06-1184

UNITED STATE COURT OF APPEALS
FOR THE TENTH CIRCUIT

LISA SIMPSON AND ANNE GILMORE,

Plaintiffs-Appellants,

– against –

UNIVERSITY OF COLORADO AT BOULDER,

Defendants-Appellees.

Case No.: 06-1184

On Appeal from the United States District Court
for the District of Colorado

The Honorable Robert E. Blackburn

D.C. No. 02-CV-02390-REB-CBS

Brief of American Civil Liberties Union, American Civil Liberties Union of Colorado, Asian American Legal Defense and Education Fund, California Women's Law Center, Connecticut Women's Education and Legal Fund, Lawyers' Committee for Civil Rights Under Law, Legal Momentum, Mexican American Legal Defense and Educational Fund, National Asian Pacific American Women's Forum, National Association for the Advancement of Colored People, NAACP Legal Defense and Educational Fund, Inc., National Partnership for Women and Families, Northwest Women's Law Center, Sargent Shriver National Center on Poverty Law, Southwest Women's Law Center, and Women's Law Project as *AMICI CURIAE* in Support of APPELLANTS

--Oral Argument Requested--

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Dated: August 24, 2006

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INTEREST OF *AMICI*

Amici are women's rights and civil rights organizations with a strong interest in preventing discrimination in education on the basis of sex or race, whether such discrimination occurs at the hands of school officials or peers. Individual statements of interest are set out in Appendix A. All parties have consented to the filing of this brief.

INTRODUCTION

The decision below threatens to eliminate the protections afforded by Title IX and Title VI against peer-on-peer harassment, for the facts of this case, while extreme, are unfortunately not unique. A school-sponsored program—here, a university football program—maintained an environment in which students were repeatedly sexually harassed and assaulted. Upon learning of these incidents, school officials did almost nothing, refusing to revise their policies, declining to impose meaningful punishment on the perpetrators, and in some instances, retaliating against the victims. Yet, the district court concluded that no jury could find the school liable for maintaining a sexually hostile environment. *Simpson v. Univ. of Colorado*, 372 F. Supp. 2d 1229 (D. Colo. 2005). This ruling contravenes established civil rights law, which recognizes that schools deny women and minorities equal educational opportunities when they show deliberate indifference to known harassment. If affirmed, the decision could insulate schools from

liability for peer-on-peer harassment and assaults in a wide range of cases, including under Title VI when harassment is based on race or national origin, given that Title IX and Title VI are often interpreted analogously.[1] *See, e.g.*, *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 286 (1998); *Bryant v. Indep. Sch. Dist. No. I-38 of Garvin County, Okla.*, 334 F.3d 928, 934 (10th Cir. 2003).

If the facts presented by Appellants do not amount to a hostile environment denying equal educational opportunity, it is difficult to imagine facts that would. In 2001, while students at the University of Colorado ("CU"), Appellant Lisa Simpson and Appellant Anne Gilmore were sexually assaulted by CU football players and recruits at a recruiting season party.[2] Viewed in the light most favorable to Appellants (the non-moving parties), the evidence shows that at that time school officials knew CU's football program used alcohol, drugs, and sex to maintain a "competitive edge" in recruiting star athletes and knew these practices had led to repeated and remarkably similar incidents of sexual harassment, assault, and rape by football players and recruits. While CU had adopted limited measures in response, such as promulgating an anti-harassment policy, it never revisited those measures after a string of harassment, assaults, and rapes by football players

[1] The antidiscrimination rules set out in § 504 of the Rehabilitation Act, 29 U.S.C. § 794, and the Age Discrimination Act, 42 U.S.C. § 6101 *et seq.*, are also often interpreted by analogy to Title IX.

[2] *Amici* rely on and incorporate by reference Appellants' Statement of Facts and the citations to the record therein. *Amici* do not independently provide citations to the record throughout this Brief, in part because much of this material is under seal.

and recruits proved them ineffective. As for the perpetrators of these assaults and rapes, one received a verbal reprimand. Another was ordered to run laps. Instead of meaningfully punishing the perpetrators, CU retaliated against the victims, ejecting one female student who complained of harassment from the sports medicine program, intimidating another into dropping charges against her football player assailant, and revoking the scholarship of a student-athlete who was raped by a football player and provided evidence to the police about the party at which Appellants were raped. Indeed, upon learning of the rape of Appellant Simpson, CU, rather than addressing the harassment, took steps to impede the criminal investigation and protect the perpetrators from prosecution. As a result of the assaults and CU's response, both Appellants ultimately left CU.

Appellants' evidence presents precisely the constellation of facts that renders a school liable for sexual harassment. CU had actual notice of a threatening pattern of assaults and harassment in the football program and displayed deliberate indifference to these incidents. This indifference caused both Appellants to experience sexual assault at the hands of football players and recruits, to which CU also responded indifferently. As a result of the assaults and CU's response, both Appellants ultimately left CU. The Supreme Court has made clear that Title IX imposes liability when a school's deliberate indifference to past harassment causes harassment of a plaintiff and when its deliberate indifference to harassment of a

plaintiff results in denial of educational opportunities to that plaintiff. *Gebser*, 524 U.S. at 290 (Title IX provides damages remedy when school officials have actual knowledge of sexual harassment and respond with deliberate indifference); *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 634, 653-54 (1999) (student stated a Title IX claim when school knew she was harassed by peer, failed to meaningfully address that harassment, and as a result, student's grades fell and she became so depressed as to threaten suicide). Both occurred here.

Although sex or race discrimination is always odious, it is particularly damaging in education, given the unique role schools should play in providing opportunities to overcome disadvantage and invidious stereotypes. Title IX and Title VI recognize the severe and particular harm presented by this kind of discrimination. The decision below undermines the equal educational opportunity promised by these laws. For this reason, *amici* respectfully urge this Court to reverse the errors of the district court.

ARGUMENT

I. Appellants' Evidence Demonstrates That CU Had Actual Notice of a Sexually Hostile Environment in the Football Program.

A school may be liable for damages under Title IX when officials with authority to address the discrimination have "actual notice" of sexual harassment of students, whether committed by a teacher, a student, or another individual

within the school's control. *Davis*, 526 U.S. at 643-44; *Gebser*, 524 U.S. at 290. 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 Coll.*, 450 F.3d 1146, 1153 (10th Cir. 2006) (emphasis in original). Such notice is sufficient when it provides "actual knowledge of a *substantial risk* of abuse to students." *Id.* at 1154 (emphasis in original) (internal quotation marks omitted); *see also Massey v. Akron City Bd. of Educ.*, 82 F. Supp. 2d 735, 744 (N.D. Ohio 2000) (requiring awareness of "facts that indicate a likelihood of discrimination"). "[A]t minimum, [a school] must have possessed enough knowledge of the harassment that it reasonably could have responded with remedial measures to address the kind of harassment upon which plaintiff's legal claim is based." *Crandell v. New York Coll. of Osteopathic Medicine*, 87 F. Supp. 2d 304, 320 (S.D.N.Y. 2000).

Applying the correct standard makes clear that Appellants introduced ample evidence from which a jury could conclude that CU had notice of a sexually hostile environment in the football program that posed a substantial risk of sexual assault to female students. In concluding otherwise, the district court erred by (1) asking whether each isolated incident provided CU with notice of a hostile environment, rather than seriously considering whether a constellation of factors of which CU

had notice, taken together, suggested a substantial risk to students; (2) improperly discounting the relevance of the many individual sexual assaults of which CU had notice; and (3) failing to recognize that CU officials' notice of the sexual assault of Appellant Simpson itself constitutes the notice required by Title IX.

A. Notice of a hostile environment arose from notice of a constellation of factors that, taken as a whole, demonstrated a substantial risk of sexual harassment and assault.

The district court misconceived the notice required by Title IX in its apparent conclusion that Appellants could only prove notice by demonstrating that CU officials knew about previous sexual assaults of CU students that were almost identical to the assaults of Appellants.[3] The court approached the question of notice as one "individually focused on particular [harassers] or on particular forms of continuing conduct. This strict application is not appropriate, however, in a claim of a . . . hostile . . . environment." *West v. Philadelphia Elec. Co.*, 45 F.3d 744, 756 (3d Cir. 1995) (applying Title VII). Indeed, "[t]o consider each offensive event in isolation would defeat the entire purpose of allowing claims based upon a 'hostile . . . environment' theory, as the very meaning of 'environment' is '[t]he surrounding conditions, influences or forces which influence or modify.'" *Jackson v. Quanex Corp.*, 191 F.3d 647, 660 (6th Cir. 1999) (quoting Black's Law Dictionary 534 (6th ed. 1990)). For this reason, courts have consistently made

[3] While this standard is far more demanding than required by Title IX, Appellants nevertheless met it, as set out in Part I.B, below.

clear that the determination of whether a hostile environment exists must rest on an analysis of a totality of circumstances, rather than on discrete incidents. Indeed, this Court has noted that harassment directed at individuals other than the plaintiff is relevant to a Title VII hostile environment claim because "one of the critical inquiries in a hostile environment claim must be the *environment*." *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1415 (10th Cir. 1987) (emphasis in original).

As a result, notice of a hostile environment depends on notice of "'a constellation of surrounding circumstances, expectations, and relationships,'" *Davis*, 526 U.S. at 651 (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 82 (1998)), the significance of any one of which in isolation may appear sharply diminished, just as a determination of whether an environment constitutes actionable harassment depends on such a constellation of factors.[4] In other words, notice of an environment posing a substantial risk of harassment may arise from many discrete facts that, taken together, suggest a threatening pattern, even if any of these facts alone would not provide notice of the larger risk. Thus, in *Bryant v. Independent School District*, when students bringing a Title VI claim alleged that

[4] Of course, the notice inquiry differs from the question of whether a hostile environment is actionable as it does not focus on the *plaintiff's* experience, but rather on the *defendant's* knowledge; thus, factors of which the defendant had knowledge are relevant to the question of notice, regardless of whether the plaintiff had such knowledge. *See generally, e.g.*, *Johnson v. Galen Health Inst., Inc.*, 267 F. Supp. 2d 679, 688 (W.D. Ky. 2003) (stating that actual notice of discrimination does not require actual notice of the individual plaintiff's experiences).

the fights leading to their suspension arose out of a racially hostile environment, this Court did not ask whether school officials had notice of previous racially motivated fights arising in the same circumstances. Instead, this Court focused on school officials' knowledge of a racially hostile environment as manifested in a variety of forms, including "racial slurs, graffiti inscribed in school furniture, and notes placed in students' lockers and notebooks [and] Caucasian males [being] allowed to wear T-shirts adorned with the confederate flag, swastikas, KKK symbols, and hangman nooses on their person and their vehicles." 334 F.3d at 932; *see also Tesoriero v. Syosset Central Sch. Dist.*, 382 F. Supp. 2d 387 (E.D.N.Y. 2005) (finding issue of fact as to notice that teacher posed a risk of sexual harassment based on knowledge that teacher had given gifts to students and lied about it, telephoned students' home, offered to tutor students, attended students' track meets, was seen in intimate conversation with student, and wrote a romantic letter to that student).

The district court in this case, however, while acknowledging that the relevant question was whether "a constellation of relevant events . . . provides sufficient notice of the broad risk of sexual harassment and assault," 372 F. Supp. 2d at 1241, failed to apply that standard. Instead, the court considered each event of which CU had notice separately, asking whether each incident when so isolated independently provided notice of a substantial risk for purposes of Title IX. *Id.* at

1237-42. Based on this analysis, the court inappropriately disregarded not only notice of repeated incidents of violence against women by football players and coaches; notice of heavy alcohol consumption and some drug use in football recruiting by unsupervised, underage players and recruits; apparent notice of use of strippers and prostitutes in football recruiting; and more broadly, notice that players were expected to provide recruits with access to alcohol and sex as part of their recruitment efforts to "show recruits a good time," but also notice of *multiple previous sexual assaults* by football players and recruits over the space of only four years (discussed in further detail below). This included notice of a 1997 rape at a football recruiting party in circumstances remarkably similar to the assaults of Appellants, which led to a meeting at which the District Attorney *specifically warned* CU officials of an ongoing risk to female students from football recruiting practices, and notice of previous *assaults carried out by Appellants' attackers.* The court moreover disregarded the fact that this pattern of harassment and assault did not occur broadly across the university community in unconnected settings, but was narrowly focused within the football program. Taken together, this constellation of facts provides clear notice of a sexually hostile environment that posed a substantial risk to female students. In focusing on each specific incident and ignoring the larger pattern, the district court missed the forest for the trees.

This Court's recent decision in *Gonzales v. Martinez*, 403 F.3d 1179 (10th Cir. 2005), provides a helpful analog. That Eighth Amendment case, brought by an inmate who was sexually assaulted by an employee in a county jail, considered whether the sheriff had actual knowledge of a substantial risk of harm to inmates and had been deliberately indifferent to that risk—a standard remarkably similar to Title IX's harassment standard, as many courts have noted. *E.g.*, *Vance v. Spencer County Pub. Sch. Dist.*, 231 F.3d 253, 260 (6th Cir. 2000); *Rosa H. v. San Elizario Ind. Sch. Dist.*, 106 F.3d 648, 658-59 (5th Cir. 1997). This Court reversed summary judgment to defendants, finding that plaintiff had raised an issue of fact as to knowledge of a substantial risk of sexual assault when she showed the sheriff had notice that: (1) an inmate was beaten up by other inmates who had been drinking and no one responded to the inmate's screams; (2) inmates had been seen unsupervised in the jail control room; (3) an identified prison employee (not plaintiff's assailant) had exposed himself to female inmates and sexually taunted them; (4) general complaints had been made about sex- and drug-related activities at the jail; (5) an identified prison employee (not plaintiff's assailant) had been arrested after harassing female dancers at a strip club; and (6) an identified prison employee (not plaintiff's assailant) had been accused of punching a male inmate. 403 F.3d at 1183-85. This Court concluded that notice of security lapses, sexual harassment, and physical assaults by various prison employees would permit a jury

to find actual notice of a substantial risk to the plaintiff and those in her situation. *Id.* at 1187. Just as a constellation of facts demonstrating lax discipline, substance abuse, sexual harassment by other prison employees, and physical assaults by these employees raised a triable issue as to notice of a substantial risk in *Gonzales*, here too a remarkably similar constellation of facts localized within the CU football program should have gone to the jury on the question of notice.

B. Previous sexual assaults in the football program provided notice of a substantial risk to female students.

Even if the appropriate inquiry were whether CU had actual notice of past sexual assaults by football players and recruits indicating a substantial risk of future assaults—a far narrower inquiry than the legal standard set out by the relevant case law, described above—Appellants still put forth ample evidence to go to the jury on the question of notice. In discounting CU's notice of multiple sexual assaults in the narrow context of the football program, the district court committed several legal errors.

1. Identity between the circumstances of prior assaults and the assaults of Appellants is not required.

The district court improperly dismissed the significance of several previous incidents of sexual harassment and assault in the football program of which CU had notice based on minor differences in details between those incidents and the assaults of Appellants. For instance, in January 1998, CU officials learned that

football recruits had sexually assaulted a teenage girl at a recruiting party on December 6, 1997. The district court noted that the victim of this assault was a high school student, rather than a CU student, and concluded that CU thus could not be liable to the victim under Title IX. The court stated that as a result, "this incident did not, *per se*, provide notice of the broader risk alleged by the plaintiffs, nor did it provide the kind of clear notice of a specific risk required by Title IX." 372 F. Supp.2d at 1238. Similarly, the district court dismissed evidence that in 2000, officials received notice that Katharine Hnida, a player on the football team, had been sexually harassed and assaulted by other players,[5] reasoning, "The harassment of Katharine Hnida involved player on player harassment by football players in an athletic milieu that is essentially *sui generis*."[6] 372 F. Supp.2d at 1240. The district court also disregarded evidence that in October 2001, CU's football coach learned that "Trainer A," a female student trainer in the football

[5] Despite the summary judgment obligation to view the evidence of Appellants, the non-moving party, in the most favorable light, the district court concluded that these allegations of sexual harassment encompassed only verbal harassment. 372 F. Supp. 2d at 1239. As set out in Appellants' Brief, the allegations also comprised physical harassment.

[6] That Ms. Hnida chose to join the football team does not somehow lessen the relevance of CU's notice of her harassment. Just as there is no "inhospitable environment" exception to Title VII's nondiscrimination mandate, *Conner v. Shrader-Bridgeport Intern. Inc.*, 227 F.3d 179, 194 (4th Cir. 2000), and "no assumption-of-risk defense to charges of workplace discrimination," *Smith v. Sheahan*, 189 F.3d 529, 535 (7th Cir. 1999), neither is there such an exception from Title IX's protections. The abuse that Ms. Hnida experienced at the hands of football players, of which CU was aware, did not become something other than sexual harassment and assault because she was herself a football player.

program, had been sexually assaulted by a particular football player, concluding that this incident, and indeed all assaults in which assailants were identified, provided notice only that "the particular player involved in [the] incident presented a risk of sexual assault" rather than notice of a broader risk. 372 F. Supp. 2d at 1240, 1241. "In combination," the court concluded, notice of all these incidents did no more than indicate "that some players, and some recruits, had engaged in sexual harassment and sexual assault." *Id.*

This analysis distorts Title IX's requirement of notice of a substantial risk. As many courts have recognized, a jury may conclude that school officials had such notice based on previous incidents of abuse and harassment, even if those incidents differ in their particulars from the abuse and harassment alleged by plaintiffs and regardless of whether previous incidents would themselves have violated Title IX. Thus, notice of a substantial risk to female students may arise from notice of harassment and assaults of individuals other than female students, or from notice of harassment and assaults of female students whose situation differed in various respects from that of a particular plaintiff's. For instance, a school may be on notice that student athletes present a risk of sexually assaulting students based on an athlete's sexual assault of employees at another school. *Williams v. Bd. of Regents of the Univ. System of Georgia*, 441 F.3d 1287, 1298 (11th Cir 2006). A school district may have actual notice that an elementary school teacher

poses a risk to elementary students based on allegations of his previous sexual harassment of middle school students and a nineteen-year-old co-worker. *Doe v. Warren Consol. Sch.*, 307 F. Supp. 2d 860, 864-66, 891 (E.D. Mich. 2003). Should the district court's conclusion that rape of a high school student does not provide notice of a similar risk to a CU student be affirmed, an elementary school could assert, for instance, that it did not have notice that a teacher posed a substantial risk to female students even when school officials knew the teacher had abused girls who were not his students. Should the court's conclusion that harassment and assault of a female football player did not provide notice of a similar risk to other female students be affirmed, a school could assert that notice that a teacher was racially harassing African-American athletes whom he coached did not provide notice that the teacher might racially harass African-American students in his class. This is not the law.

Moreover, a student alleging a violation of Title IX "need not show that the district knew that a particular [individual] would abuse a particular student." *Rosa H.*, 106 F.3d at 659; s*ee also Escue*, 450 F.3d at 1153. In other words, notice of a risk need not be abuser-specific. In the Eighth Amendment context, where as under Title IX, liability turns on actual knowledge of a substantial risk, the Supreme Court has explained that an official may not escape liability "by showing that, while he was aware of an obvious, substantial risk to inmate safety, he did not

know that the complainant was especially likely to be assaulted by the specific prisoner who eventually committed the assault." *Farmer v. Brennan*, 511 U.S. 825, 843 (1994). In considering notice of risk, "it does not matter whether the risk comes from a single source or multiple sources, any more than it matters whether a prisoner faces an excessive risk of attack for reasons personal to him or because all prisoners in his situation face such a risk." *Id.*; *see also Gonzales*, 403 F.3d at 1182-85, 1187 (female inmate sexually assaulted by prison employee could go to jury with Eighth Amendment claim when sheriff had notice of previous sexual harassment and assault of other inmates by other prison employees). Under Title IX as well, the appropriate inquiry is whether school officials had notice of a substantial risk of sexual harassment and assault to persons in Appellants' situation, not whether officials had notice of a particular risk of harm to Appellants from Appellants' particular assailants. Thus, contrary to the district court's suggestion, that the multiple previous assaults of which CU had notice were by "identified players," 372 F. Supp. 2d at 1241, does not somehow insulate CU from notice of the broader pattern of harassment in the football program revealed by these incidents. As in *Gonzales*, notice of previous assaults and harassment by identified individuals provided notice of a broader hostile environment posing a substantial risk to women. *See Escue*, 450 F.3d at 1153 (notice of discrimination in recipient's *programs* sufficient under Title IX).

Taken together, the previous assaults of which CU had notice clearly permit a jury to conclude that CU knew female students faced a substantial risk of sexual assault and harassment by football players and recruits. The contrary rule crafted by the district court suggests that regardless of how many football players and recruits sexually assault young women, Title IX imposes no obligations on CU to address the problem unless officials previously received notice that a CU student has been assaulted in almost identical circumstances either by an unidentified player or by the particular player or recruit accused in an individual case. If applied in the context of Title VI, it suggests that a school is insulated from liability for racial harassment no matter how many students are repeatedly threatened with nooses and vile racial epithets in a particular department, if the previous incidents of harassment occurred under slightly different circumstances than the plaintiff's or were undertaken by identified individuals other than the plaintiff's harasser. This rule fundamentally misconceives the balance struck in *Davis* and *Gebser*, which recognize that when school officials have notice of any set of facts indicating a hostile environment, the school has an obligation to act. It should be rejected by this Court.

2. Notice to a CU law enforcement officer is relevant notice under Title IX.

In October 2001, "CC," a CU student, reported to CU police that she had been sexually assaulted by a football player—one of the individuals who would

weeks later assault Ms. Simpson. The district court failed to address this incident, perhaps because it concluded that notice to CU police officers does not constitute notice to CU.

Gebser makes clear that Title IX's notice requirement is fulfilled when a school official "who at a minimum has authority to institute corrective measures on the [school's] behalf" has actual knowledge of harassment. 524 U.S. at 277. As law enforcement officers, CU police had the power to institute corrective measures on CU's behalf that would have prevented future harassment by the assailant, including his assault of Appellants—namely, the power of criminal investigation and arrest. Moreover, such action would have begun to remedy the larger hostile environment by instituting accountability for sexual assault in the football program. This Court and others have described reports to law enforcement as one corrective measure school officials can institute to address harassment rising to the level of criminal assault and comply with civil rights law. *E.g.*, *Murrell v. Sch. Dist. No. 1*, 186 F.3d 1238, 1244 (10th Cir. 1999); *Vance*, 231 F.3d at 262. It necessarily follows that those law enforcement officers who are themselves school officials have authority to institute corrective measures to address criminal harassment.

3. Allegations need not be proven or corroborated to constitute notice under Title IX.

"Trainer B," a female student trainer in the football program, was raped by players and recruits at a football recruiting party in November 2001—just two weeks before the assault of Appellants—by some of the same players who assaulted Appellants, in circumstances remarkably similar to Appellants' assault. The district court nevertheless concluded that this did not provide notice to CU of the relevant risk because although officials may have heard rumors about the assault of Trainer B, those rumors were not confirmed.

Rampant gossip in the athletic department that something bad had happened to Trainer B involving sexual contact with football players at this event were sufficient to "alert [officials in the football program] to the possibility" that players and recruits had been involved in some form of sexual misconduct. *Gebser*, 524 U.S. at 291. Such uncorroborated allegations can constitute actual notice for purposes of Title IX. *E.g.*, *Doe v. Sch. Admin. Dist. No. 19*, 66 F. Supp. 2d 57, 60, 63 (D. Me. 1999) (denying summary judgment for school district on issue of notice when school principal had heard rumors that teacher was having a sexual relationship with high school student); *see generally Doe A. v. Green*, 298 F. Supp. 2d 1025, 1034 (D. Nev. 2004) ("While the complaints may be unsubstantiated by corroborating evidence and denied by the allegedly offending [individual], whether such complaints put the school district on notice of a substantial risk to students . . .

is usually a question for the jury.") (internal quotation marks omitted). Evidence of widespread discussion within the athletic department of improper sexual behavior by Appellants' attackers in circumstances remarkably similar to Appellants' assault should have gone to the jury as circumstantial evidence of notice to athletic department officials. *See Gant v. Wallingford Bd. of Educ.*, 195 F.3d 134, 141 (2d Cir. 1999) ("Of course, a showing that the defendant 'should have known' can, in some circumstances, create an inference—at least sufficient to raise a genuine issue—that the defendant *did* know.") (emphasis in original); *cf. Gonzales*, 403 F.3d at 1183 ("[K]nowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including *inference* from circumstantial evidence.") (emphasis in original).

C. Undisputed notice of the assault of Appellant Simpson satisfies Title IX's notice requirement.

Appellant Simpson reported the December 7, 2001, assault by players and recruits to CU officials immediately after it occurred. CU thus indisputably had the actual notice of sexual harassment required by Title IX. *See, e.g., Escue*, 450 F.3d at 1154-55 (noting plaintiff's allegations of harassment to school official constitutes "actual notice"); *Williams*, 441 F.3d at 1298 (notice of rape of student by football players constituted notice of harassment). As set out in Part II, below, CU's deliberately indifferent reaction to Simpson's own assault after receiving this notice denied her educational opportunities and thus violated Title IX.

*****

In summary, the district court's holding that CU did not have notice of a sexually hostile environment in the football program, if left to stand, "would permit school administrators to sit idly, or intentionally, by while horrible acts of discrimination occurred on their grounds by and to students in their charge." *Bryant*, 334 F.3d at 933. Such a holding is inconsistent with the core purposes of Title IX and Title VI, as well as the law of this Circuit and the United States Supreme Court.

II. Appellants' Evidence Establishes that CU Was Deliberately Indifferent to the Existence of a Sexually Hostile Educational Environment.

Supreme Court precedent makes clear that a school is "deliberately indifferent" to a hostile educational environment where its "response to [] harassment or lack thereof is clearly unreasonable in light of the known circumstances." *Davis*, 526 U.S. at 648. As articulated by this Court, "when administrators who have a duty to provide a nondiscriminatory educational environment for their charges are made aware of egregious forms of intentional discrimination and make the intentional choice to sit by and do nothing, they can be held liable." *Bryant*, 334 F.3d at 933. Even where a school "did not necessarily create the hostile environment," it will be deemed deliberately indifferent when it "facilitated the hostile environment or, in the least, permitted it to continue." *Id.*

The district court's analysis of the deliberate indifference prong of the hostile environment claim departed from established law in two disturbing ways. First, the district court erroneously concluded that a school insulates itself from liability by adopting minimalist remedial measures even when the school becomes aware that such measures are ineffective. This cannot be squared with legal precedent. Second, the district court erred in refusing to consider evidence of CU's response to Appellants' December 2001 assaults. Its legal conclusion that a school's response to an incident of assault, *i.e.*, post-incident conduct, should not be considered in determining deliberate indifference contravenes Supreme Court and lower court precedent. Even without the considerable evidence of CU's indifference prior to December 2001, CU's efforts to impede the criminal investigation of the December 2001 assaults and to protect Appellants' assailants exemplifies precisely the deliberate indifference that exposes a school to Title IX liability, because this indifference drove Appellants from CU, thus further denying them equal educational opportunities on the basis of sex.

A. CU's response to harassment in the football program prior to December 2001 constituted deliberate indifference.

The district court erred in finding that CU was not deliberately indifferent to sexual harassment in the football program prior to December 2001 based exclusively on the minimal remedial measures that CU said it adopted from 1997 to 1999. In drawing this conclusion, the court ignored evidence that CU knew

female students continued to be victimized by a spate of harassment, assaults, and rapes in the football program after the last of the remedial measures was adopted and before the December 2001 rapes occurred, yet did nothing further to protect its students. According to the district court, the utter ineffectiveness of a school's remedial measures is irrelevant to the deliberate indifference inquiry, even when the school knows that the measures have failed.

In determining whether a school's response to harassment amounts to deliberate indifference, courts across the nation examine (among other factors) the effectiveness of remedial measures in curbing the harassment. These courts reach the unremarkable conclusion that a school cannot rely on superficial remedies to shield itself from a deliberate indifference finding, particularly when it learns that those remedies are inadequate yet takes no further action. In *Vance v. Spencer County Public School District*, the Sixth Circuit explained the rationale for this position. In that case, the defendant school was on notice of repeated sexual assaults on campus. In response, it promulgated a sexual harassment policy and provided presentations on sexual harassment. Additionally, school officials confronted the students accused of assaulting plaintiff. Nonetheless, because these measures failed to end the assaults, and because the school knew the remedies were ineffective yet refused to take further steps, the Sixth Circuit concluded that the school was deliberately indifferent to the harassment. It explained,

> [W]here a school district has knowledge that its remedial action is inadequate and ineffective, it is required to take reasonable action in light of those circumstances to eliminate the behavior. Where a school district has actual knowledge that its efforts to remediate are ineffective, and it continues to use those same methods to no avail, such district has failed to act reasonably in light of the known circumstances.

231 F.3d at 261; *accord Wills v. Brown Univ.*, 184 F.3d 20, 26 (1st Cir. 1999) ("[I]f [the institution] learns that its [corrective] measures have proved inadequate, it may be required to take further steps to avoid new liability."); *Jones v. Indiana Area Sch. Dist.*, 397 F. Supp.2d 628 (W.D. Pa. 2005) (rejecting defendant's motion for summary judgment where school learned efforts to remedy harassment were ineffective in stopping a pattern of harassment); *Canty v. Old Rochester Reg'l Sch. Dist.*, 66 F. Supp.2d 114, 116-17 (D. Mass. 1999) (same).

This Court approvingly cited this rule in *Escue*, a Title IX case involving a female student who was sexually harassed by her professor. 450 F.3d at 1155. In concluding that the university was not deliberately indifferent, this Court explicitly relied upon the fact that the university "had no 'knowledge that its remedial action [was] inadequate and ineffective.'" *Id.* at 1155-56 (alteration in original) (citing *Vance*, 231 F.3d at 261). It then approvingly discussed *Theno v. Tonganoxie Unified School District No. 464*, 377 F. Supp.2d 952, 965 (D. Kan. 2005), which denied summary judgment to a school district in a peer-on-peer harassment case. Although the school district in *Theno* had implemented remedial measures to address a pattern of harassment, summary judgment was inappropriate because a

jury "certainly could conclude" that inaction in the face of the known ineffectiveness of these measures constituted deliberate indifference. *Escue*, 450 F.3d at 1156. Thus, this Court already has endorsed the uncontroversial position, uniformly espoused by sister circuits and lower courts, that a school is deliberately indifferent to a hostile environment even if it has adopted reasonable anti-harassment measures, when the school learns that the measures fail to remedy the hostile environment yet takes no further action.

Applying that rule to Appellants' evidence leads to the inescapable conclusion that CU exhibited deliberate indifference to the sexual harassment, assaults, and rapes that continued unabated even after its 1997-1999 reforms were implemented. Even assuming that the remedial measures CU adopted from 1997 to 1999—*i.e.*, recommending a one-semester and one-game suspension for one player among several involved in the rape of a high school student, and developing recruiting guidelines, a sexual harassment protocol and an anti-harassment policy—constituted reasonable attempts to end harassment in the football program when adopted, after CU learned that the sexual harassment continued unabated despite adoption of the reforms, Title IX imposed an obligation to do more. Football officials knew of the continued use of alcohol, drugs, and sex to recruit players, but opposed eliminating these practices for fear of losing a "competitive edge" in attracting star athletes. In 2000, CU learned that its anti-harassment

policies failed to protect the sole female player on the team, Katherine Hnida, who was sexually harassed on multiple occasions by football players. CU knew that its anti-harassment policies failed to protect another student trainer, Trainer A, who was raped by a football player in September 2001. It then learned that its policies failed to prevent the October 2001 sexual assault of CC, a CU student and football-recruiting ambassador, by one of the football players who would assault Appellants two months later. Then, in November 2001, after Trainer B was sexually assaulted by multiple football players and recruits during a recruiting event, CU learned of rumors of something bad that happened to Trainer B involving sexual contact with multiple players at the event.

And how did CU respond to these revelations? It did not revisit the effectiveness of the 1997-1999 remedial measures. It did not ensure enforcement of its anti-harassment policies and protocol. It did not conduct any investigation into these incidents. It did not punish the players involved in any meaningful way. CU's most aggressive measures upon discovering the ineffectiveness of its anti-harassment policies consisted of making one offending player run laps and verbally reprimanding another. Otherwise, CU responded by covering up the allegations, summoning Trainer A into the football coach's office and intimidating her from bringing criminal charges against the player, and retaliating against Ms. Hnida by preventing her from staying on the team and interfering with her attempt to transfer

to another football program. CU's own internal commission concluded that the football program had adopted a policy of "plausible deniability" with respect to the risks posed by recruiting practices.[7] Time and again officials in the football program rejected pleas for substantive reforms, prioritizing the "competitive edge" that sex and alcohol offered in recruiting star athletes, over the rights of female students to be free from sexual assaults and protected against rapes. It simply cannot be said that CU acted reasonably in concluding that the superficial measures adopted from 1997 through 1999 were sufficient to address the hostile environment in the football program, when CU knew that those measures failed to protect students against the ongoing pattern of sexual harassment, assaults, and rapes in that program.

B. CU's response to the December 7, 2001, assaults was deliberately indifferent.

Appellants' evidence as to CU's conduct in response to the December 2001 assaults, standing alone, was sufficient to go to the jury on the question of whether CU was deliberately indifferent to a sexually hostile educational environment, even absent consideration of CU's previous tolerance of harassment and assaults in the football program. The district court's categorical refusal to consider CU's conduct after the December 7, 2001, assaults on Appellants—including CU's efforts to

[7] Independent Investigative Commission, *Final Report to the University of Colorado Board of Regents* 13 (May 14, 2004).

impede the criminal investigation—constitutes an unprecedented and unwarranted departure from established civil rights law.

Specifically, the district court's conclusion that "evidence that the University exhibited deliberate indifference after the key discriminatory event at issue does not tend to show that the University's deliberate indifference caused the severe sexual harassment suffered by the plaintiffs," 372 F. Supp.2d at 1245, too narrowly construes the harm against which Title IX protects. Title IX does not merely address incidents of sexual harassment *per se*. Rather, Title IX more broadly protects against the denial of educational opportunities on the basis of sex. When a school attempts to cover up a student's rape and refuses to investigate the incident or punish the perpetrators, and when this deliberate indifference to the rape leads the victim to withdraw from the school, the school has in effect excluded a student from an educational opportunity on the basis of her sex, even if it did not cause the discrete incident of the rape itself.

For this reason, courts consistently examine a defendant's response to harassment of a plaintiff to determine whether a defendant has been deliberately indifferent. The law in this Circuit could not be clearer on this point. In *Murrell*, this Court explicitly relied on a school's response after plaintiff was sexually assaulted to conclude that the school was deliberately indifferent to the existence of a sexually hostile environment and that this deliberate indifference deprived

plaintiff of educational opportunities in violation of Title IX. 186 F.3d at 1244, 1247-49. In that case, a female plaintiff experienced a series of assaults by a male classmate. After the assaults ended, school administrators acted rudely to plaintiff and her mother, suggested the sexual contact to which plaintiff was subject might have been consensual, and then suspended the plaintiff but not her assailant. As a result, plaintiff left the school. In the view of this Court, this post-harassment behavior established deliberate indifference that deprived the plaintiff of educational benefits in violation of Title IX. *Id.* at 1249. Similarly, in the more recent case of *Escue*, this Court examined a university's response after the harassment occurred to determine whether the university had evinced deliberate indifference that denied the plaintiff educational opportunities. 450 F.3d at 1155 (relying on university's decision to transfer the plaintiff out of the class taught by the harasser, confront the harasser, and terminate the harasser to conclude that the school's post-incident conduct did not constitute deliberate indifference). This Court's consistent conclusion that post-incident conduct is crucial in determining whether a school has been deliberately indifferent is entirely consistent with Supreme Court precedent, *see Gebser*, 524 U.S. at 291 (relying in part on school's post-incident decision to terminate a sexual harasser to conclude that the school was not deliberately indifferent), as well as case law from sister circuit courts, *Williams*, 441 F.3d at 1299-1300 (relying in part on "sluggish" pace of defendant's

response to sexual assault of plaintiff to affirm finding of deliberate indifference); *Gant*, 195 F.3d at 143 (stating that deliberate indifference could be found on the basis of a teacher's response to a complaint of name-calling made after an incident of racial harassment occurred). The district court's categorical refusal to consider CU's response to Appellants' December 2001 rapes represents a clear departure from established civil rights law.

When CU's response to the December 2001 assaults and rapes is considered, it becomes even more evident that CU was deliberately indifferent. CU did not punish any of the football players involved for the assaults or rapes; in fact, all of them played in the Fiesta Bowl game only four weeks later. Even after the players pled guilty to criminal charges, CU arranged for at least one of them to work off his community service hours in the CU weight room. CU's football coach never met with at least one of the players to discuss the rapes or expressed any concern about the incident. Even after CU police reported that evidence against one of the recruits was "overwhelming," CU's football program continued to recruit him.

Indeed, far from undertaking reasonable efforts to investigate or remedy a hostile environment, CU actually took steps to impede the criminal investigation of the assaults. Football players were instructed to withhold evidence from the police. Coaches and players met with a friendly officer to review their accounts for consistency before meeting with investigating officers. Athletic officials

retaliated against a student-athlete who was also raped that evening and who provided evidence to the prosecution by revoking her soccer scholarship and banning her from athletic facilities. As a result of CU's reaction and the hostility it demonstrated, both Appellants ultimately left CU and thus were denied educational opportunities. CU's conduct constitutes a quintessential example of the deliberate indifference against which Title IX and its analogs protect. In *Murrell*, when this Court was confronted with a virtually identical situation wherein school officials "not only refused to remedy [] harassment but actively participated in concealing it," this Court had no difficulty in concluding that such conduct "quite plainly amounts to deliberate indifference." 186 F.3d at 1248; *see also Ericson v. Syracuse Univ.*, 35 F. Supp.2d 326, 328 (S.D.N.Y. 1999). The district court's blind eye toward CU's malfeasance that served to deny Appellants educational opportunities cannot be squared with the protections afforded by civil rights laws.

CONCLUSION

For these reasons, *amici* urge this Court to reverse the grant of summary judgment for Defendants and remand for further proceedings.

STATEMENT REGARDING ORAL ARGUMENT

Counsel for *amici* request permission to participate in oral argument because this case raises issues of exceptional legal importance regarding the interpretation of Title IX and analogous civil rights statutes, and *amici* wish to present to the Court their analysis of these statutes, including the relevance of Appellants' notice of and deliberate indifference to the assaults of Appellees.

Dated: August 24, 2006

Respectfully submitted,

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APPENDIX A
Statements of Interest of *Amici*

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization of more than 600,000 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) and its Racial Justice Program, 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 or race. In particular, the ACLU has battled the invidious effects of discrimination in education, including sexual harassment, given that the proper role of education is to provide opportunities to overcome disadvantage and stereotypes; discrimination that serves to undermine this vital role and close down opportunity is especially pernicious. The American Civil Liberties Union Foundation of Colorado ("ACLU of Colorado") is the Colorado state affiliate of the ACLU. The proper resolution of this case is a matter of substantial interest to the ACLU and its members.

The Asian American Legal Defense and Education Fund ("AALDEF"), founded in 1974, is a non-profit organization based in New York City. AALDEF defends the civil rights of Asian Americans nationwide through the prosecution of

lawsuits, legal advocacy and dissemination of public information. A key focus of AALDEF's educational equity project is the growing problem of anti-Asian harassment in public schools and universities.

The California Women's Law Center ("CWLC") is a private, nonprofit public interest law center specializing in the civil rights of women and girls. The California Women's Law Center, established in 1989, 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 *Simpson v. University of Colorado* 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 the *Simpson* 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. Since its founding in 1973, 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 employment opportunities.

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") is a non-profit, nonpartisan organization founded in 1963 at the request of President John F. Kennedy to involve the private bar in providing legal services to address racial discrimination. The principal mission of the Lawyers' Committee is to secure, through the rule of law, equal justice for all Americans. Its Board of Trustees includes several past Presidents of the American Bar Association, past Attorneys General of the United States, law school deans and professors, and many of the nation's leading lawyers. Through the Lawyers' Committee and its independent local affiliates, hundreds of attorneys have represented thousands of clients in discrimination cases across the country. The Lawyers' Committee has been continually involved in cases before the Supreme Court involving the proper scope and coverage afforded to federal civil rights laws prohibiting discrimination. Through the Leadership Conference for Civil Rights, the Lawyers' Committee recently filed an *amicus* brief in the Title IX case *Jackson*

v. Birmingham Board of Education, 544 U.S. 167 (2005). The Lawyers' Committee has also filed *amicus* briefs in recent sexual harassment cases including *Suders v. Pennsylvania State Police*, 542 U.S. 129 (2004) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

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 curiae* in numerous cases concerning the right to be free from sexual harassment and sex discrimination in education, including *Jackson v. Birmingham Board of Education*, 544 U.S. 167 (2005), *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999), and *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992).

The Mexican American Legal Defense and Educational Fund ("MALDEF"), a national nonprofit Latino civil rights organization, has as its primary objective

the protection and promotion of the civil rights of Latinos living in the United States. Founded in 1968, MALDEF seeks to empower the Latino community to participate fully in American society through impact litigation, advocacy, research, community outreach, leadership development, and education. MALDEF's core program areas include education, immigrants' rights, employment discrimination, and political access. MALDEF has litigated and appeared as *amicus curiae* in numerous cases involving the right to be free of discrimination, harassment, and a hostile environment.

Founded in 1996, the National Asian Pacific American Women's Forum ("NAPAWF") is dedicated to forging a grassroots progressive movement for social and economic justice and the political empowerment of Asian Pacific American women and girls. NAPAWF supports the plaintiffs in *Simpson v. University of Colorado*. Ending violence against women, including sexual assault and harassment, is one of the central issues that forms the basis of NAPAWF's advocacy. Over the past few years, reports of sexual harassment, stalking, and assault against Asian Pacific Islander ("API") women on college campuses have steadily increased. This increase stems primarily from race and sex discrimination against API women and the failure of university administrators to quickly and adequately respond to these situations. The Supreme Court has recognized that

federally funded educational institutions deny women and minorities equal educational opportunity in violation of Title IX and Title VI not only when schools themselves discriminate, but also when they knowingly ignore discrimination by third parties. A narrow interpretation of the notice and deliberate indifference requirements required under law would ultimately eviscerate the protections of Title IX and Title VI, leaving many API women without the ability to seek judicial redress.

The National Association for the Advancement of Colored People ("NAACP" or the "Association"), established in 1909, is the nation's oldest civil rights organization. The principal objectives of the Association are to ensure the political, educational, social, and economic equality of rights and eliminate race prejudice among the citizens of the United States; to remove barriers of racial discrimination through democratic processes; to seek enactment and enforcement of federal, state and local laws securing civil rights; to inform the public of the adverse effects of racial discrimination and to seek its elimination; to educate persons as to their constitutional rights and to take all lawful action to secure the exercise thereof, and to take other lawful action in furtherance of these objectives.

The NAACP Legal Defense and Educational Fund, Inc. (“LDF”) is a non-profit corporation formed to assist African-Americans in securing their legal rights. It is the nation's oldest civil rights law firm, having been founded as an arm of the NAACP in 1939 by Charles Hamilton Houston and Thurgood Marshall. The LDF was chartered by the Appellate Division of the Supreme Court of New York in 1940 as a non-profit legal aid society "to render legal aid gratuitously to such Negroes as may appear to be worthy thereof, who are suffering legal injustices by reason of race or color and are unable to employ and engage legal aid and assistance on account of poverty." Since 1957, LDF has operated independently of the NAACP. LDF has been described by the Supreme Court of the United States as a "'firm' . . . which has a corporate reputation for expertness in presenting and arguing the difficult questions of law that frequently arise in civil rights litigation," *NAACP v. Button*, 371 U.S. 415, 422 (1963). LDF has long been concerned with effective enforcement of the nation's civil rights laws, including Title VI of the 1964 Civil Rights Act, 42 U.S.C. § 2000d, *see, e.g., Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973) (*en banc*), *aff'g* 351 F. Supp. 636 (D.D.C. 1972), *case later dismissed on other grounds sub nom. WEAL v. Cavazos*, 906 F.2d 742 (D.C. Cir. 1990), and similar statutes patterned on Title VI, which are construed *in pari materia* with it, such as Title IX. LDF's interest in the matter at bar arises from its concern that the cramped interpretation of the evidence necessary to establish a

sexually hostile environment adopted by the court below would be equally applicable to Title VI and other civil rights laws, and would virtually result in judicial nullification of the broad purposes of these laws as well as work flagrant injustices upon the victims of the stereotypical and discriminatory conduct to which they are subjected.

Founded in 1971, the National Partnership for Women and Families is a national advocacy organization that develops and promotes public policies to help women achieve equal opportunity, quality health care, and economic security for themselves and their families. The National Partnership has a longstanding commitment to equal opportunity for women and to monitoring the enforcement of antidiscrimination laws. The National Partnership has devoted significant resources to combating sex and race discrimination in education and has filed numerous briefs *amicus curiae* in the federal circuit courts of appeal to advance women's opportunities in education.

The Northwest Women's Law Center (NWLC) is a regional non-profit public interest organization that works to advance the legal rights of all women through litigation, legislation, education, and the provision of legal information and referral services. Since its founding in 1978, NWLC has been involved in both

litigation and legislation aimed at ending all forms of discrimination against women. As part of that effort, NWLC has been dedicated to protecting and ensuring women's rights to equality in education and athletics. Toward that tend, NWLC has participated as counsel and as *amicus curiae* in cases throughout the Northwest and the country. NWLC believes it is imperative that courts preserve the protections afforded to women and girls by Title IX.

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, including 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 discrimination in education on the basis of sex or race, which denies women and minorities equal educational opportunities.

The Southwest Women's Law Center is a nonprofit public interest organization based in Albuquerque, New Mexico. Its mission is to create the opportunity for women to realize their full economic and personal potential by: (i) eliminating gender bias, discrimination and harassment; (ii) lifting women and their families out of poverty; and (iii) ensuring that women have full control over their reproductive lives through access to comprehensive reproductive health services and information.

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 is committed to ending sexual abuse and harassment of women and children and to safeguarding the legal rights of women and children who experience sexual abuse. Toward that end, the WLP is interested in insuring that the law provides comprehensive remedies for students who are subject to sexual abuse and harassment.

CERTIFICATE OF DIGITAL SUBMISSIONS

I, Lenora M. Lapidus, hereby certify that on August 24, 2006, I provided a digital copy of the foregoing *Amici Curiae* Brief in Support of Appellants to the Clerk for the Tenth Circuit Court of Appeals via electronic mail and further certify that:

(1) all required privacy redactions have been made and, with the exception of those redactions, every document submitted in digital form is an exact copy of the written document filed with the Clerk; and

(2) the digital submission has been scanned for viruses with the most recent version of a commercial virus scanning program (Symantec Antivirus) and according to the program is free of viruses.

Dated: August 24, 2006

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CERTIFICATE OF SERVICE

I, Emily J. Martin, hereby certify that on August 24, 2006, a copy of the foregoing *Amici Curiae* Brief in Support of Appelants was served by U.S. Mail and electronic mail to counsel of record as follows:

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