RUSSELL HORNOR, Plaintiff-Appellant, v. UPPER FREEHOLD REGIONAL BOARD OF EDUCATION, D/B/A UPPER FREEHOLD REGIONAL SCHOOL DISTRICT, AND ALLENTOWN HIGH SCHOOL, Defendants-Respondents, and NEW JERSEY FUTURE FARMERS OF AMERICA, Defendant, and ALLENTOWN FUTURE FARMERS OF AMERICA, AND CHARLES HUTLER, III, Defendants.	NEW JERSEY SUPREME COURT APP. DIV. # **A-000366-22** SUPREME COURT **# 089973** **On Motion for Leave to Appeal from Superior Court of New Jersey, Appellate Division** Sat Below: Hon. Allison E. Accurso, P.J.A.D. Hon. Francis J. Vernoia, J.A.D. Hon. Arnold L. Natali, Jr., J.A.D.

AMENDED BRIEF OF THE NORTHFIELD BOARD OF EDUCATION & SCHOOL DISTRICT, AND, LINCOLN PARK BOARD OF EDUCATION & SCHOOL DISTRICT ON APPEAL TO SUPREME COURT

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PRELIMINARY STATEMENT

Pursuant to New Jersey Court Rule 1:13-9, the Northfield City School District, Northfield Board of Education, and the Northfield Community School, defendants in John Doe v. Northfield City School District, Northfield Board of Education, Northfield Community Schools, Howard Dennies, et al. (Docket No.: ATL-L-2709-23) ("Northfield"); and, the Lincoln Park Board of Education, Lincoln Park School District and Lincoln Park Elementary School, defendants in Adam Baker v. Lincoln Park Board of Education, Lincoln Park School District, Adam Whitenhower, et al. (Docket No.: MRS-L-002618-21) ("Lincoln Park"), respectfully submit this brief in support of its request for leave from the trial court to appear as *amici curiae* before the New Jersey Supreme Court in Hornor v. Upper Freehold Reg'l Bd. of Educ. et al. (Docket No.: A-0366-22 (2024) and Supreme Court No.: # 089973) for which the Supreme Court granted Plaintiff's leave for appeal and posted notification on February 18, 2025. (Herein, "Northfield" and "Lincoln Park" to be collectively referred to as "*Amici*"). The issue presented is whether and when a public entity can be strictly liable for the conduct of its employee which is intentional, criminal or outside the scope of the employment and therefore imputed to his or her public employer.

STATEMENT OF FACT

Amici adopt the Statement of Facts contained in Plaintiff's brief on motion for leave to appeal for purposes of this Motion only.

PROCEDURAL HISTORY

Amici adopt the Statement of Procedural History contained in Plaintiff's brief on motion for leave to appeal for purposes of this Motion only.

STANDARD OF REVIEW

Under New Jersey Court Rule 1:13-9(a), an application for leave to appear as *amicus (amici) curiae* in any court shall be made by motion in the cause stating with specificity: the identity of the applicant, the issue intended to be addressed, the nature of the public interest therein; and the nature of the applicant's special interest, involvement, or expertise in respect thereof. The court shall grant the motion if the motion is timely, the applicant's participation will assist in the resolution of an issue of public importance, and no party to the litigation will be unduly prejudiced thereby. Id.

Pursuant to R. 1:13-9(a), *Amici* have standing to request for leave to appear as *amici curiae* in the New Jersey Supreme Court's review of Hornor v. Upper Freehold Reg'l Bd. of Educ. et al. (Docket No.: A-0366-22 (2024) and Supreme Court No.: # 089973).

ARGUMENT

I. *AMICI*'S SPECIAL INTEREST.

The material facts and legal arguments in *Amici*'s cases are identical to those in Hornor. *Amici*, like the Upper Freehold Regional School District ("Respondent"), are both a public schools in New Jersey who have been sued under the Child Sexual Abuse Act ("C.S.A.A."). Like Hornor, plaintiffs' claims, in both *Amici's* cases, are predicated upon the allegation that an employee of the school committed a sexual assault on the plaintiff while plaintiff was a student at the school district. In Northfield, plaintiff alleges that a substitute teacher, employed by the school, sexually assaulted plaintiff, while plaintiff was student of the district; and similarly, in Lincoln Park, plaintiff claims that a janitor, employed by the school, sexually assaulted plaintiff, while plaintiff was a student of the district. Thus, the facts of Hornor and *Amici's* cases are analogous.

The central questions in *Amici*'s matters are: (i) whether N.J.S.A. 59:2-1.3 precludes any immunity and defense afforded to public entities through the Tort Claims Act in C.S.A.A. cases and (ii) whether a public entity is strictly liable for the conduct of an employee when said conduct is intentional, constitutes criminal conduct or is outside the scope of employment. These very same consequential questions are to be presented before the New Jersey Supreme Court in its review of Hornor. Any decision rendered by the Court in Hornor will be controlling and

determinative as to the law applicable to *Amici*'s cases at the trial level. Thus, consistent with R. 1:13-9, *Amici* both have a special interest in appearing in the Supreme Court's review of Hornor as *Amici*'s facts, issues, and questions of law are analogous to those of Hornor.

II. *AMICI*'S PUBLIC INTEREST.

The Supreme Court's decision in Hornor will be one of great public interest and importance with respect to public entities in the State of New Jersey. Any restriction on the Tort Claims Act, and the immunities and the affirmative defenses afforded to public entities by the Act, will adversely impact all public entities in the State of New Jersey. If the holding is not upheld, the Supreme Court would open the door to, essentially, limitless litigation against public entities alleging imputed-strict vicarious liability relating to these classes of cases. This conclusion would be contrary to years of statutory and judicial jurisprudence affording tort claim immunities and defenses as applied to vicarious liability of public entities.

III. ALTERNATIVE AVENUES OF REDRESS ARE AVAILABLE TO PLAINTIFFS.

The Court, by upholding the Appellate Court's holding, will not leave plaintiffs filing claims against public entities under the C.S.A.A. and N.J.S.A. 59:2-1.3 without appropriate redress. Such claims for damages arising from sexual assault made against public entities may still be asserted by plaintiffs via causes of action

alleging negligent hiring, supervision, retention and other related claims which are based upon an employer's conduct.

IV. N.J.S.A. 59:2-1.3'S LIMITATIONS AND APPLICATIONS

The one of the central questions posed to the Appellate Court in Hornor was whether the employee's sexual assault of a student held the employer vicariously liable for such conduct in light of the revised C.S.A.A. and the 2019 amendments to the Tort Claims Act. N.J.S.A. 59:2-1.3. The Appellate Court, in reaching its decision, analyzed the 2019 amendments to the Tort Claims Act and the revised version of C.S.A.A. In completing its analysis, the Court found that the C.S.A.A. and N.J.S.A. 59:2-1.3 did not preclude the affirmative defenses afforded to public entities by the Tort Claims Act, such as N.J.S.A. 59:2-2. The Appellate Court stated,

> The 2019 amendments to the Child Sexual Abuse Act…do not address the entity's vicarious liability for sexual assault or abuse committed by an active abuser-employee…. a public school cannot be held vicariously liable for such under the Tort Claims Act…N.J.S.A. 59:2-2(a) allows for liability of a public entity "for injury proximately caused by an act or omission of a public employee" only "within the scope of his employment." As Section 219(2)(d) addresses an employer's liability for conduct occurring outside the scope of employment, it does not provide a basis for holding a public entity, like the Board, liable under the Tort Claims Act. Hornor's failure to identify a liability predicate in the Act for the Board's vicarious liability for Hutler's sexual assault is fatal to Hornor's vicarious liability claim against the Board. Hornor v. Upper Freehold Reg'l Bd. of Educ., A-0366-22, 2024 WL 4440951, at *20–21 (N.J. Super. Ct. App. Div. Oct. 8, 2024) (Quoting, Tice, 133 N.J. at 355).

Ultimately, the Appellate Court held that public entities can only be held vicariously liable for the conduct of its employees only if the conduct was committed within the scope of employment, and further, that liability of a public entity must satisfy the requirements of the Tort Claims Act. The Appellate Court's reasoning is sound.

a. The Tort Claims Act.

The Appellate Court's holding is congruent with the intent and law of the Tort Claims Act. Since its codification in 1972, the Tort Claims Act aims to balance the interests of both the public and the public entities. The Tort Claims Act provides individuals potential avenues for legal redress within the scope of the act, while also providing protection to public entities predicated upon long standing jurisprudence of public policy providing reasonable immunities. The "… Act is a comprehensive scheme that seeks to provide compensation to tort victims without unduly interfering with governmental functions and without imposing an excessive burden on taxpayers." Bernstein v. State, 411 N.J. Super. 316, 986 A.2d 22 (A.D.2010). The intent of the TCA is set out in its preamble,

> The Legislature recognizes the inherently unfair and inequitable results which occur in the strict application of the traditional doctrine of sovereign immunity…Consequently, it is hereby declared to be the public policy of this State that public entities shall only be liable for their negligence within the limitations of this act and in accordance with the fair and uniform principles established herein. All of the provisions of this act should

> be construed with a view to carry out the above legislative declaration. N.J.S.A. 59:1-2

In analyzing a tort claim against a public entity in New Jersey, the first task is always to locate the predicate for liability in the Tort Claims Act. Troth v. State, 117 N.J. 258, 277 (1989) (O'Hern J., concurring). If there is no predicate for liability, the inquiry ends. "The requirements of the New Jersey Tort Claims Act are stringent and place a heavy burden on plaintiffs seeking to establish public entity liability." Charney v. City of Wildwood, D.N.J.2010, 732 F.Supp.2d 448, affirmed 435 Fed. Appx. 72, 2011 WL 2632122. The primary source of public entity liability is typically contained in N.J.S.A. 59:2-2(a),

> [a] public entity is liable for injury proximately caused by an act or omission of a public employee within the scope of his employment in the same manner and to the same extent as a private individual under like circumstances.

A public entity has no vicarious liability for acts of its employees outside the scope of employment. Cosgrove v. Lawrence, 214 N.J. Super. 670, 680 (Law. Div. 1986). In construing provisions of Tort Claims Act, an appellate court must favor immunity provisions over liability provisions. N.J.S.A. Speziale v. Newark Housing Authority, 193 N.J. Super. 413, (App. Div. 1984). The purpose and intent of the Tort Claims Act is to limit public entities' exposure. Reversal of Hornor would increase public entities' exposure to liability predicated upon the acts of others, rather the conduct of the public entity itself.

b. N.J.S.A. 59:2-1.3 Two Pronged Requirements for Minors.

The Appellate Court's holding does not conflict with the C.S.A.A. and is consistent with the legislative intent of the 2019 Tort Claim Amendments. In 2019, Governor Murphy signed the C.S.A.A. and corresponding amendments to the Tort Claims Act. N.J.S.A. 59:2-1.3. A fair reading of the amended section to the Tort Claims Act cannot be interpreted to impose strict liability upon public entities who have been sued predicated upon intentional, criminal or conduct outside the scope of authority conduct under the C.S.A.A.

Section (a.) of N.J.S.A. 59:2-1.3 states, "Notwithstanding any provision of the 'New Jersey Tort Claims Act'… to the contrary…"

> 1) Immunity from civil liability granted by that act to a public entity or public employee shall not apply to an action at law for damages as a result of a sexual assault, any other crime of sexual nature, a prohibited sexual act as defined in [N.J.S.A. 2A:30B-2], or sexual abuse as defined in section [N.J.S.A. 2A:61B-1] being committed against a person, which caused by a willful, wanton, or grossly negligent act of the public entity or public employee; **and**
>
> 2) Immunity from civil liability granted by that act to a public entity shall not apply to an action at law for damages as a result of a sexual assault, any other crime of sexual nature, a prohibited sexual act as define in section [N.J.S.A. 2A:30B-2] or sexual abuse as defined in section [N.J.S.A. 2A:61B-1] being committed against a minor under the age of 18, which was caused by the negligent hiring, supervision, or retention of any public employee.

These two provisions should be read *in pari materia*. Section (a)(1) does not provide for imputed liability of an employee to the public entity. It provides for an exception from the Tort Claim Act immunities for (i) conduct by the employee; and (ii) the willful wanton act or grossly negligent act of the public entity, separate and distinct from the conduct of the employee. Section (2)(a) specifies the three specific types of conduct for which the public entity is no longer immune.

To interpret those provisions in any way is much broader than the plain language of the statute and not contemplated by the New Jersey Legislature. Such an interpretation would establish strict liability to public entities and would directly conflict with well-settled jurisprudence and with the purpose of the section itself. (See, Comment 1 to N.J.S.A. 59:2-10). As the legislature has explicitly states as it pertains to section (a.) of N.J.S.A. 59:2-1.3,

> This section inadvertently fails to establish a standard of proof for cases involving claims filed against public entities. If unaddressed, the lack of clarity would create uncertainty and likely lead to additional litigation. I have received assurances that the Legislature will correct this omission by clarifying that public entities should be held to the same standard of liability that is applied to religious and nonprofit organizations. Applying a different standard would be unjustified. See, Governor's Statement Upon Signing Senate Committee Substitute for Senate Bill No. 477 (May 13, 2019).

Liability for religious and nonprofit institution hinges on wrongful conduct. N.J.S.A. 2A:53A-7(c) (no organizational immunity for sexual abuse claims based on

willful, wanton, or gross negligence acts); and, N.J.S.A. 2A:53A-7.4 (charitable organizations liable for acts of negligence in employee hiring, supervision, or retention). N.J.S.A. 59:2-1.3 conforms liability for public entities to conform with the charitable immunity provisions by abandoning the strict liability standard. Thus, imposing strict liability in such cases would directly conflict with the legislative intent of the Tort Claims Act and the respective 2019 amendments.

c. N.J.S.A. 59:2-1.3 Does Not Preclude a Public Entities Ability to Assert Defenses.

Further, N.J.S.A. 59:2-1.3 does not prohibit public entities from asserting defenses in cases which an employee is alleged to have sexually assaulted an individual. N.J.S.A. 59:2-1.3(a)(1) purports to eliminate existing immunities for public entities and its employee where the entity or employee acted "willfully, wantonly, or with gross negligence" in causing damages resulting from sexual assault. If the Legislature wanted to impute liability for an employee's conduct to a public entity it would have done so. It did not.

Thus, N.J.S.A. 59:2-2 serves as a limitation on liability in such cases and provides public entities with a defense. This section of the Tort Claims Act simply conditions a finding of vicarious liability against a public entity by requiring plaintiffs to show the employee in question was acting within the scope of employment.

V. SCOPE OF EMPLOYMENT.

a. Controlling Standard.

The Court should uphold the Appellate Court's decision in Hornor as New Jersey jurisprudence has recognized the limitations of the vicarious liability of employers for the illegal conduct of its employees when such conduct falls outside the scope of employment. See, N.J.S.A. 59:2-2.

In Davis v. Devereux Found, 209 N.J. 269 (2012) an employee, who was employed by an assisted living facility, poured boiling water on a resident who has resided at the facility since childhood. On that day, the employee was assigned to supervise the resident, and right as her shift began, she assaulted the resident. As a result of this, the residents sustained various injuries and burns. The employee was criminally charged with assault, and subsequently, the resident sued the facility for damages.

The issue before the court in Davis was whether the employer was liable for the assault committed by the employee. Whether an employee's conduct falls within the scope of employment, or not, is determinant to the issue of an employer's vicarious liability for the employee's conduct. And so, in reaching it's holding the court iterated the following four-factor test which decides whether an employee's conduct falls within the "scope of employment." Id. at 302. (citing, the Restatement):

(i) it is of the kind he is employed to perform

> (ii) it occurs substantially within the authorized time and space limits;
>
> (iii) it is actuated, at least in part, by a purpose to serve the master; and,
>
> (iv) if force is intentionally used by the servant against another, the use of force is not unexpectable by the master. Id. at 303 (quoting Restatement (Second) of Torts § 228(1) (1965)).

The Court in Davis in reaching this test declined to rely on Hardwicke, contrary to plaintiff's reliance on Hardwicke and its progeny. On this point, the Court held,

> As the Appellate Court noted in Davis, Court's opinion that Hardwicke cannot be read to introduce 'what would clearly be a major doctrinal change respecting the law governing institutions that care for children and the disabled.' Davis, supra, 414 *N.J.Super.* at 10, 997 *A.*2d 273. The liability of *in loco parentis* institutions has thus been determined in accordance with traditional negligence principles; the "non-delegable" duty proposed here, amounting to an employer's absolute liability for an employee's criminal act, has not been accepted by this Court in any setting similar to that of this case. Davis v. Devereux Found., 209 N.J. 269, 291–92 (2012).

Additionally, the Court noted in Davis that "[o]nly rarely will intentional torts fall within the scope of employment." Id. (Citing, Schultz v. Roman Catholic Archdiocese of Newark, 95 N.J. 530, 535 n.1 (1984); and, Di Cosala v. Kay, 91 N.J. 159, 450 A.2d 508 (1982)). The Davis court ultimately held that the employer was not liable for the conduct of the employee (assault) as the conduct was well outside the scope of employment. The court stated,

> Under *Restatement* § 228(1), [employee's] conduct is clearly outside of the scope of her employment. [Employee]'s decision to injure [plaintiff] was not only inconsistent with [employer]'s purpose in employing her, but directly contravened [employer]'s mission to protect a resident for whom [employer] had cared since his childhood. While [employee]'s act was "substantially within the authorized time and place limits" of her job, it was not by any measure "actuated" by a purpose to serve [the employer]. Davis v. Devereux Found., 209 N.J. 269, 307 (2012).

Davis is an instructive case which articulates a balancing test for the New Jersey courts to use when determining the scope of employment of an employee who committed an illegal act. Davis is an appropriate and analogous authority in the matter before the New Jersey Supreme Court as one of the key questions is the "scope of employment." Davis, *Amici*'s and Respondent's cases concern employees who allegedly committed an illegal act.

Applying the Davis test to Respondent's and *Amici*'s matters, the employees' sexual assault of the students:

> (i) was not of the kind the employee was employed to perform as in Respondent's matter the employee was a teacher; and, in Northfield's matter the employee was a substitute teacher and in Lincoln Park's matter the employee was a janitor;
>
> (ii) in both *Amici*'s cases the alleged event happened on school grounds;
>
> (iii) none of the employees at issue in Respondent's, Northfield's, nor Lincoln Park's cases acted in such

a way with the purpose of serving the school districts and boards of education; and,

(iv) the use of force used by the employees at issue in Respondent's, Northfield's and Lincoln Park's matters was unexpectable by any of the school districts and boards of education.

And so, consistent with Davis, the conduct of the employees in Respondent's and *Amici*'s matters was well outside the scope of employment. Accordingly, the Appellate Court's holding must be upheld as it is predicated upon the proper authority.

b. Hardwicke is inapplicable to public entities.

The Court must not rely on Hardwicke in reaching its decision. For many years, the application of Hardwicke has been detrimental to public schools due to its overreaching definition of "*in locos parentis*." First, Hardwicke is predicated upon an outdated version of the C.S.A.A., specifically N.J.S.A. 2A:61B-1(a)(1), and so, the holding of Hardwicke is in effect "bad law." Second, the facts in Hardwicke are unique, rendering it distinguishable from the facts in both *Amici*'s and Hornor.

The Supreme Court decided Hardwicke on August 08, 2006. The Court in reaching its decision relied on the 2006 version of the C.S.A.A. In 2006, C.S.A.A. established the definition of "…a passive abuser [as] (1) a person (2) standing *in loco parentis* (3) within the household." Hardwicke v. Am. Boychoir Sch., 188 N.J. 69, 86 (2006) (quoting, N.J.S.A. 2A:61B-1(a)(1)). In 2019, the New Jersey

legislature amended the C.S.A.A. and following the amendments to the statute, a passive abuser is presently defined as "…[a] parent, resource family parent, guardian or other person standing *in loco parentis* who knowingly permits or acquiesces in sexual abuse by any other person also commits sexual abuse." N.J.S.A. 2A:61B-1(a)(1). The 2019 legislative amendments removed the qualifier "within the household" from its definition of a "passive abuser." When Hardwicke was decided in 2006 N.J.S.A. 2A:61B-1(a)(1) required that a passive abuse who stood *in loco parentis* to be "within the household."

The element of "within the household" carried the Hardwicke Court to its holding since the school in that case was a boarding school, where the teachers lived in dormitories with its students. On these facts, Court in held that the boarding school met the requirement of "within the household" for purposes of the C.S.A.A.,

> …the School provides food, shelter, educational instruction, recreational activities and emotional support to its full-time boarders—in other words, ***housing with the amenities characteristic of both a school and a home***. We find that 'the qualities and characteristics of the [school-student] relationship,' establish the School as a household under the CSAA. Hardwicke v. Am. Boychoir Sch., 188 N.J. 69, 94 (2006)

The fact that the school had characteristics "of both a school and home" also controlled the Court's decision in determining whether the school stood *in loco parentis* for purposes on the C.S.A.A. Concerning this issue, the Court held,

> … by providing students with necessary shelter, food, education, recreation, and succor, the School acted in place of their parents….the School regulated the students' personal hygiene, monitored the cleanliness of their rooms, dictated the amount of money each student could have on campus, required students to write two weekly letters to friends or family, expected students to attend religious services when on campus during the weekend, provided transportation for recreational activities off school grounds, and disciplined students who violated those policies. Each student was assigned a faculty advisor by the School, who acted as a confidant to that student and was available at any time. In effect, the School accepted the responsibility to nurture these young children at a critical and vulnerable stage in their development. Hardwicke v. Am. Boychoir Sch., 188 N.J. 69, 91–92 (2006).

In determining whether the school was liable for the illegal conduct of its employee, the Court relied on the fact that the students lived at the school and that the school provided the same "around the clock" of care as a parent would. Thus, to the extent that the "employee was aided in committing that sexual abuse by his status as an employee of the school" was due to the employee be employed by a boarding school and was allowed the employee/abuser to reside with the victim.

The facts in Hardwicke are unique and the case should be extremely narrowly applied. The 2006 version of N.J.S.A. 2A:61B-1(a)(1) required passive abusers be "within the household" and so, it was seamless for the Court to reach this conclusion

as applied to a boarding school. Therefore, any reliance on Hardwicke before the Court is misplaced.

No such facts exist that either Northfield, Lincoln Park, or Respondent were "within the household." Further, nor do such facts exist in the cases concerning Northfield, Lincoln Park, or Respondent which are remotely analogous to Hardwicke. In *Amici*'s cases, Northfield was not a boarding school, and Lincoln Park was not a boarding school. The students, substitute-teachers, staff, and teachers did and do not live together in either matter. The facts are the same for Respondent. The very fact that the students and staff lived together controlled the Court's determination of Hardwicke. And conversely, the fact that the students and staff did not live together should control the decision in the present case insofar as it should negate any authority Hardwicke has in the matters before the Court. In sum, the 2019 amendments to N.J.S.A. 2A:61B-1(a)(1) undermine the holding of Hardwicke and limits its application to cases filed after the 2019. Hardwicke must not be so broadly applied to C.S.A.A. cases due to its unique set of facts, especially those filed against non-boarding schools and public schools.

Since Hardwicke is an unreliable authority, any arguments or claims relying on said case must be dismissed by the Court as such arguments and claims erroneously rely on bad law.

CONCLUSION

Amici respectfully requests the Court uphold the Appellate Court's holding in the matter of Hornor v. Upper Freehold Reg'l Bd. of Educ. et al. (Docket No.: A-0366-22 (2024)).

Respectfully submitted,

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By: */s/ Robert E. Levy*
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Dated: April 30, 2025