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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

PHOENIX DIVISION

J.K., a single woman,

Plaintiff,

v.

ARIZONA BOARD OF REGENTS, a public entity, DARNEL HENDERSON, a single man, DIRK KOETTER, a married man, and STEVE RIPPON, a married man,

Defendants.

CASE NO. CV-06-916-PHX-MHM

BRIEF OF AMERICAN CIVIL LIBERTIES UNION FOUNDATION, AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF ARIZONA, CALIFORNIA WOMEN'S LAW CENTER, CONNECTICUT WOMEN'S EDUCATION AND LEGAL FUND, LEGAL MOMENTUM, NATIONAL WOMEN'S LAW CENTER, SARGENT SHRIVER NATIONAL CENTER ON POVERTY LAW, AND WOMEN'S LAW PROJECT AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF'S OPPOSITION TO ABOR/ARIZONA STATE UNIVERSITY'S MOTION FOR SUMMARY JUDGMENT

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INTEREST OF *AMICI CURIAE*

Amici are women's rights and civil rights organizations with a strong interest in preventing discrimination in education on the basis of sex, including student-on-student sexual harassment and sexual assault on campus. Individual statements of interest are set out in Appendix A. Counsel for the Arizona State University ("ASU") defendants indicated to counsel for *amici* that the ASU defendants will not oppose *amici*'s motion to file this brief.

INTRODUCTION AND SUMMARY

Plaintiff, a student at ASU, was raped in her dormitory room by ASU student athlete Darnel Henderson, whom the defendant ASU administrators had arranged to admit to ASU and whom the defendants failed to supervise adequately, despite knowing firsthand that Henderson had engaged in repeated egregious sexual harassment *at ASU* prior to his admission in the fall. Indeed, Henderson's harassment of women at ASU during the "Summer Bridge" program for incoming first-year students was so intolerable that ASU took the unusual step of expelling Henderson from the Summer Bridge program and evicting him from ASU dorms, only to re-admit him to ASU and to the dorms a few weeks later without taking precautions to protect women at ASU from further harassment. This conduct amounts to deliberate indifference to Henderson's harassment of women living and working at ASU – harassment that subjected Plaintiff to discrimination – and accordingly subjects defendants to liability under Title IX.

The Supreme Court has determined that an educational institution receiving federal funds will be liable for one student's severe and offensive sexual harassment of another student where the institution acted with deliberate indifference to known acts of harassment in its programs and activities. *See Davis v. Monroe County Bd. Of Educ.*, 526 U.S. 629, 633, 645 (1999). *Amici*'s concerns, and their reasons for submitting a brief in this case, involve the scope and application of the "known acts of harassment" and "deliberate indifference" prongs of the test for liability. Both prongs are satisfied by the evidence in the record, which demonstrates that ASU was aware of Henderson's repeated

sexual harassment of ASU students and staff members at ASU during the summer of 2003 and that ASU expelled Henderson from the Summer Bridge program for this harassment. ASU then admitted Henderson to its university and its dorms mere weeks later without supervision or safeguards in place to ensure that the harassment Henderson had committed over the summer would not continue. This is more than enough to establish liability under Title IX for Henderson's subsequent on-campus rape of Plaintiff.

In arguing to the contrary, ASU misstates Title IX law and attempts to persuade the Court that its knowledge of Henderson's sexual harassment of ASU students and staff in June and July 2003 is immaterial. ASU seeks to exclude artificially from the Court's consideration any harassment by Henderson of students other than Plaintiff, no matter how recent, severe, frequent, physically proximate to his rape of Plaintiff, and well-known to the ASU defendants that harassment was. This proposed limitation runs counter to the weight of Title IX precedent, would gut the statutory protections that Congress codified in Title IX, and defies common sense.

Moreover, ASU's indifference following Plaintiff's rape, including allowing Henderson to remain at ASU for two months and refusing to crack down on a culture of violence in its football program, provides an independent basis for liability.

For these reasons, the Court should deny ASU's motion for summary judgment.

ARGUMENT

Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). To establish ASU's liability for one student's sexual harassment of another, Plaintiff must demonstrate that ASU "act[ed] with deliberate indifference to known acts of harassment in its programs or activities." *Davis*, 526 U.S. at 633 (1999).[1]

[1] The harassment also must be "so severe, pervasive and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit," *id.*, and the defendant institution must "exercise[] substantial control over both the harasser and the context in which the known harassment occurs," *id.* at 645. These two conditions are not in dispute here: ASU exercised substantial control over Henderson, who was a student

The record shows that ASU exhibited such deliberate indifference to known acts of harassment in its programs, and the Court should reject ASU's attempt to shield its knowledge of Henderson's on-campus harassment from consideration.

I. ASU HAD ACTUAL KNOWLEDGE OF EGREGIOUS HARASSMENT BY HENDERSON AND ACTED WITH DELIBERATE INDIFFERENCE BY ADMITTING HENDERSON WITHOUT SAFEGUARDS.

A. ASU's Actual Knowledge Of Henderson's Harassment Of Other Students And Its Deliberately Indifferent Decision To Admit Him Without Safeguards Support Title IX Liability.

The Supreme Court established in *Davis*, its definitive case regarding student-on-student sexual harassment, that courts applying Title IX should look at a funding recipient's actual knowledge of the alleged harasser's harassment of students at the institution generally, and not only at his harassment of the plaintiff. *See* 526 U.S. at 653 (finding relevant allegations that "there were multiple victims who were sufficiently disturbed by [the harasser's] conduct to seek an audience with the school principal"). This common-sense principle comports with the purpose of Title IX's notice and indifference requirements as set out by the courts, which is to ensure that, consistent with the Spending Clause, damages actions "are available only where recipients . . . had adequate notice that they could be liable for the conduct at issue," *id.* at 640 (discussing

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athlete living on campus, as well as over the ASU dorm in which Henderson raped Plaintiff. Moreover, rape "obviously qualifies" as sexual harassment so severe, pervasive and objectively offensive that it effectively bars access to an educational opportunity or benefit. *Soper v. Hoben*, 195 F.3d 845, 855 (6th Cir. 1999); *see also* Kelly *v. Yale University*, 2003 WL 1563424, at *3 (D. Conn. Mar. 26, 2003) ("There is no question that a rape, as alleged by [plaintiff university student] constitutes severe and objectively offensive sexual harassment under the standard set forth in *Davis*."); *Doe ex rel. Doe v. Dallas Indep. Sch. Dist.*, 2002 WL 1592694, at *6-7 (N.D. Tex. July 16, 2002) (holding that a single instance of forced manual penetration by another student's finger qualified as sufficiently severe student-on-student harassment); *Doe ex rel. Doe v. Derby Bd. of Educ.*, 451 F. Supp. 2d 438, 444-45 (D. Conn. 2006) (single instance of sexual assault off of school grounds, in conjunction with subsequent off-campus teasing ("proxy harassment") by harasser's friends, gave rise to triable factual issue regarding severity and pervasiveness of harassment under *Davis*); *S.S. v. Alexander*, __P.3d __, 2008 WL 352618, at *15-19 (Wash. App. Feb. 11, 2008) (collecting cases and reaching the same conclusion in a case concerning a single instance of rape by a University of Washington football player in a dormitory room).

Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981)), and nonetheless "engage[d] in intentional conduct that violates the clear terms of the statute . . . by remaining deliberately indifferent to acts of . . . harassment of which … [they] had actual knowledge," *id.* (citing *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998) (a pre-*Davis* case concerning teacher-on-student harassment)).

Courts applying *Davis* accordingly have recognized that the "actual knowledge" requirement is satisfied where a funding recipient knew of a student's sexual harassment of the plaintiff *or of others* and nevertheless failed to take reasonable steps to prevent the harassment that is the subject of the Title IX action. *See, e.g.*, *Delgado v. Stegall*, 367 F.3d 668, 672 (7th Cir. 2004) (Posner, J.) (recognizing that, "in *Davis* the Court required knowledge only of 'acts of sexual harassment' by the [harasser], . . . not of previous acts directed against the particular plaintiff"). The Seventh Circuit offered the example of an offender who "had been known to be a serial harasser," as one that could satisfy the *Davis* standard. *Id.* Other federal appellate courts agree that, because "actual knowledge of discrimination in *the recipient's program* is sufficient, . . . harassment of persons other than the plaintiff may provide the school with the requisite notice to impose liability under Title IX." *Escue v. No. Oklahoma Cool*, 450 F.3d 1146, 1153 (10th Cir. 2006) (construing the Supreme Court's statement in *Gebser*, 524 U.S. 290, that the plaintiff must show an appropriate person had "'actual knowledge of discrimination *in the recipient's . . . programs*'").

A Title IX plaintiff also must show that the funding recipient was "deliberately indifferent" to the known harassment. *Davis*, 526 U.S. at 643. In the § 1983 context, the Supreme Court has explained that a defendant acts with deliberate indifference when its actions (or inaction) amount to a "'conscious' choice," *City of Canton v. Harris*, 489 U.S. 378, 389 (1989), or a "conscious disregard for the consequences of . . . [its] action," *Board of County Comm'rs of Bryan County, Okla. v. Brown*, 520 U.S. 397, 407 (1997). Liability attaches "only where the recipient's response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances." *Davis*, 526 U.S. at 648.

The recent decision in *Williams v. Board of Regents of the University System of Georgia*, 477 F.3d 1282 (11th Cir. 2007), is instructive on the correct application of the "actual knowledge" and "deliberate indifference" requirements of *Davis*. In *Williams*, the defendants at the University of Georgia ("UGA") recruited and admitted a student athlete who raped the plaintiff, despite the defendants' knowledge of the student's previous harassment of other women *at other colleges*. 477 F.3d at 1289-90. The harasser had been expelled from another college for sexually assaulting two women who worked in the college's athletic department, *id.* at 1290, and he had been dismissed from the basketball team at a third college because of incidents including sexual harassment, *id.* The Court of Appeals held that the defendants' "preexisting knowledge of [harasser]'s past sexual misconduct" – committed against people *other than the plaintiff*, and indeed at locations other than UGA – "[wa]s relevant when determining" whether the plaintiff had stated a claim under Title IX. 477 F.3d at 1293.

The Eleventh Circuit found that, while in both *Davis* and *Gebser*, "the defendant did not learn about the alleged harasser's proclivities until the harasser became a teacher or a student at the defendant's school," in *Williams*, the petitioner had alleged that the defendants "knew about [the harasser]'s past sexual misconduct when they recruited him and gained his admission to UGA." 477 F.3d at 1292. Particularly in such a context, UGA's knowledge of the defendant's prior misconduct against others and its decision to recruit and admit him to UGA regardless were highly relevant to the Title IX determination. *Id.* At 1293; *accord id.* At 1304-05 (Jordan, J., concurring) (finding UGA liable because it knew that the harasser had attacked women at previous colleges, yet admitted him on a special sports program and failed to supervise him). In finding that UGA had exhibited "deliberate indifference," the court held that the "decision to recruit [the harasser] and admit him through UGA's special admission process was a form of discrimination," because defendants "knew at that point of the need to supervise [the harasser]" as a result, "importantly," of their knowledge "about [the harasser's] past sexual misconduct" at other colleges, yet they "failed to adequately supervise" the

harasser. *Id.* at 1296.

The facts of the instant case concerning notice to the defendants and their subsequent deliberate indifference are considerably more egregious than those in *Williams*, because here the defendants knew firsthand of Henderson's very recent and repeated severe harassment of women *at their own institution*. As in *Williams*, the defendants here knew about Henderson's "past sexual misconduct" when they "recruited him and gained his [re]-admission to" ASU for the fall semester in 2003. 477 F.3d at 1292. During the summer of 2003, Henderson sexually harassed a number of women at ASU, including fellow students and Residential Life staff, so severely that one employee continually feared for her safety, another resigned her position out of fear that Henderson would assault her, and another moved out of the dorm and off-campus out of fear of Henderson and his friends. Plaintiff's Statement of Facts (PSOF) ¶¶ 20-23. Defendant ASU administrators catalogued numerous incidents involving Henderson from the summer of 2003, and employees reported multiple episodes of sexual misconduct by Henderson that summer, ultimately resulting in Henderson's expulsion. PSOF ¶¶ 24-26.

Notwithstanding their knowledge of repeated sexual harassment by Henderson while he was in their charge in June and July, 2003, ASU administrators arranged to get Henderson re-admitted to ASU – and to the ASU dorms where he had previously terrorized students and staff – less than a month later. PSOF ¶ 32-33; PSSOF ¶ 17. These senior administrators took no steps to safeguard female students from him. On the contrary, Henderson was housed in the same dorm complex that was the site of his summer harassment, and he was unrestricted from the time he returned to campus in August 2003 until he raped Plaintiff in March 2004. PSOF ¶ 40, 60-61; Plaintiff's Supplemental Statement of Facts (PSSOF) ¶ 18.

In short, Plaintiff alleges facts showing that ASU deliberately took an approach of indifference to the pervasive sexual misbehavior that had gotten Henderson evicted from ASU and ASU dorms over the summer when it arranged to admit him in August. This is therefore a case in which the funding recipient was aware that its student, Henderson, was

"known to be a serial harasser," *Delgado*, 367 F.3d at 672, and nonetheless allegedly arranged to admit him to the institution and dormitories with no supervision, *see* Pltf.'s Resp. in Opp. to Deft's Mot. for Sum. J. ¶ A.5 (stating Plaintiff's contention that at the time ASU re-enrolled Henderson, it "knew he not only was a serial sexual harasser but that he posed risks of sexual and physical assault to female students"). Such a response was "clearly unreasonable in light of the known circumstances." *Davis*, 526 U.S. at 648.

B. ASU's Suggestion That Plaintiff Asks The Court To "Extend" *Davis* Misstates Title IX Law.

ASU argues that holding it accountable for its deliberate indifference to known sexual harassment by Henderson would be an extension of *Davis*, because Henderson had harassed female students and staff members other than Plaintiff. ABOR/Ariz. St. Univ's Mot. for Sum. J. 7. This is wrong. As explained in Part I.A., *supra*, knowledge of current, frequent harassment by the harasser of other women affords defendants "actual knowledge" of harassment for purposes of *Davis*. *See Williams*, 477 F.3d at 1296; *Escue*, 450 F.3d at 1153; *Delgado*, 367 F.3d at 672. Because the harassment in this case was current, frequent, egregious, and in the defendants' own programs, there can be little question that *Davis* is satisfied.

ASU's contention that the *Escue* court noted what ASU calls "a split of authority as to whether a [sic] Title IX liability may be imposed based on prior complaints of harassment of others" does not help ASU. Deft's Reply in Supp. of Mot. for Sum. J. at 6-7. The Tenth Circuit considered whether allegations of misconduct by the professor in question that took place *nine years earlier* sufficed to put the college on notice. The court observed that courts "differ on whether notice sufficient to trigger liability may consist of prior complaints or must consist of notice *regarding current harassment in the recipient's programs*." *Escue*, 450 F.3d at 1153 (emphasis added). The court compared *Johnson v. Galen Health Insts., Inc.*, 267 F. Supp. 2d 679, 688 (W.D. Ky. 2003) (collecting cases), in which the district court stated that the Title IX notice standard (in the teacher-student context) "does not require that the offending instructor actually commit previous acts of

harassment against the plaintiff-student and that the plaintiff-student complain before the institution may be held liable for the instructor's subsequent repeated misconduct," with *Baynard v. Malone*, 268 F.3d 228, 233 (4th Cir. 2001), in which the Fourth Circuit had to decide whether *Gebser* was satisfied by knowledge of abuse that occurred "some 15 years earlier" than the year in which the same teacher's abuse of the plaintiff began. The Fourth Circuit held in *Baynard* that *Gebser* was not satisfied where no jury could conclude that the relevant school official "had actual notice that [the teacher] was abusing one of his students" during the decade in question, notwithstanding reports of abuse fifteen years earlier by that teacher. *Id.* at 238. Likewise, in *Escue*, the Tenth Circuit agreed with the district court that the instances of harassment nine years earlier were "too dissimilar, too infrequent, and/or too distant in time" to provide actual knowledge to the college "of sexual harassment in its programs." 450 F.3d at 1153 (internal quotation marks omitted); *id.* at 1154 (holding that, "[e]specially given that nearly ten years passed without additional allegations," the college did not have "the requisite knowledge based on prior complaints").

The instant case does not raise the dilemma, present in *Escue* and *Baynard*, of whether reports of inappropriate conduct by a teacher occurring years before the discrimination against the plaintiff (nine years in *Escue*, fifteen in *Baynard*) satisfy the standard for actual notice. ASU had actual notice "regarding *current* harassment in the recipient's programs" in light of its expulsion of Henderson from the Summer Bridge program and from ASU dorms only a few weeks before it arranged to admit him to ASU and to the ASU dorm where he raped Plaintiff. *Escue*, 450 F.3d at 1153 (emphasis added). Even to the extent that *Baynard* can be read to preclude consideration of a funding recipient's actual knowledge of recent, frequent, similar harassment by the alleged harasser of students other than plaintiff,[2] subsequent courts have declined to

[2] Importantly, Judge Michael, in his *Baynard* dissent, did not read the majority opinion that way. He noted that, according to the majority, the notice requirement could be satisfied if the official had knowledge that the teacher "was currently abusing one of his students even without any indication of which student was being abused." 268 F.3d at 238 n.9. Judge Michael found that this standard "still means that the actual notice

follow such an interpretation of *Gebser*, and that part of *Baynard*'s analysis is widely recognized, including by district courts in this Circuit, to be "a minority view." *Doe A. v. Green*, 298 F. Supp. 2d 1025, 1033-34 & n.2 (D. Nev. 2004) (collecting cases); *see also Aguilar v. Corral*, 2007 WL 2947557, at *5-6 (E.D. Cal. Oct. 9, 2007) (collecting cases and "adopt[ing] the majority rule that knowledge of a substantial risk of harassment is sufficient to place a school on actual notice"); *accord Hart v. Paint Valley Local School Dist.*, 2002 WL 31951264, at *5-6 (S.D. Ohio Nov. 15, 2002) (collecting and following pre-*Baynard* cases holding that "'the actual notice standard does not set the bar so high that a school district is not put on notice until it receives a clearly credible report of sexual abuse from the plaintiff-student'" and disagreeing with *Baynard*) (quoting *Doe v. School Admin. Dist. No. 19*, 66 F. Supp. 2d 57, 63 (D. Me. 1999)).[3]

Moreover, the arbitrary and artificial exclusion of relevant and probative information proposed by ASU defies common sense and flies in the face of Title IX's purpose as understood by the Supreme Court. Where a funding recipient is well aware of severe sexual harassment targeting female students and staff in its dorms, it subjects the women on campus to discrimination when it ignores the harassment and allows the harasser to live on campus without any supervision or restriction. Adopting ASU's proposed rule barring courts from considering the evidence that ASU turned its back on known harassment would undercut Title IX's core prohibition on funding recipients "remain[ing] idle in the face of known student-on-student harassment in [their] schools."

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standard is satisfied only if the school board official was aware of current sexual abuse to someone in the student body (not necessarily the eventual plaintiff)," a standard Judge Michael still found "wrong . . . because *Gebser* does not require that the appropriate official have actual knowledge of current abuse." *Id.* at 240 (Michael, J., dissenting).

[3] A district court in the Fourth Circuit went so far as to state that the court would have preferred to "adopt the view embraced by the majority of courts" that a school need not have had actual knowledge of the harassment of the plaintiff in question, *see Rasnick v. Dickenson County Sch. Bd.*, 333 F. Supp. 2d 560, 566 (W.D. Va. 2004). Indeed, in the years since *Baynard*, Judge Michael's dissent has become the majority rule, which has been adopted by district courts in the Ninth Circuit as exemplified by *Doe A.*, 298 F. Supp. 2d at 1033-34 & n.2, and *Michelle M. v. Dunsmuir Joint Union School District*, 2006 WL 2927485, at *5-6 (E.D. Cal. Oct. 12, 2006) (denying summary adjudication where the school knew of the alleged harasser's behavior towards students other than the plaintiff).

Davis, 526 U.S. at 641.

In this case, where ASU had direct, firsthand knowledge of egregious and repeated harassment by Henderson when it readmitted him to its dorm, the Court should follow the overwhelming majority of courts to consider the issue and hold that such knowledge of harassment in its current programs satisfies *Davis*.[4]

II. ASU ALSO ACTED WITH DELIBERATE INDIFFERENCE FOLLOWING PLAINTIFF'S RAPE, PROVIDING AN INDEPENDENT BASIS FOR LIABILITY.

Plaintiff alleges facts that, if proven, support a finding that ASU's behavior in the wake of Henderson's rape of Plaintiff on March 12, 2004[5], provides an additional, independent basis for liability under Title IX. First, ASU permitted Henderson to remain on the football team and in the same dorm as Plaintiff for three weeks and allowed him to remain at ASU for two months, with access to the same campus and classes that Plaintiff was attending. PSSOF ¶¶ 74-81. Although Plaintiff "was not subjected to further harassment by" Henderson during this time, this outcome was "not" the result of "any immediate action taken by" ASU. *See Kelly v. Yale Univ.*, 2003 WL 1563424, at *2-4 (D. Conn. March 26, 2003) (holding that a reasonable jury could find that Yale's response was deliberately indifferent where the harasser remained in the victim's dorm for several weeks after the assault); *cf. Derby Bd. of Educ.*, 451 F. Supp. 2d at 444 (finding that "the fact that [the harasser] and plaintiff attended school together" after the assault added to the severity of the harassment).[6] During this time, Plaintiff had to live with the knowledge that she might be assaulted again.

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[4] ASU argues that if it did not discriminate against Plaintiff within the limitations period, it should not be required to litigate claims of harassment against others prior to that. ASU Reply at 7. The point, however, is that ASU subjected Plaintiff to discrimination by remaining deliberately indifferent to harassment by Henderson and by failing to protect Plaintiff and other students from his harassment *as of the day he raped Plaintiff*, either by removing Henderson from campus or by supervising him in some other manner that was not clearly unreasonable.

[5] It is undisputed that ASU had notice of Henderson's assault of Plaintiff.

[6] ASU cites *Oden v. Northern Marianas College*, 440 F.3d 1085 (9th Cir. 2006) (holding that a nine-month delay in convening a hearing did not amount to deliberate indifference), but *Oden* is inapposite, because the delay in that case was based in part upon the college's understanding that the plaintiff was looking for a lawyer and upon the plaintiff's move out of state.

Second, ASU defendants ignored the "rape-prone culture" in the ASU athletic program, PSSOF ¶ 108, despite knowledge of violent offenses committed by the student athletes in the program. ASU running back Hakim Hill, who was charged with sexual assault of a fifteen-year-old girl and pled guilty to a lesser included sexual offense, was reinstated to the team and played following that incident in the year prior to Plaintiff's rape (Hill was subsequently dismissed from ASU, reportedly for fighting with teammates). PSSOF ¶ 92. After she was raped by Henderson, Plaintiff had to continue to attend classes knowing that ASU tolerated this kind of violence from its football players. *See Alexander*, 2008 WL 352618, at *13 ("It constitutes a deliberately indifferent response if the harasser and other students are left to believe that the harassing behavior has the 'tacit approval' of the funding recipient.") (quoting *Siewert v. Spencer-Owen*, 497 F. Supp. 2d 942, 954 (S.D. Ind. 2007))

Defendants' indifference also subjected Plaintiff to further discrimination after her rape by Henderson and intensified the severity of her experience. In September 2004, Henderson's former teammates intimidated Plaintiff in a restaurant, calling her a "liar" and upsetting and frightening her. PSSOF ¶ 118. And ASU failed to reform its policies to address sexual assault by its student athletes or to change the athletic program's practice of handling athletes' misconduct in-house, PSSOF ¶¶ 85-90, despite what had by then become a clear problem of misconduct among student athletes. All of these allegations support Plaintiff's claim that ASU "did not ameliorate the discrimination she suffered . . . but, rather, exacerbated the damage done by the discrimination and enhanced its discriminatory impact." *Alexander*, 2008 WL 352618, at *15.

This indifference to the rape- and violence-prone culture and harassment by other students in its athletic program – whether directed against Plaintiff or other victims – bears on the inquiry into indifference under *Davis*. In the Tenth Circuit's recent decision in *Simpson v. University of Colorado Boulder*, 500 F.3d 1170 (10th Cir. 2007), the university's head coach had retaliated against one female student-athlete who had complained about harassment, had discouraged another student employed by the athletic

department from pressing charges after she was raped by a university football player, and had recruited an assistant football coach who had been accused of assaulting "a woman a few years earlier." *Simpson*, 500 F.3d at 1183-84. These factors led the court to determine that the evidence could support a finding that the head coach had been deliberately indifferent to the need for changes in the athletic department program in question. *Id.* at 1184. By the same token, defendants in this case maintained a policy of indifference to violence and sexual assault committed by their student athletes (not just Henderson) during the period in question, and this attitude subjected Plaintiff to additional discrimination. As in *Simpson*, at ASU "'the need for more or different'" policies had become "'so obvious, and the inadequacy so likely to result in the violation of'" women's legal rights, that "'the policymakers . . . can reasonably be said to have been deliberately indifferent to the need'" to reform their procedures. *Id.* at 1178 (quoting *City of Canton*, 489 U.S. at 390).[7]

CONCLUSION

For the foregoing reasons, *amici* urge this Court to deny Defendants' motion for summary judgment.

[7] ASU seeks to gain mileage by arguing that the standards contained in the *Revised Sexual Harassment Guidance* ("Guidance") promulgated by the Department of Education's Office for Civil Rights ("OCR") are not controlling and that the Guidance is contrary to the standard articulated in *Davis*. This is nonsense. The Supreme Court favorably cited then-current OCR guidelines in *Davis* as evidence that funding recipients were on notice that they could be liable for the acts of certain non-agents, 526 U.S. at 643-44, and as support for its conclusion that student-on-student harassment falls within Title IX's scope, *id.* at 647-68. In any event, the parties' debate over the overlap between the OCR's guidelines and the standard for liability under Title IX case law is irrelevant, because ASU's conduct in response to known harassment by Henderson was inadequate under *Davis* and subsequent cases applying *Davis* as well. *See supra*, Part I.A.

Dated: February 26, 2008

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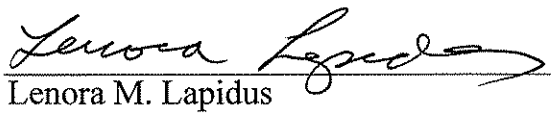
WOMEN'S RIGHTS PROJECT

Daniel Pochoda
ACLU FOUNDATION OF ARIZONA



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Counsel for *Amici Curiae*

APPENDIX A

Statement of Interest of *Amici Curiae*

The ACLU is a nationwide, non-partisan organization of more than 550,000 members dedicated to preserving the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. Through its Women's Rights Project (founded in 1972 by Ruth Bader Ginsburg), the ACLU has long sought to ensure that the law provides individuals with meaningful protection from harassment and other forms of discrimination on the basis of gender. The ACLU has battled the invidious effects of discrimination in education, including sexual harassment and assault. The ACLU of Arizona has been involved on a nonpartisan basis in fighting for the civil rights of women and students throughout the state of Arizona, and has advocated against discrimination and harassment in educational institutions for fifty years. The proper resolution of this case is, therefore, a matter of substantial interest to the ACLU, the ACLU of Arizona, and their members.

The California Women's Law Center (CWLC) is a private, nonprofit public interest law center specializing in the civil rights of women and girls. Established in 1989, the California Women's Law Center works in the following priority areas: sex discrimination, women's health, race and gender, women's economic security, exploitation of women and violence against women. Since its inception, CWLC has placed a strong emphasis on eradicating sex discrimination and sexual harassment in schools. CWLC has authored numerous *amicus* briefs, articles, and legal education materials on this issue. The *J.K. v. Arizona Board of Regents* case raises questions within the expertise and concern of the California Women's Law Center. Therefore, the California Women's Law Center has the requisite interest and expertise to join in the *amicus* brief in this case.

The Connecticut Women's Education and Legal Fund (CWEALF) is a non-profit women's rights organization dedicated to empowering women, girls, and their families to

achieve equal opportunities in their personal and professional lives. CWEALF defends the rights of individuals in the courts, educational institutions, workplaces and in their private lives. For the past three decades, CWEALF has provided legal information and conducted public policy and advocacy to ensure the spirit of Title IX is implemented and enforced in educational and athletic opportunities.

Legal Momentum advances the rights of women and girls by using the power of the law and creating innovative public policy. It is the nation's oldest legal advocacy organization devoted to women's rights. Legal Momentum, then known as NOW Legal Defense, pioneered the implementation of Title IX with PEER, its nationwide Project on Equal Education Rights, from 1974-1992. It was co-counsel in *Doe v. Petaluma City School District*, 949 F. Supp. 1415 (N.D. Cal. 1996), the first case to recognize that a school's failure to respond to peer sexual harassment may violate Title IX, and has appeared as *amicus* in numerous cases concerning the right to be free from sexual harassment and sex discrimination in education, including *Fitzgerald v. Barnstable Sch. Comm.*, 504 F.3d 165 (1st Cir. 2007), *Simpson v. Univ. of Colo. Boulder*, 500 F.3d 1170 (10th Cir. 2007), *Davis v. Monroe County Board of Education*, 526 U.S. 648 (1999) and *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992).

The National Women's Law Center ("Center") is a non-profit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. Since 1972, the Center has worked to secure equal opportunities in education for girls and women through the full enforcement of Title IX of the Education Amendments of 1972. The Center has provided assistance or participated as counsel or *amicus curiae* in a range of cases to secure the equal treatment of women under the law, including successfully arguing before the Supreme Court that Title IX requires schools to address student-to-student sexual harassment in *Davis v. Monroe County Board of Education.*

The Sargent Shriver National Center on Poverty Law (Shriver Center) champions economic opportunity through fair laws and policies so that people can move out of poverty permanently. Our methods blend advocacy, communication, and strategic leadership on issues affecting people living in poverty. National in scope, the Shriver Center's work extends from the Beltway to state capitols and into communities building strategic alliances. Through its Women's Law and Policy Project, the Shriver Center works on issues related to education, sexual harassment, and other forms of violence against women and girls. Access to safe and quality education is the surest path out of poverty and toward economic well-being. The Shriver Center has a strong interest in the eradication of sexual harassment (including all forms of violence against women and girls) and sex discrimination in schools because they deny women and girls equal educational opportunities.

The Women's Law Project (WLP) is a non-profit public interest law firm with offices in Philadelphia and Pittsburgh, Pennsylvania. Founded in 1974, the WLP works to abolish discrimination and injustice and to advance the legal and economic status of women and their families through litigation, public policy development, public education and individual counseling. The WLP has worked throughout its history to eliminate sex discrimination in education under all applicable laws, including the United States and Pennsylvania Constitutions and Title IX of the Education Amendments of 1972. The WLP has a strong interest in the proper application and enforcement of Title IX to protect students from sexual harassment.

CERTIFICATE OF SERVICE

I, Lenora M. Lapidus, hereby certify that on February 26, 2008, a copy of the foregoing *Amici Curiae* Brief in Support of Plaintiff's Opposition to ABOR/Arizona State University's Motion for Summary Judgment was served by first class mail to counsel of record and Defendant Henderson as follows:

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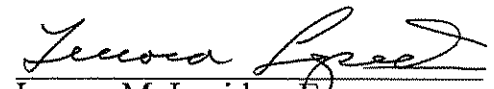

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