

SUPREME COURT OF NEW JERSEY
Docket No. 090230

IN THE MATTER OF RUTGERS,
THE STATE UNIVERSITY OF
NEW JERSEY,

Petitioner-Petitioner,

and

AFSCME LOCAL 888, AMERICAN
FEDERATION OF STATE,
COUNTY AND MUNICIPAL
EMPLOYEES, AFL-CIO,

Respondent-Respondent.

A Petition for Certification from the
December 13, 2024, Judgment of the
Superior Court of New Jersey,
Appellate Division
Docket No. A-0277-23

Sat Below:

Hon. Lisa Perez Friscia, J.A.D.
Hon. Stanley L. Bergman, Jr. J.A.D.

Civil Action

**REPLY BRIEF IN FURTHER SUPPORT OF THE
PETITION FOR CERTIFICATION OF
RUTGERS, THE STATE UNIVERSITY OF NEW JERSEY**

Date Submitted: February 12, 2025

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PRELIMINARY STATEMENT

Try as they might, Respondents PERC and Local 888 cannot defeat the grounds for certification. First, as explained in the Petition, the appeal presents a question of general public importance with much at stake, focusing as it does on federal regulations that for the first time have conferred critical protections to victims of sexual misconduct at a school or college campus, including protections that were afforded to the individual victim in this case. By allowing a post-termination arbitration at which that victim would have no rights, the decisions by PERC and the Appellate Division have taken away her right to participate equally with the accused as part of the grievance process.

The erroneous decisions will undermine the legal protections and process future victims deserve and which Title IX rules guarantee. That risk is heightened because PERC has exclusive jurisdiction over certain labor issues and is likely to follow its decision below in future cases. For those reasons, this is not, as Local 888 says, “a matter unique to one employee and one employer.” Rather, it reflects “a question of general public importance.” R. 2:12-4.

Second, Respondents do not deny that Title IX protections are important to the public. Instead, they attempt to downplay the damage done by the decisions below and avoid the real issue in this case. Respondents basically

argue that Title IX rights and collective negotiations agreements can co-exist. The Petition acknowledges such co-existence (see page 13) but that is beside the point. As the Petition discusses at length, this case is about *actual* conflicts between the Title IX rules and the arbitration process to be followed under the collective negotiations agreement (CNA) between Rutgers and the union. The question is: which source—the federal rules or the CNA terms—must yield to the other? The correct answer is that the Title IX rules preempt the CNA.

Third, this is a case of first impression. To our knowledge, until the Appellate Division ruled in December of last year, no court had ever permitted the federal government's Title IX rules to be superseded by a conflicting source such as a labor contract. In response to the Petition, PERC ignores the novelty of this case. And Local 888 portrays a fundamentally different picture, describing the panel's decision as a standard application of well settled law. But none of the cases cited by the union grappled with *federal* preemption, much less the specific application of it here. Instead, the union-cited cases all dealt with *state* preemption in the context of negotiability, a distinct strand of law. In other words, Respondents are analyzing, arguing and applying the *wrong law* (i.e., they rely on state preemption law rather than federal law). Thus, the question presented “has not been but should be settled by the Supreme Court.” R. 2:12-4.

ARGUMENT

I. AS DID THE DECISIONS BELOW, RESPONDENTS APPLY THE WRONG PREEMPTION LAW; RESPONDENTS ALSO APPLY THE WRONG STANDARD OF REVIEW.

A. The Standard Of Review For PERC's Legal Determination About Title IX And Federal Preemption Law Is De Novo.

Respondents begin their legal argument by wrongly suggesting that this Court should pay “substantial deference” to and not “question PERC’s expertise in this case.” (Prb7; Lrb9).¹ But PERC is an agency, not a court of law. PERC possesses no expertise in how federal preemption law and Title IX should be interpreted. That is a “strictly legal” determination entitled to no deference on appeal. In re Ridgefield Park Bd. of Ed., 244 N.J. 1, 17 (2020). So, as the Appellate Division did here (Aa15), the Court should review PERC’s decision de novo.

B. Federal Preemption Law Applies, Not State Law Regarding The Scope Of Negotiations.

Whether the federal Title IX rules preempt the union’s requested CNA arbitration is a question of federal law, falling under the doctrine of federal preemption. Compare Hager v. M&K Const., 246 N.J. 1 (2021) with In re Ridgefield Park Bd. of Ed., 244 N.J. at 17. Rather than apply federal law,

¹ Lrb and Prb refer to the briefs filed by Respondent Local 888 on February 2, 2025, and Respondent PERC on January 29, 2025, respectively.

including the standards governing express and implied conflict preemption, the Appellate Division applied state law relating to the scope of negotiations. (See Aa13-14). That error, which is repeated in Respondents' briefs (see Prb7-9; Lrb9-11), led directly to the incorrect outcome below.

To briefly reiterate, federal law recognizes two types of preemption: express and implied. A subset of implied preemption is implied conflict preemption. As the Petition explains, both express and implied conflict preemption are relevant here. The latter applies when something "stands as an obstacle to," or makes it impossible to comply with, federal law. Petition at 11. Federal preemption analysis also requires courts to "look beyond" the rule's language to its "broader framework" and to effectuate "the purposes [the agency] sought to serve" in its rulemaking. Hager, 246 N.J. at 30.

The legal standard selected by the appellate court, however, applies to *state* law and asks whether such law preempts negotiation "expressly, specifically and comprehensively." (Aa14). But state law is not the source of preemption here. And the state law standard applied below diverges from federal law in two important respects. First, although the state standard resembles the express form of federal preemption, the state version is a harder test to satisfy because the regulation must be preempted "comprehensively," among other things. Second, the state standard leaves no room for implied

conflict preemption.

Rather than analyze the case under the broader, federal approach, the appellate court confined its analysis, as noted above, to whether Title IX preempts negotiation “expressly, specifically and comprehensively.” (Aa14). In so doing, the court displaced federal law and did not adequately consider whether, under implied conflict preemption, the CNA “stands as an obstacle to,” or makes it impossible to comply with, Title IX. At most, the court’s opinion contains a single remark about the absence, in its view, of a “conflict” (Aa18), but that alone does not suffice for meaningful appellate review.

For their part, Local 888 does not address the error at all, and PERC does so only in a footnote in its brief, noting that “[a]pplication of federal preemption framework” would “produce the same result” reached below. (Lrb9). PERC offers no explanation for that conclusion and its decision below failed to apply federal law, including implied conflict preemption and consideration for the federal government’s objective of protecting victims throughout the Title IX process. The Court should grant certification to clear up the resulting confusion about which law governs this type of issue.

II. BECAUSE THE REQUESTED ARBITRATION CONFLICTS WITH TITLE IX REQUIREMENTS, FEDERAL LAW EXPLICITLY AND IMPLICITLY PREEMPTS THE CONTRACTED ARBITRATION TERM.

As the Petition also explains, Title IX rules are explicit about

preemption. One provision in particular, 34 C.F.R. §106.6(h), directs that the rules have “[p]reemptive effect” over any conflicting process. Respondent Local 888 does not address that provision. Neither did PERC in its decision below. The agency ultimately mentions 34 C.F.R. §106.6(h) in its brief but dismisses the provision ostensibly because it does not prohibit a grievance arbitration specifically. (See Prb11). PERC is mistaken. That level of specificity is not required. The CNA arbitration is subject to the preemption analysis under subsection of 106.6(h) because the arbitration would constitute a provision or practice “other than those required by [Section 106.45].” 34 C.F.R. §106.45(b).

To satisfy subsection 106.6(h), the arbitration “must apply equally to both parties,” ibid., meaning to both the accused *and the victim*. But, as the Petition notes, equal application is impossible due to the kind of arbitration contemplated by the CNA. Respondents do not dispute that it would be a proceeding at which the person found to have committed sexual misconduct would have rights while his victim would have none. This is the nature of the conflict between the CNA arbitration and the Title IX rules. It is not, as PERC suggests, about appellate rights (see Prb12) or, as the union asserts, that the CNA “arbitration could [] result in affirmation of the termination.” (Lrb8). What matters is that the CNA process itself would negate the victim’s rights.

The union attempts to disassociate the CNA arbitration from the Title IX grievance process. Local 888 contends that the Title IX process is limited to how institutions “initially” handle sexual harassment complaints and does not extend beyond the moment any discipline is imposed. (Lrb13). But the Title IX process is not so truncated. The federal rules contemplate a process that encompasses post-disciplinary matters, including appeals (34 C.F.R. §106.45(b)(8)) as well as the provision of remedies (id. §106.45(b)(1)(i)) and their “effective implementation.” Id. §106.45(b)(7)(iv). Remedies, of course, may include the discipline of an employee. That the rules allow some flexibility on how institutions may provide appeals, including whether to allow appeals of any disciplinary sanction, does not lessen the point that the grievance process is broader than how the union describes it.

Respondents’ apparent misunderstanding derives in part from plucking one part of subsection 106.45(b)(1)(i) out of context. The provision states, in pertinent part, that the “grievance process must . . . [t]reat complainants and respondents equitably by . . . following a grievance process that complies with this section before the imposition of any disciplinary sanctions. . . .” Id. §106.45(b)(1)(i). Respondents emphasize the portion “before the imposition of any disciplinary sanctions” as if it restricts the scope of the entire Title IX process. (Lrb13; Aa41). But the provision is best understood to ensure the fair

treatment of the accused by disallowing any discipline until the Title IX process is complied with, at least as of that juncture. See Final 2020 Title IX Rules, 85 Fed. Reg. 30026, 30053 (May 19, 2020) (expressing the Department of Education’s intent to ensure the equitable treatment of the accused who would “face disciplinary sanctions only after a fair process determines responsibility”).

In addition to the rule text, there is other evidence that the Department never intended to design a federal process that ends before an employee is disciplined. Specifically, the regulatory history of Title IX contains several references to post-termination proceedings. See 85 Fed. Reg. at 30443-44. If the Department viewed such proceedings as being outside the scope of the federal process, then surely it could and would have said so somewhere in the 554 pages discussing public comments to the 2020 final rules. See generally 85 Fed. Reg. 30026. But it did not. Nor would Respondents’ cramped version of the federal process, one devoid of remedies, truly advance the critical goals the Department “sought to serve” in the rules, namely, to protect and “provide remedies to victims of sexual harassment.” 85 Fed. Reg. at 30030.²

Local 888 also argues that the Department of Education made an

² This is another reason why the appellate court’s failure to apply federal law was consequential. The court confined its analysis to the regulatory text and did not adequately consider the broader governmental objectives. (See Aa15-16).

“unequivocal statement of non-preemption” when adopting the 2020 rules. (Lrb14). Quite the opposite, while acknowledging the mere fact that the Title IX rules do not preclude a school from honoring additional rights negotiated in an employment contract, the Department reiterated the point that “any such contracts must comply with these final regulations.” 85 Fed. Reg. at 30442.³ And, at that same time, the Department warned that the Title IX rules would have preemptive effect “in the event of an actual conflict between a union contract or practice and the final regulations.” 85 Fed. Reg. at 30298.

Local 888 makes much of the fact that an employer and union may negotiate a process that includes both a pre-termination hearing and a post-termination hearing. (Lrb16). According to Respondent, if Rutgers’ argument were correct, then post-termination proceedings would be prohibited because pre-termination hearings are final and unreviewable. (Lrb16). But Local 888 cites no authority for the premise that pre-termination hearings are unreviewable. In fact, the federal rules require a school to offer an appeal from a responsibility determination, 34 C.F.R. §106.45(b)(8), and no rule precludes a school from offering a post-termination appeal if it so chooses.

The key point is that *if* such an additional measure is adopted by a

³ The Department essentially emphasized this point twice in the same excerpt block-quoted in Local 888’s brief and a third time in the very next sentence appearing after the quote. (See Lrb14).

school, then it must be applied equally for both the accused and the victim. The fact remains that unions and universities are free to negotiate so long as their terms do not conflict with Title IX. Similarly, a university has discretion to write its Title IX policy so long as it comports with Title IX rules.

In sum, neither Local 888 nor PERC persuasively address the actual conflicts. The Petition enumerates several ways in which the requested arbitration conflicts with the grievance process required by 34 C.F.R. §106.45. (See Petition at 13-14). Respondents do not respond directly to any one of those enumerated ways. Nor do they weaken the reasons for certification.

CONCLUSION

In conclusion, the CNA would allow what federal law disallows: a type of proceeding under which the victim would have no rights while the person found to have sexually harassed and assaulted her would enjoy virtually no shortage of rights in a post-termination arbitration. That inequality impermissibly conflicts with Title IX protections and harms this victim and countless others. This Court should certify and reverse the judgment below.

Respectfully submitted,

SILLS CUMMIS & GROSS P.C.

Dated: February 12, 2025

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