *See Mumid*, 618 F.3d at 793. Again, Title VII provides broader protection against discrimination. "It is a distinguishing feature of a Title VII cause of action that discriminatory impact suffices to establish a prima facie case of discrimination." *Firefighters Inst. For Racial Equality v. City of St.*

Louis, 549 F.2d 506, 510 (8th Cir. 1977). Minnesota courts have expressly adopted this standard for employment discrimination under the MHRA. *Brotherhood of Ry. and S.S. Clerks v. State by Balfour*, 303 Minn. 178, 191 (1975). Disparate impact claims are only unavailable under the MHRA's public accommodations section, solely because of the precise wording of that section. *Monson v. Rochester Athletic Club*, 759 N.W.2d 60, 67 (Minn. Ct. App. 2009).

The textual distinctions between Spending Clause anti-discrimination laws and other anti-discrimination laws such as Title VII therefore lead to significant doctrinal differences. This creates a dilemma for federal courts looking to interpret the MHRA. The MHRA prohibits hostile environments in employment and education, as well as in other realms. To determine which of these two sets of very different standards applies to the Minnesota Human Rights Act, this court should consider that Title VII is the statute with the best match for the MHRA's text and purpose, and that Title VII best reflects Minnesota's high level of protections for students.

III. The Minnesota Human Rights Act Goes Further Than Parallel Federal Statutes To Protect Minnesotans From Discriminatory Hostile Environments

Both the federal Title VI and the Minnesota Human Rights Act prohibit race-based discrimination in schools. 42 U.S.C. § 2000d; Minn. Stat. § 363A.13, subd. 1. Similarly, 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. It is true that Minnesota courts frequently rely on interpretations of federal anti-discrimination statutes in interpreting the MHRA. *McBee v. Team Indus., Inc.*, 925 N.W.2d 222, 228 (Minn. 2019). But the Minnesota Supreme Court has emphasized that the MHRA is more protective than parallel federal laws.

Abel v. Abbott Northwestern Hosp., 947 N.W.2d 58, 75-76 (Minn. 2020) ("[T]he Human Rights Act has historically 'provided more expansive protections to Minnesotans than federal law.'") (quoting *Kenneh*, 944 N.W.2d at 229).

"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 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 a federal rule for interpreting Title VII claims when analyzing claims brought under the MHRA because of textual distinctions in the statute: "Title VII's statutory prohibition turns on discrimination, while Minnesota's statutory language includes the specific definition of sexual harassment.").

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 . . ."). "[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)).

This court should take care, then, before assuming that the MHRA's prohibition on education discrimination follows case law for Title IX and Title VI. In many instances, relying on the Spending Clause statutes is not consistent with Minnesota state law principles.

IV. Minnesota Human Rights Act Claims Should Follow Title VII, Not Title VI or Title IX.

Like Title VII, the MHRA explicitly provides for a private right of action. *See* 42 U.S.C. §§ 2000e to 2000e–15 (1964); Minn. Stat. § 363A.33, subd. 1. "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.

Like Title VII, the MHRA lacks the contractual framework of the federal Spending Clause statutes. Both Title VII and the MHRA 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.'")

Minnesota courts have not applied *Gebser*, *Davis*, or *Sandoval* to the Minnesota Human Rights Act. To the extent that Minnesota courts treat education discrimination claims differently than employment discrimination claims, Minnesota courts have held that students in school are entitled to greater protection from discrimination, not less protection, than employees. *N.H. v. Anoka-Hennepin School District No. 11*, 950 N.W.2d 553, 560-61 (Minn. Ct. App. 2020). In the *N.H.* decision, the Minnesota Court of Appeals found that the anti-discrimination language in the education provision of the statute is broader and more sweeping than that in the employment section. *Id.* at 560. In addition, the Minnesota Court of Appeals held that providing an environment free from discrimination is more important in education than in employment because education is compulsory, and access to education is a state constitutional right. *Id.* at 561. Under this precedent, it is clear that Minnesota courts would not require any heightened standard to prove hostile environment claims in school as compared to employment.

Thus, it would be inappropriate to impute the judicial interpretation of the standard for Title VI and Title IX claims to the MHRA. The statutory language protecting students from discrimination under the MHRA is meaningfully different and more protective of students' rights than the language in Title VI and Title IX. This Court should use the standards from Title VII case law, that have been adopted by Minnesota courts for the MHRA, when evaluating education discrimination claims under the MHRA.

CONCLUSION

Minnesota courts are especially protective of students' rights. This court should not assume that legal standards unique to Spending Clause anti-discrimination laws such as Title

VI and Title IX would apply to the Minnesota Human Rights Act. Instead, this court should use standards developed under Title VII, which is more consistent with Minnesota's protections under the MHRA.

Respectfully Submitted,

Dated: October 26, 2021

GENDER JUSTICE

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