No. 22-15714

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL GRABOWSKI,

Plaintiff-Appellant,

v.

ARIZONA BOARD OF REGENTS, *et al.*

Defendants-Appellees.

Appeal from the United States District Court
for the District of Arizona
Case No. 4:19-cv-00460
The Honorable Scott H. Rash

BRIEF OF *AMICI CURIAE* CIVIL RIGHTS ORGANIZATIONS IN SUPPORT OF PLAINTIFF-APPELLANT MICHAEL GRABOWSKI

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CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amici curiae* state that no *amicus* has a parent corporation and that no publicly held company owns 10% or more of the stock of any *amicus*.

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INTERESTS OF *AMICI*

Amici curiae are nineteen civil rights organizations that work to ensure equal access to education for lesbian, gay, bisexual, transgender, and queer (LGBTQ) students. Some litigate Title IX cases on behalf of survivors of anti-LGBTQ discrimination, including anti-LGBTQ harassment; others advocate for policies that benefit student-victims. From their significant experience, *amici* recognize that judicial enforcement of Title IX that is consistent with the statute's full breadth and promise is crucial to ensuring student survivors of anti-LGBTQ harassment receive the support they need to learn and thrive in school. *Amici* have a particular interest in ensuring judicial recognition that Title IX prohibits anti-LGBTQ harassment, and that students can report such harassment without fear of retaliation. Further information about *amici* and their interest in this case is available in the Appendix.[1]

[1] *Amici* are Public Justice, the American Civil Liberties Union, the ACLU of Arizona, Arizona Trans Youth and Parent Organization, Atlanta Women for Equality, the Clearinghouse on Women's Issues, Equal Rights Advocates, Family Violence Appellate Project, Human Rights Campaign, Know Your IX, Legal Aid at Work, the National Alliance to End Sexual Violence, the National Center for Lesbian Rights, the National Center for Youth Law, the National Women's Law Center, Rocky Mountain Victim Law Center, the Sikh Coalition, University of Arizona Pride Law, and the Women's Law Project.

Consistent with Federal Rule of Appellate Procedure 29(a)(4)(E), *amici*'s counsel authored this brief, no party's counsel authored the brief in whole or in part, and no party beyond *amici* contributed any money towards the brief. The parties to the case have consented to *amici* filing this brief.

STATEMENT REGARDING ORAL ARGUMENT

Amici curiae respectfully seek leave to participate in oral argument because their subject matter expertise may be helpful to the Court in addressing the important issues presented by this appeal. *See* Fed. R. App. P. 29(a)(8).

INTRODUCTION

Every year, many thousands of students are harassed based on their actual or perceived sexual orientation. Fortunately, they are protected by federal law: Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*, requires their schools to take steps to end sex-based harassment and support its victims so they can continue to learn in the wake of abuse. Title IX also forbids schools from retaliating against students who speak up. These rights are necessary both to ensure individual students' access to education and to combat systemic inequalities.

Michael Grabowski was entitled to Title IX's protections when he reported that his teammates at the University of Arizona were subjecting him to ongoing harassment because they thought he was gay. Because Michael alleges the University instead ignored his concerns and then punished him for reporting, his Title IX claims for deliberate indifference and retaliation should proceed to discovery. Yet the district court improperly narrowed Title IX's "broad reach," *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005), and dismissed his claims.

First, it wrongly viewed the harassment to which Michael was subjected as simple non-discriminatory name-calling, holding that Title IX does not prohibit sexual orientation-based harassment and that the misconduct was not sufficiently severe, pervasive, and objectively offensive to give rise to money damages. In doing so, the district court ignored the Supreme Court's clear statement in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), that discrimination based on sexual orientation is a form of prohibited discrimination based on sex—a holding this Court has since recognized applies to Title IX. The district court also overlooked the seriousness of the daily harassment.

Second, the district court imposed an erroneously limited view of what constitutes a "protected activity" for purposes of Michael's retaliation claim. It held that Michael lacked a good faith belief that he was reporting sex discrimination because the harassment was not yet, in the district court's view, serious enough to be legally actionable. But plaintiffs may reasonably believe that they are reporting discrimination even if they ultimately do not succeed on their harassment claim. For good reason. Under the district court's view of anti-retaliation law,

students would have to delay reporting until harassment escalated to the point that it disrupted their education.

This Court should reverse—not only to give Michael the chance to pursue his case, but to protect the Title IX rights of students throughout the Ninth Circuit. As organizations dedicated to protecting LGBTQ students' rights and furthering gender equality, *amici* ask the Court to send a clear statement that Title IX protects LGBTQ students from harassment, and to forcefully reject the district court's hollow vision of anti-retaliation protections. As this case demonstrates, students' access to education depends on it.

ARGUMENT

I. Michael Pleaded Actionable Sex-Based Harassment.

A. Harassment based on sexual orientation is sex-based harassment.

Title IX plainly requires schools to address harassment based on sexual orientation because it is a form of sex-based discrimination. The district court's conclusion to the contrary cannot be squared with *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), which held discrimination based on sexual orientation is sex-based, or with this Court's subsequent

recognition in *Doe v. Snyder*, 28 F.4th 103, 114 (9th Cir. 2022), that *Bostock* applies to Title IX.

Title IX prohibits sex discrimination in federally-funded education programs and activities. 20 U.S.C. § 1681(a). Sex-based harassment is a form of prohibited sex discrimination. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 281–82 (1998); *Meritor Sav. Bank, FSB v. Vinson,* 477 U.S. 57, 64 (1986); *Perugini v. Safeway Stores, Inc.,* 935 F.2d 1083, 1086–88 (9th Cir. 1991). Accordingly, schools must take steps to address such harassment to comply with Title IX, much as employers must do to comply with Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*. *See Gebser*, 524 U.S. at 281 (recognizing schools' responsibility to address sexual harassment of students by teachers, analogizing to employer liability under Title VII); *see also Davis ex rel. LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 643 (1999) (explaining schools may be liable for failing to address student-on-student harassment).

In *Bostock*, a Title VII case, the Supreme Court held that discrimination based on sexual orientation is discrimination "on the basis of sex." 140 S. Ct. at 1743; *see id.* at 1747. This means that sexual orientation-based harassment is sex-based harassment. In light of

Bostock, then, Title VII requires employers to address harassment based on an employee's actual or perceived sexual orientation. *E.g.*, *Redmon v. Yorouz Auto. Tenn., Inc.*, 834 F. App'x 234, 235 (6th Cir. 2021) (per curiam) (noting that *Bostock* requires employers to address sexual orientation-based harassment under Title VII); *see also Roberts v. Glenn Indus. Grp., Inc.*, 998 F.3d 111, 120–21 (4th Cir. 2021) (holding harassment based on an employee's perceived sexual orientation could "violate[] Title VII").

This Court has already held that *Bostock*'s reasoning applies equally to Title IX, explaining that "Title IX's protections [are] consistent[] with those of Title VII." *Snyder*, 28 F.4th at 114; *see also Emeldi v. Univ. of Or.*, 698 F.3d 715, 724 (9th Cir. 2012) (reasoning that Title VII's "substantive standards" apply in Title IX cases). The Fourth Circuit, too, has recognized that *Bostock* applies to Title IX. *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020), *as amended* (Aug. 28, 2020), *cert. denied*, 141 S. Ct. 2878 (2021).[2]

[2] Although not at issue in this case, the same logic applies equally to harassment and other forms of discrimination based on a student's transgender identity, since *Bostock* also held that such discrimination is sex-based. *Bostock*, 140 S. Ct. at 1741–42.

The United States has reached the same conclusion. In a memorandum on *Bostock,* the Department of Justice explained that the language used in Title VII and Title IX's prohibitions of sex-based discrimination is "sufficiently similar . . . as to be considered interchangeable." Pamela S. Karlan, Principal Deputy Assistant Att'y Gen., U.S. Dep't of Justice, Civ. Rts. Div., *Memorandum re: Application of* Bostock v. Clayton County *to Title IX of the Education Amendments of 1972* (Mar. 26, 2021), https://www.justice.gov/crt/page/file/1383026/download. As a result, it has explained, Title IX forbids discrimination based on a student's sexual orientation. *Id.*; *see also* Exec. Order No. 13,988, 86 Fed. Reg. 7023, 7023 (Jan. 20, 2021) (stating that *Bostock*'s prohibition on sexual orientation-based discrimination applies to Title IX); Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41,390, 41,531–33, 41,571 (proposed July 12, 2022) (to be codified at 34 C.F.R. pt. 106) (proposing Title IX regulation that defines sex discrimination to encompass discrimination based on sexual orientation, and relying on *Bostock*).

And because schools must address sexual orientation-based discrimination, Title IX requires they address harassment based on an individual's actual or perceived sexual orientation. *E.g.*, *Doe v. Univ. of Scranton*, No. 3:19-cv-01486, 2020 WL 5993766, at *5 n.61 (M.D. Pa. Oct. 9, 2020); *Dimas v. Pecos Indep. Sch. Dist. Bd. of Educ.,* No. 1:21-cv-00978, 2022 WL 816501, at *4 (D.N.M. Mar. 17, 2022); *Koenke v. St. Joseph's Univ.,* No. 19-4731, 2021 WL 75778, at *2 (E.D. Pa. Jan. 8, 2021); *see also* 87 Fed. Reg. at 41,568–69, 41,571–75, 41,577–78 (proposing Title IX regulation that requires schools to address harassment based on sexual orientation).

The district court improperly concluded that, as a matter of law, sexual orientation-based harassment is not sex-based, and so is not actionable under Title IX. ER-22–24; *see also* ER-9. Specifically, the district court reasoned that *Bostock* was based on Title VII's statutory language, and so was "limited to Title VII." ER-23. This Court, however, directly rejected that reasoning in *Snyder*, 28 F.4th at 114. Title VII forbids discrimination "because of . . . sex," 42 U.S.C. § 2000e–2(a), and Title IX prohibits discrimination "on the basis of sex," 20 U.S.C. § 1681(a). In *Snyder,* this Court explained that those phrases mean the

same thing. 28 F.4th at 114. Indeed, *Snyder* noted that the Supreme Court used those same words interchangeably in *Bostock*. *Id.* (citing *Bostock*, 140 S. Ct. at 1737–38, 1743–45, 1753). The district court, then, was wrong that, as a matter of law, the harassment Michael experienced based on his perceived sexual orientation was not sex-based.

B. Michael sufficiently pleaded severe, pervasive, and objectively offensive harassment.

The district court was wrong that, as a matter of law, Michael has not alleged severe, pervasive, and objectively offensive sex-based harassment. Michael alleges that he was taunted for seeming gay and called a "fag" on a nearly daily basis. *E.g.*, ER-144–46 (Third Am. Compl. at ¶¶ 22–25, 35). His teammates even posted online a homophobic video about Michael, and refused to let him sleep in a bed at their pre-season cross-country camp. ER-144–45 (Third Am. Compl. at ¶¶ 21, 25); ER-147 (Third Am. Compl. at ¶¶ 36, 39); *see also* Opening Br. at 8–10 (describing harassment). That is far more than simple name-calling.

In similar cases, courts have found that verbal harassment may be severe and pervasive. For example, in a Title VII case, this Court held that a plaintiff was subjected to "severe and pervasive" harassment when coworkers "habitually called him sexually derogatory names, referred to

him with the female gender, and taunted him for behaving like a woman." *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 872–73 (9th Cir. 2001); *see also, e.g.*, *Ellison v. Brady*, 924 F.2d 872, 873–74, 878 (9th Cir. 1991) (holding verbal harassment in the form of love letters, notes, and comments was "severe and pervasive"); *Sewell v. Monroe City Sch. Bd.*, 974 F.3d 577, 585 (5th Cir. 2020) (holding harassment might be severe, pervasive, and objectively offensive when student was "ridiculed" on the basis of his race "'every other day' for much of the school year"); *Doe v. E. Haven Bd. of Educ.*, 200 F. App'x 46, 48–49 (2d Cir. 2006) (holding student called a "slut" and other gendered epithets experienced severe and pervasive harassment); *Farpella-Crosby v. Horizon Health Care*, 97 F.3d 803, 806 (5th Cir. 1996) (holding frequent comments and questions about plaintiff's sexual activity amounted to "severe and pervasive" harassment).

Plus, "fag," used as a pejorative against gay people, is a particularly egregious slur. *See, e.g.*, George W. Smith, *The Ideology of "Fag": The School Experience of Gay Students*, 39 Soc. Q. 309, 309 (1998) (explaining function of term "fag" to "isolat[e] the gay student and incit[e] to physical violence"); Elizabethe Payne & Melissa Smith, *LGBTQ Kids, School*

Safety, and Missing the Big Picture: How the Dominant Bullying Discourse Prevents School Professionals from Thinking about Systemic Marginalization or . . . Why We Need to Rethink LGBTQ Bullying, QED: J. in GLBTQ Worldmaking, Fall 2013, at 1, 24 (explaining how the use of the word "fag" and other homophobic epithets serve as "powerful tools for marking any student who falls outside social norms"). The district court's dismissal of the harassment Michael alleges as mere name-calling trivializes homophobic harassment, and might have been informed by its incorrect belief that such harassment is not discriminatory.

Further, "matters of degree—such as severity and pervasiveness—are often best left to the jury. Thus, [the Tenth Circuit has] observed that 'the severity and pervasiveness evaluation is particularly unsuited for summary judgment because it is quintessentially a question of fact,' and it is even less suited for dismissal on the pleadings." *Doe v. Sch. Dist. No. 1, Denver, Colo.*, 970 F.3d 1300, 1311–12 (10th Cir. 2020) (citation omitted). Accordingly, this Court should reverse the dismissal of Michael's Title IX harassment claim.

II. Michael and His Parents Engaged in a Protected Activity When They Reported the Sex-Based Harassment.

A. Title IX forbids retaliation against people like Michael who lodge good faith complaints of sex-based harassment, regardless of whether the harassment is ultimately found actionable.

Students are protected from retaliation when they report sex-based harassment to their school, even if the harassment is not yet severe and pervasive. The Supreme Court and this Court's cases require that rule.

Title IX prohibits retaliation for reporting sex-based discrimination. *E.g.*, *Jackson*, 544 U.S. at 171; *Ollier v. Sweetwater Union High Sch. Dist.*, 768 F.3d 843, 867 (9th Cir. 2014). "Reporting incidents of discrimination is integral to Title IX enforcement and would be discouraged if retaliation against those who report went unpunished," the Supreme Court has explained. *Jackson*, 544 U.S. at 180. "Indeed, if retaliation were not prohibited, Title IX's enforcement scheme would unravel." *Id.* A plaintiff may bring a retaliation claim if he suffers an adverse action as a result of his own report, *id.*, or the report of someone

close to him, *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170, 173–75 (2011).[3]

"[T]he Title VII framework generally governs Title IX retaliation claims." *Emeldi*, 698 F.3d at 725.[4] Broadly speaking, then, "a plaintiff who lacks direct evidence of retaliation must first make out a prima facie case of retaliation by showing (a) that he or she was engaged in protected activity, (b) that he or she suffered an adverse action, and (c) that there was a causal link between the two." *Id.* at 724.[5] "In the Title IX context, 'speak[ing] out against sex discrimination'—precisely what [Michael]

[3] In a "third-party" retaliation claim, the defendant takes an adverse action against the plaintiff in order to punish a different person for engaging in a protected activity. *Thompson*, 562 U.S. at 174–75, 178. For example, in the leading case, a company fired the plaintiff after his fiancée, who was also an employee, filed a sex discrimination charge. *Id.* at 172. The Supreme Court has "decline[d] to identify a fixed class of relationships for which third-party reprisals are unlawful," but has noted that adverse action against "a close family member will almost always" suffice. *Id.* at 175. Michael, then, can surely state a claim for being removed from his team as a result of his parents' protected activity.

[4] Although not at issue here, Title IX and Title VII retaliation causation standards differ. *Varlesi v. Wayne State Univ.*, 643 F. App'x 507, 518 (6th Cir. 2016).

[5] Michael has pleaded a prima facie case, which is sufficient to survive the Regents' motion, but plaintiffs need not do so at this early stage. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508, 514–15 (2002); *Austin v. Univ. of Or.*, 925 F.3d 1133, 1136 (9th Cir. 2019); *Sheppard v. David Evans & Assoc.*, 694 F.3d 1045, 1050 n.2 (9th Cir. 2012); *see also Cafasso U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1054 n.4 (9th Cir. 2011) (explaining "'the same standard of review applies' to motions brought under" Rule 12(b)(6) and Rule 12(c)).

says that [he and his parents] did—is protected activity." *Emeldi*, 698 F.3d at 725 (quoting *Jackson*, 544 U.S. at 178).

Crucially, complainants do not lose protections even if their reports are not ultimately substantiated or found legally sufficient to state a claim. It is a matter of blackletter law that "[t]he protected status of [the] alleged statements holds whether or not [the plaintiff] ultimately would be able to prove her contentions about discrimination." *Id.* (citing *Moyo v. Gomez*, 40 F.3d 982, 984 (9th Cir. 1994)). All that is necessary for a complainant to be protected from retaliation is for her report to be lodged based on a "reasonable belief" that the underlying conduct is discriminatory. *Moyo*, 40 F.3d at 984 (emphasis removed). That reasonableness standard "makes due allowance . . . for the limited knowledge possessed by most [anti-discrimination] plaintiffs about the factual and legal bases of their claims." *Id.* at 985. The question is whether a layperson, not a lawyer or properly instructed jury, could believe the report alleged discrimination. *See id.*; *see also Kengerski v. Harper*, 6 F.4th 531, 540 (3d Cir. 2021) (declining to "saddle the reasonable employee with all of the doctrinal twists and turns that a civil rights lawyer would need to navigate"); *E.E.O.C. v. Rite Way Serv., Inc.*,

819 F.3d 235, 242 (5th Cir. 2016) (asking whether an employee "not instructed on Title VII law as a jury would be, [could] reasonably believe that she was providing information about a Title VII violation").

As a practical matter, this means a harassment plaintiff "does not need to succeed on the sex[-based] harassment claim to succeed on a retaliation claim." *Steinaker v. Sw. Airlines, Co.*, 472 F. Supp. 3d 540, 558 (D. Ariz. 2020). She does not need to wait until harassment escalates to the point of being legally actionable before she can report without fear of retaliation. On this, the courts of appeals are unanimous. *See, e.g.*, *Kengerski*, 6 F.4th at 540 (3rd Cir. 2021) (explaining plaintiffs are protected from retaliation for reporting harassment insufficiently serious to "support a hostile-environment claim"); *Rite Way Serv.*, 819 F.3d at 242 (5th Cir. 2020) ("[T]he reasonable belief standard recognizes there is some zone of [harassing] conduct that falls short of an actual violation but could be reasonably perceived to violate Title VII."); *Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264, 285 (4th Cir. 2015) (en banc) (explaining that a jury could reject a harassment claim because the "conduct was not sufficiently serious . . . but award relief on the retaliation claims" stemming from the plaintiff's harassment complaint);

La Grande v. DeCrescente Distrib. Co., 370 F. App'x 206, 212 (2d Cir. 2010) ("The test for whether someone has 'a good faith, reasonable belief' . . . does not turn on whether the conduct was ultimately 'severe or pervasive' enough to constitute a violation of Title VII."); *Gupta v. Fla. Bd. of Regents*, 212 F.3d 571, 586 (11th Cir. 2000) ("Although the conduct [the plaintiff] complained about was not . . . severe and pervasive . . . , we cannot say she lacked a 'reasonable good faith belief' that she was being sexually harassed."), *abrogated on other grounds by Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006).

That rule makes sense because a plaintiff may reasonably believe sub-actionable harassment is unlawful discrimination. *E.g.*, *Rite Way Serv.*, 819 F.3d at 242–44 (explaining plaintiff was protected from retaliation because she reasonably could have believed her supervisor's harassment violated Title VII); *Gupta*, 212 F.3d at 586 (similar). It also makes sense because harassment *is* a form of discrimination even if it is not (yet) actionable. As explained above, sex-based harassment is sex-based discrimination, which is forbidden by Title IX. *See supra* p. 7 (citing *Gebser*, 524 U.S. at 281–82 and *Meritor*, 477 U.S. at 64). The "severe and pervasive" standard concerns how serious sexual harassment must be

before a school may be liable in money damages for its deliberate indifference; it is not an element of what *defines* sexual harassment. *See Davis*, 526 U.S. at 650–52. In *Davis*, for example, the Court said that, to meet Title IX's liability standard, "a plaintiff must establish sexual harassment of students that is . . . severe, pervasive, and objectively offensive." *Id.* at 651. That would be illogical if sexual harassment were *definitionally* severe, pervasive, and objectively offensive. To the contrary, pervasive but not severe sex-based harassment—for example—is still sex-based harassment, and so still discriminatory. *See Meritor*, 477 U.S. at 67–68 (discussing "severe or pervasive" sexual harassment).

Indeed, at the time of Michael's harassment, the U.S. Department of Education used a "severe or pervasive" standard in evaluating administrative complaints alleging Title IX violations. *See* Off. for Civ. Rts., U.S. Dep't of Educ., Q&A on Campus Sexual Misconduct 1 (2017), https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf; Off. for Civ. Rts., U.S. Dep't of Educ., Questions and Answers on Title IX and Sexual Violence 1 (2014), https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf. A school's failed response to harassment that was "severe or pervasive," but

fell short of *Davis*'s "severe and pervasive" threshold, could not give rise to money damages. *Davis*, 526 U.S. at 650–52. But that harassment was still discriminatory, and schools still had an obligation to address it to avoid administrative sanctions.

B. The district court's rule would lead to absurd results.

The district court's rule would frustrate Title IX's purpose. As the Supreme Court has explained, the statute's effectiveness depends on reporting. *Jackson*, 544 U.S. at 180–81. But if the district court were right, students could not safely report harassment until it had escalated to the point that it was so severe, pervasive, and objectively offensive as to deprive them of educational opportunities. Its rule, then, "is at odds with the hope and expectation that [victims] will report harassment early, before it rises to the level of a hostile environment." *Boyer-Liberto*, 786 F.3d at 282. Students and families need to be able to lodge reports before the harassment escalates so that schools can intervene before victims' educations are derailed—the very injury Title IX seeks to prohibit. 20 U.S.C. § 1681(a) (prohibiting exclusion from or denial of benefits of education programs or activities); *see also, e.g.*, *Cannon v. Univ. of Chi.*, 441 U.S. 677, 704 (1979) (noting Congress passed Title IX

"to provide individual citizens effective protection against [discriminatory] practices"). Schools also benefit from early reports, which give officials the chance to care for their students and to act well before a lawsuit might be imminent.[6]

The district court's logic does not only imperil students and schools. It could have equally devastating consequences for workers, tenants, and other whistleblowers if applied to other civil rights statutes interpreted *in pari materia* with Title IX. *See, e.g.*, *Jackson*, 544 U.S. at 176–77 (presuming that Congress meant for Title IX to be "interpreted in conformity with" Fair Housing Act retaliation case law); *Emeldi*, 698 F.3d at 724 (explaining Title IX and Title VII's anti-retaliation protections are substantively similar); *Wetzel v. Glen St. Andrew Living Cmty., LLC*, 901 F.3d 856, 868 (7th Cir. 2018) (citing Title VII, Title IX, and ADEA standards for retaliation in FHA retaliation case); *see also Chavez-*

[6] Severe, pervasive, and objectively offensive harassment is not, on its own, sufficient to establish a school's liability. The plaintiff must also establish the school had actual notice—usually provided by a harassment report—and was deliberately indifferent. *Davis*, 526 U.S. at 633, 641–43. A student too afraid of retaliation to report, then, not only risks continued harassment and lost educational opportunities, but also likely forfeits her opportunity for legal redress. *Cf. Boyer-Liberto*, 786 F.3d at 283 (citing *Crawford v. Metro. Gov't of Nashville & Davidson Cnty., Tenn.*, 555 U.S. 271, 279 (2009)) (explaining how an employer could wrongly escape liability if employees were not protected from retaliation when they reported harassment that was not yet actionable).

Lavagnino v. Motivation Educ. Training, Inc., 767 F.3d 744, 749 (8th Cir. 2014) (applying Title VII retaliation standard to state whistleblower law); *Fournier v. Exec. Off. of the Trial Ct.*, 498 F. Supp. 3d 193, 208-09 (D. Mass. 2020) (same), *rev'd and remanded on other grounds sub nom. Fournier v. Massachusetts*, No. 20-2134, 2021 WL 4191942 (1st Cir. Sept. 15, 2021); *Franklin v. Pitts,* 826 S.E.2d 427, 431 (Ga. Ct. App. 2019) (same).

C. Michael and his parents engaged in a protected activity.

For all the reasons explained above, the district court erred in holding that, as a matter of law, Michael lacked a good faith belief that he had experienced discrimination simply because—in the court's view—he could not fulfill Title IX's demanding liability standard for money damages. Michael certainly could have reasonably believed that the daily harassment he experienced was sufficiently serious as to be legally actionable, regardless of whether the district court, or this Court, ultimately disagreed. *Cf. supra* Part I.B (explaining severity and pervasiveness of alleged harassment). He was *correct* that the conduct he reported was discrimination. And, though not necessary, the harassment was legally actionable under the Department of Education's

contemporaneous standards, underscoring the good faith basis for his belief. Because the pleadings provide no reason to infer bad faith on Michael or his parents' part, the Court should reverse and remand to allow Michael's retaliation claim to proceed.

III. Title IX's Protections Against Sexual Orientation-Based Harassment and Retaliation Are Crucially Important to Students.

Title IX's protections from sexual orientation-based harassment, and retaliation for reporting the same, are important not only for Michael but for thousands and thousands of other students. Too many young people experience harassment at school based on their sexual orientation. According to a recent national survey of LGBTQ students, 68.7% of survey participants had been verbally harassed on the basis of their sexual orientation over the last year. Joseph G. Kosciw et al., GLSEN, The 2019 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation's Schools 28 (2020), https://www.glsen.org/sites/default/files/2021-04/NSCS19-FullReport-032421-Web_0.pdf. Over a quarter had been physically harassed, and eleven percent had been assaulted, on the same basis. *Id.* at 28–29. Nearly 60% of LGBTQ students "reported feeling

unsafe at school because of their sexual orientation." *Id.* at 16. And another study found that LGB youth are bullied at nearly twice the rate of their heterosexual peers. Michelle M. Johns et al., U.S. Dep't of Health & Hum. Servs. & Ctrs. for Disease Control & Prevention, Trends in Violence Victimization and Suicide Risk by Sexual Identity Among High School Students — Youth Risk Behavior Survey, United States, 2015–2019, at 23 (2020), https://www.cdc.gov/mmwr/volumes/69/su/pdfs/su6901a3-H.pdf.

This harassment poses a grave threat to students' education. Sexual orientation-based harassment leads to lower academic performance and grade point averages, and higher rates of absenteeism. Kosciw, *supra*, at 48. It also leads to "lower educational aspirations." *Id.* at 47–48. Younger students, for example, are less likely to plan to attend college if they have been subjected to severe sexual orientation-based harassment. *Id.* at 47. Harassment also has significant effects on LGBTQ students' mental health. In a 2021 study, LGBTQ students who reported being bullied in the past year were three times more likely to have attempted suicide during the same period than those who had not been bullied. The Trevor Project, The Trevor Project Research Brief: Bullying

and Suicide Risk Among LGBTQ Youth 2 (2021), https://www.thetrevorproject.org/wp-content/uploads/2021/10/The-Trevor-Project-Bullying-Research-Brief-October-2021.pdf.[7]

School staff can help students who face anti-LGBTQ harassment—but only if the adults know about it. Students are already reluctant to report this harassment, and decreased protections from retaliation will only discourage them further. Most surveyed LGBTQ students who had been harassed never reported to school staff. Kosciw, *supra*, at 32. Nearly half feared that "they might be blamed and/or disciplined by school staff simply for reporting the incident." *Id*. at 33.

Those concerns are well-founded. In one study of student victims of sexual assault, 15% "who reported to their schools were threatened with or faced punishment for coming forward." Sarah Nesbitt & Sage Carson, Know Your IX, The Cost of Reporting: Perpetrator Retaliation,

[7] Rates of suicidality among LGBTQ youth are devastatingly high. In one recent study, 46.8% of LGB youth reported seriously considering suicide, compared to 14.5% of heterosexual peers. Johns, *supra*, at 23 tbl.2. Over 40% of LGB youth reported making a suicide plan, and almost a quarter had attempted suicide. *Id*. In a survey published last year, 52% of transgender and nonbinary youth reported considering suicide and 20% reported having attempted suicide. The Trevor Project, National Survey on LGBTQ Youth Mental Health 2021, at 3 (2021), https://www.thetrevorproject.org/wp-content/uploads/2021/05/The-Trevor-Project-National-Survey-Results-2021.pdf.

Institutional Betrayal, and Student Survivor Pushout 15 (2021), https://www.knowyourix.org/wp-content/uploads/2021/03/Know-Your-IX-2021-Report-Final-Copy.pdf. Public reporting suggests students of color are particularly likely to face such retaliation for telling their schools about sex-based harassment. *E.g.*, Tyler Kingkade, *Schools Keep Punishing Girls — Especially Students of Color — Who Report Sexual Assaults, and the Trump Administration's Title IX Reforms Won't Stop It*, The 74 (Aug. 6, 2019), https://www.the74million.org/article/schools-keep-punishing-girls-especially-students-of-color-who-report-sexual-assaults-and-the-trump-administrations-title-ix-reforms-wont-stop-it/. The district court's erroneous interpretation of Title IX, then, would only serve to further entrench existing inequalities in schools.

CONCLUSION

For the reasons explained above, *amici* urge the Court to reverse the district court's judgment and remand for further proceedings.

Dated: August 16, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because this brief contains 4,926 words, excluding those parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office 365 in 14-point Century Schoolbook font.

Dated: August 16, 2022

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on August 16, 2022.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished using the appellate CM/ECF system.

Dated: August 16, 2022

/s/ Alexandra Z. Brodsky
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APPENDIX

LIST OF AMICI CURIAE

Public Justice is a national public interest advocacy organization that fights against abusive corporate power and predatory practices, the assault on civil rights and liberties, and the destruction of the earth's sustainability. In its Students' Civil Rights Project, Public Justice focuses on ensuring that educational institutions comply with the Constitution and anti-discrimination laws, including Title IX. Public Justice often represents students denied equal educational opportunities because of sex-based harassment suffered at school, and also represents LGBTQ students facing other forms of discrimination. In Public Justice's experience, holding schools accountable under Title IX is critically important to protecting students against discriminatory practices and to ensuring that students can obtain their education in a safe environment, free from sex-based harassment.

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with nearly 2 million members and supporters dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The ACLU works to

advance the free speech rights of students as well as students' rights to equal educational opportunities through litigation and policy advocacy. The ACLU has taken a leading role in recent years advocating for the rights of survivors of gender-based violence and harassment, including LGBTQ students who experience harassment at school. **The ACLU of Arizona** is the state affiliate of the national ACLU. The proper resolution of this case is a matter of substantial interest to the ACLU and its members.

Arizona Trans Youth and Parent Organization is a peer-to-peer support organization for parents and caregivers of trans and gender diverse youth to empower children, teens, and their families in a supportive and inclusive environment in which gender may be freely expressed and respected. The organization fully supports the participation of all students in any school sponsored activities regardless of sexuality or gender identity.

Atlanta Women for Equality ("AWE") is a nonprofit legal aid organization dedicated to helping women students assert their legal rights to equal educational opportunities and to shaping our education system according to true standards of gender equity. AWE accomplishes

this mission by providing free legal representation for women facing gender discrimination in the educational environment—in particular campus sexual violence—and by protecting and expanding their legal protections and educational opportunities through public policy advocacy.

The mission of the **Clearinghouse on Women's Issues** ("CWI") is to provide information on issues relating to women, including discrimination on the basis of gender, age, ethnicity, marital status or sexual orientation, with particular emphasis on public policies that affect the economic, educational, health and legal status of women; cooperate and exchange information with organizations working to improve the status of women; and take action and positions compatible with its mission. For this reason, CWI supports Title IX protections for LGBTQ students.

Equal Rights Advocates ("ERA") is a California-based national civil rights advocacy organization dedicated to protecting and expanding economic and educational access and opportunities for women, girls and people of all marginalized genders. Since its founding in 1974, ERA has led efforts to combat sex-based and other forms of discrimination by

litigating high-impact cases, engaging in policy reform and legislative advocacy campaigns, conducting community education and outreach, and providing free legal assistance to individuals experiencing unfair treatment at work and in school through our national Advice & Counseling program. ERA has filed hundreds of suits and appeared as *amicus curiae* in numerous cases to defend and enforce civil rights in state and federal courts, including before the United States Supreme Court. ERA has observed the urgent necessity of affirming Title IX's coverage of the LGBTQIA+ community as a civil rights protection against anti-LGBTQIA+ harassment at schools, including protection against retaliation. ERA firmly believes that the law must recognize and account for the historic and ongoing gender and sex-based discrimination and marginalization of the LGBTQIA+ community as they seek to access equitable educational opportunities in the United States. Protecting the rights or the LGBTQIA+ student community is vital to ensuring all students have equitable access to education.

Family Violence Appellate Project ("FVAP") is a California and Washington state non-profit legal organization whose mission is to ensure the safety and well-being of survivors of domestic violence and

other forms of intimate partner, family, and gender-based abuse by helping them obtain effective appellate representation. FVAP provides legal assistance to survivors of abuse at the appellate level through direct representation, collaborating with pro bono attorneys, advocating for survivors on important legal issues, and offering training and legal support for legal services providers and domestic violence, sexual assault, and human trafficking counselors. FVAP's work contributes to a growing body of case law that provides the safeguards necessary for survivors of abuse and their children to obtain relief from abuse through the courts.

Human Rights Campaign ("HRC"), the largest national lesbian, gay, bisexual and transgender political organization, envisions an America where lesbian, gay, bisexual and transgender people are ensured of their basic equal rights, and can be open, honest and safe at home, at work and in the community. Among those basic rights is freedom from discrimination, including in schools and universities.

Founded in 2013, **Know Your IX** is a survivor- and youth-led project of Advocates for Youth that aims to empower students to end sexual and dating violence in their schools. Know Your IX envisions a world in which all students can pursue their civil right to an education

free from violence and harassment. Know Your IX recognizes that gender violence is both a cause of inequity and a consequence of it, and we believe that women, transgender, and gender non-conforming students will not have equality in education or opportunity until the violence ends. Know Your IX draws upon the civil rights law Title IX as an alternative to the criminal legal system—one that is more just and responsive to the educational, emotional, financial, and stigmatic harms of violence.

Legal Aid at Work ("LAAW") is a public interest legal organization that advances justice and economic opportunity for low-income people and their families at work, in school, and in the community. The organization's long history of advocating for LGBTQ workers began with the establishment of its AIDS project in 1986 and LGBT project in 1999 and continues today through the work of the Gender Equity & LGBTQ Rights Program. LAAW has represented many low-wage LGBTQ workers bringing claims under federal and state civil rights laws. For many years, LAAW also has represented female student athletes seeking equal access to sports under Title IX. As a result of this work, LAAW has a strong interest in ensuring LGBTQ individuals receive the full protections of anti-discrimination laws like Title IX.

The **National Alliance to End Sexual Violence** ("NAESV") is the voice in Washington for the 56 state and territorial sexual assault coalitions and 1500 rape crisis centers working to end sexual violence and support survivors. The rape crisis centers in NAESV's network see every day the widespread and devastating impacts of sexual assault upon survivors. NAESV works to ensure all survivors of sexual violence have access to justice, support, and healing services.

The **National Center for Lesbian Rights** ("NCLR") is a national non-profit legal organization dedicated to protecting and advancing the civil rights of lesbian, gay, bisexual, and transgender people and their families through litigation, public policy advocacy, and public education. Since its founding in 1977, NCLR has played a leading role in securing fair and equal treatment for LGBT people and their families in cases across the country involving constitutional and civil rights. NCLR has a particular interest in promoting equal opportunity in educational institutions for LGBT students and athletes through legislation, policy, and litigation. For over twenty years, NCLR's Sports Project worked to ensure that LGBT players, coaches, and administrators receive fair and equal treatment—free of discrimination. Additionally, NCLR represents

LGBT people who have experienced discrimination based on sex in civil rights cases in courts throughout the country, including *Doe v. Snyder*, 28 F.4th 103 (9th Cir. 2022).

The **National Center for Youth Law** ("NCYL") is a private, non-profit organization that uses the law to help children in need nationwide. For more than 40 years, NCYL has worked to protect low-income children's rights and to ensure they have the resources, support, and opportunities necessary for healthy and productive lives. As part of the organization's advocacy, NCYL works to ensure all youth attend safe schools free of discrimination.

The **National Women's Law Center** is a nonprofit legal organization dedicated to the advancement and protection of the legal rights of women and girls, and the right of all persons to be free from sex discrimination. Since its founding in 1972, the Center has focused on issues of key importance to women and their families, including education, reproductive rights and health, economic security, and workplace justice, with particular attention to the needs of low-income women and girls and those who face multiple and intersecting forms of discrimination. The Center has participated as counsel or *amicus curiae*

in a range of cases before the Supreme Court, federal Courts of Appeals, federal district courts and state courts to secure protections against sex discrimination in all aspects of society. The Center has long worked for including the full and fair enforcement of Title IX in athletics, and seeks to ensure that all individuals, including LGBTQ individuals, enjoy the full protection against sex discrimination as promised by our laws.

Rocky Mountain Victim Law Center ("RMvlc") is a Colorado non-profit organization that provides free legal services to victims of crime. RMvlc's mission is to elevate victims' voices, champion their rights, and transform the systems impacting them. RMvlc meets its mission through the provision of three programs; Victim Rights Legal Services, the Legal Information Network of Colorado (LINC), and Title IX Legal Services. RMvlc seeks to participate as an *amicus* to share the importance of the role schools play in appropriately intervening and preventing sex-based harassment and violence in order to create safe learning environments.

The Sikh Coalition is a nonprofit and nonpartisan organization dedicated to ensuring that members of the Sikh community in America are able to practice their faith. The Sikh Coalition defends the civil rights

and civil liberties of Sikhs by providing direct legal services and advocating for legislative change, educating the public about Sikhs and diversity, promoting local community empowerment, and fostering civic engagement amongst Sikh Americans. The organization also educates community members about their legally recognized free exercise rights and works with public agencies and officials to implement policies that accommodate their deeply held beliefs. The Sikh Coalition owes its existence in large part to the effort to combat uninformed discrimination against Sikh Americans after September 11, 2001.

University of Arizona Pride Law is an LGBTQA+ student organization at the James E. Rogers College of Law. Pride Law is dedicated to creating LGBTQA+ community spaces, supporting LGBTQA+ law students, and advocating for equal, equitable justice. Pride Law believes all students must be protected from harassment, and no one deserves unlawful retaliation for standing up for themselves.

Women's Law Project ("WLP") is a nonprofit public interest legal organization working to defend and advance the rights of women, girls, and LGBTQ+ people in Pennsylvania and beyond. WLP uses an intersectional analysis to prioritize work on behalf of people facing

multiple forms of oppression based on sex, gender, race, ethnicity, class, disability, incarceration, pregnancy, and immigration status. We leverage impact litigation, policy advocacy, public education, and direct assistance and representation to dismantle discriminatory laws, policies, and practices and eradicate institutional biases and unfair treatment based on sex or gender. WLP seeks equitable opportunity in many arenas including healthcare, education, athletics, employment, public benefits, insurance, and family law, and seeks justice for victims of gender-based violence.