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.	On 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

BRIEF IN REPLY TO AMICUS CURIAE MATTHEW J. PLATKIN, ATTORNEY GENERAL OF THE STATE OF NEW JERSEY

Date Submitted: September 2, 2025

SILLS CUMMIS & GROSS P.C.
The Legal Center
One Riverfront Plaza
Newark, New Jersey 07102
973-643-7000
pverniero@sillscummis.com
mcarucci@sillscummis.com
Counsel for Petitioner Rutgers, the State University of New Jersey

Of Counsel and On the Brief:
Peter G. Verniero, Esq. (#017471984)
Michael S. Carucci, Esq. (#025192008)

On the Brief:
Paul Salvatoriello, Esq. (#032782001)

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PRELIMINARY STATEMENT

Federal rules adopted under Title IX established a first-of-its-kind grievance process for how federally funded educational institutions must address sexual harassment and protect victims on campuses throughout the country. That obligatory process is not only adjudicatory in nature, but also comprehensive and integrated. From the moment a victim files a complaint, the institution must handle it in accordance with a multitude of prescribed Title IX grievance procedures. Those procedures go well beyond the initial intake of the complaint and extend through the investigation, hearing, determination and appellate stages. Unless reversed by the Court, the judgment below effectively would displace this carefully calibrated Title IX process.

Title IX rules grant institutions some flexibility in how they implement certain aspects of the grievance procedures, such with respect to appeals. However, such additional measures still must conform to Title IX requirements, particularly in ensuring the victim has equal rights relative to the accused. And, as part of the Title IX process, the institution must provide remedies to victims, which includes a disciplinary sanction against a responsible individual. Adherence to the extensive set of requirements and procedures is so important to the nondiscrimination objectives of Title IX that institutions are warned that noncompliance with the federal rules itself can constitute a violation of Title IX.

In this case, having determined that the accused in fact assaulted and sexually harassed his victim, the sanction of termination was appropriately imposed.

The Attorney General, as amicus curiae, recognizes that this case presents an important question of preemption under federal law, not state law. And he agrees with Rutgers that the Appellate Division erred by applying the wrong test. But the Attorney General, like other amici and Respondents, misses the wider scope of the Title IX process. They seek to compartmentalize the process into merely a pre-disciplinary one—instead of the broader, holistic process it is required to be.

The Title IX rules set up a comprehensive adjudicatory system with which the requested arbitration necessarily conflicts. An arbitrator, working under union contract rules, cannot reasonably review whether just cause existed for a union member's termination without also reviewing and determining whether the individual engaged in the conduct underlying the discipline sought to be imposed. If an arbitrator were permitted to review such conduct, then the arbitrator in this case could render a decision finding that the alleged conduct is not substantiated by the evidence presented in a hearing in which the victim has no rights. Such a decision essentially would overrule the factual determinations already rendered in the federally-mandated process. The former employee at issue, who was found to have harassed and assaulted his female colleague,

should not be permitted such a do-over. And taken to its logical conclusion, reinstating an individual already found to have violated Title IX could subject the victim to continued harassment or assault.

In sum, this Court should uphold the proper order of federal law and the nondiscrimination objectives of Title IX by reversing the judgment below.

ARGUMENT

I. AMICUS CURIAE THE ATTORNEY GENERAL AGREES WITH RUTGERS THAT FEDERAL PREEMPTION LAW SHOULD HAVE BEEN APPLIED BELOW.

Rutgers and the Attorney General agree that federal (not state) preemption law applies and that the court below failed to apply the correct law. As the Attorney General puts it, "the Appellate Division . . . should have applied federal preemption analysis—rather than the analysis under state law to scope-of-negotiations cases—because Title IX and its regulations are governed by the Supremacy Clause of the U.S. Constitution." AG brief at 16. Because of that agreement, the University will not repeat the reasons why federal law governs the analysis.

It is important, however, to discuss why that analysis matters—something the Attorney General's brief does not emphasize. The selection and application of law are not academic or technical exercises. Federal and state preemption law are distinct in critical ways that impact the disposition of this case. And

perhaps most importantly, Rutgers disagrees with the Attorney General's conclusion that application of federal law does not change the outcome in this case.

As noted in Rutgers' reply brief in further support of certification, the test for preemption under federal law is less rigorous or, said differently, easier to satisfy than under state law. Under the federal test, the federal law at issue need not preempt state law "comprehensively" (a term included under a state law analysis). That term connotes one of three types of federal preemption that is not relevant here, namely, implied field preemption. See, e.g., Hillsborough Cty. v. Automated Med. Labs., Inc., 471 U.S. 707, 714 (1985) (analyzing implied field preemption by examining the comprehensiveness of certain federal regulations); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (using a similar word, "pervasive," to describe the reach of congressional action that would trigger implied field preemption).

The relevant federal law analysis contains express and implied conflict preemption as two other separate grounds. But state preemption law does not recognize such distinct grounds. Instead, state law uses only a single state test that eliminates the independent and alternative elements of federal express preemption and implied field preemption, so that "[n]egotiation is preempted only if the regulation fixes a term and condition of employment 'expressly,

specifically ***and*** comprehensively.'" Bethlehem Twp. Bd. of Educ. v. Bethlehem Twp. Educ. Ass'n, 91 N.J. 38, 44 (1982) (citation omitted) (emphasis added). The critical point is that application of the correct federal analysis changes the outcome in this case, a topic to which Rutgers now turns.

II. TITLE IX RULES PREEMPT THE REQUESTED ARBITRATION, AND THE ATTORNEY GENERAL'S ARGUMENTS TO THE CONTRARY DO NOT ALTER THAT CONCLUSION.

A. No Presumption Against Preemption Applies.

Because the federal government unequivocally stated its intention that the Title IX rules shall have preemptive effect (34 C.F.R. § 106.6(h)), no presumption against preemption exists in this case. The Attorney General tries to cast some doubt about the inapplicability of that presumption in the express preemption context (AG brief at 23 n.4), but no real uncertainty exists. In a precedential case not cited by the Attorney General, the United States Supreme Court made clear that the presumption against preemption does not apply in express preemption cases. Further, as more fully described below, that result is neither negated nor undermined just because implied conflict preemption analysis serves as part of the analytical framework for express preemption.

In Puerto Rico v. Franklin California Tax-Free Trust, the United States Supreme Court declared, without qualification, that it would not invoke the presumption against preemption when a statute contains an express preemption

clause. 579 U.S. 115, 125 (2016) ("because the statute 'contains an express pre-emption clause,' we do not invoke any presumption against pre-emption"). The Franklin Court stated that it would instead "focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent." Ibid. (citation omitted). The Court's reasoning thus reveals the purpose of the presumption—to help courts discern the government's intentions when they are obscure. But when, as here, the federal government has spoken plainly about the preemptive effect of its statutes or regulations, then courts need not resort to the aid of a negative presumption. See Brown v. Hotel & Rest. Emps. & Bartenders Int'l Union Local 54, 468 U.S. 491, 501 (1984) ("Our task is quite simple if, in the federal enactment, Congress has explicitly mandated the pre-emption of state law."). If anything, in such circumstances, there is a presumption in favor of preemption. Ibid. (discussing a presumption ***for*** preemption rather than one against preemption in an express preemption case).

Circuit courts from around the country examining this issue have followed the proper scope of the Franklin Court's holding. The First, Second, Fourth, Fifth, Seventh, Eighth, Ninth, Tenth and Eleventh Circuits all are in lockstep with Franklin. See Medicaid & Medicare Advantage Prods. Ass'n of Puerto Rico, Inc. v. Emanuelli Hernandez, 58 F.4th 5, 12 (1st Cir. 2023) (applying Franklin to Puerto Rico's law regarding Medicare Advantage and stating "the

Supreme Court's broad language in Franklin forecloses us from applying the presumption against preemption" in that express preemption case); Buono v. Tyco Fire Products, LP, 78 F.4th 490, 495 (2d Cir. 2023) (applying Franklin to determine whether the Hazardous Materials Transportation Act of 1975 preempts common law claims for strict liability and negligence); Air Evac EMS, Inc. v. Cheatham, 910 F.3d 751, 761 (4th Cir. 2018) (applying Franklin to the Airline Deregulation Act, while acknowledging the Third Circuit's choice not to follow Franklin); Dialysis Newco, Inc. v. Cmty. Health Sys. Grp. Health Plan, 938 F.3d 246, 258-59 (5th Cir. 2019) (applying Franklin to ERISA); Ye v. GlobalTranz Enterprises, Inc., 74 F.4th 453, 465 (7th Cir. 2023) (applying Franklin to the Federal Aviation Administration Authorization Act); Pharm. Care Mgmt. Ass'n v. Wehbi, 18 F.4th 956, 967 (8th Cir. 2021) (applying Franklin to ERISA and to Medicare Part D's preemption provision, which is identical to 42 U.S.C. § 1395w-26(b)(3)); Watson v. Air Methods Corp., 870 F.3d 812, 817 (8th Cir. 2017) (same); California Restaurant Ass'n v. City of Berkely, 89 F.4th 1094, 1101 (9th Cir. 2024) (applying Franklin to the Energy Policy and Conservation Act, and noting "[a]s with any express preemption case . . . we apply [the] textual analysis without any presumptive thumb on the scale for or against preemption" (internal citations and quotations omitted); EagleMed LLC v. Cox, 868 F.3d 893, 899, 903 (10th Cir. 2017) (applying Franklin to the

Airline Deregulation Act's express preemption clause); and Carson v. Monsanto Co., 72 F.4th 1261, 1267 (11th Cir. 2023) (applying Franklin to the Federal Insecticide, Fungicide, and Rodenticide Act).

The Third Circuit is an outlier. Before virtually every other circuit addressed this issue, the Third Circuit narrowed Franklin by reasoning that it pertains only to the Bankruptcy Code and not the historic police powers of the States. Shuker v. Smith & Nephew, PLC, 885 F.3d 760, 771 n.9 (3d Cir. 2018); Lupian v. Joseph Cory Holdings LLC, 905 F.3d 127, 131 n.5 (3d Cir. 2018). But, as noted above, virtually every other circuit has since ruled that Franklin was not so limited in scope. Indeed, there is no indication that the Franklin Court confined its holding to that statute or facts of that case. As this Court recently observed about Franklin, the United States Supreme Court "expressed in broad language, that the presumption against preemption will not be applied to interpret express preemption cases." In re Altice USA, Inc., 253 N.J. 406, 416 n.1 (2023) (declining to apply the presumption against preemption).

This Court should not follow the Third Circuit's decisions that disregard Franklin because they are at odds with a U.S. Supreme Court ruling. See, e.g., Hart v. Massanari, 266 F.3d 1155 (9th Cir. 2001) ("Binding authority . . . cannot be considered and cast aside; it is not merely evidence of what the law is. Rather, caselaw on point ***is*** the law"). Nor do Third Circuit decisions bind this Court.

Pressler & Verniero, Current N.J. Court Rules, cmt. 3.5 on R. 1:36-3 (2025) (noting that "only decisions of the United States Supreme Court are binding on courts of this state"). Thus, contrary to the Attorney General's arguments, there is no "uncertainty" regarding the presumption against preemption. In a case of express preemption, such as this one, the presumption does not apply.

That Rutgers also discusses implied conflict preemption in no way diminishes express preemption, but rather, only underscores the preemptive effect in the present case. Although the presumption against preemption ordinarily would be implicated by implied conflict preemption, that holds up only "[a]bsent explicit preemptive language." Gade v. Nat'l Sold Wastes Mgmt. Ass'n, 505 U.S. 88, 98 (1992). As noted, however, explicit preemption language exists in the Title IX rules. See 34 C.F.R. § 106.6(h). Moreover, Rutgers explores implied conflict preemption in part because it informs the analysis under the express preemption language contained in the regulation.

That language provides that no "conflict" between state law and the mandatory Title IX process may exist. Ibid. To properly understand what "conflict" means in that provision, the Court should look to caselaw in the closely related context of implied conflict preemption law for how courts define "conflict" as anything creating a physical impossibility or obstacle. See Petition at 15. The mere use of implied conflict preemption as an analytical tool does

not somehow transform this express preemption case into an exclusive implied conflict preemption case or mean that a presumption against preemption applies here.

In sum, the Attorney General's attempt to apply a presumption against preemption should be rejected because the federal government expressly has codified its intent about preemption in the Title IX rules themselves. That clear expression of intent is not diminished simply because the legal analysis here also makes use of implied conflict preemption principles.

B. Rather Than Merely A Pre-Disciplinary Process, The Mandatory Title IX Process Covers Disciplinary Action Based On A Determination Of Responsibility And Appeals.

Much of the Attorney General's argument stems from a misunderstanding of the scope of the Title IX grievance process. He believes, incorrectly, that the Title IX process is only a pre-disciplinary one. Like Respondents, he emphasizes one word—"before"—in the following subsection:

> A recipient's [Title IX] grievance process must—
>
> > (i) Treat complainants and respondents equitably by providing remedies to a complainant where a determination of responsibility for sexual harassment has been made against the respondent, and by following a grievance process that complies with this section ***before*** the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent.
>
> [34 C.F.R. § 106.45(b)(1) (emphasis added).]

The Attorney General suggests that the grievance process ends "before" any discipline is imposed. But that is not what that provision says or means. Instead, the provision simply seeks to treat the accused fairly by sequencing the timing of any discipline such that it occurs, if at all, after a school has first complied with the grievance process up to that point.

Moreover, the referenced provision actually supports the opposite position taken by the Attorney General. The first part of the provision, which he overlooks, states that the "grievance process must . . . [t]reat complainants and respondents equitably ***by providing remedies*** to a complainant where a determination of responsibility for sexual harassment has been made against the respondent." Ibid. (emphasis added). That the "grievance process must . . . provid[e] remedies" after a determination of responsibility is made is compelling proof that the grievance process: (i) does not terminate upon the determination of responsibility and (ii) covers remedies including disciplinary action against the responsible employee. As such, the grievance process cannot reasonably be understood to be just a pre-disciplinary process.

The Attorney General also cites other provisions in the Title IX rules that seem to reference early stages of the grievance process, such an investigation or hearing, but those select references are just that—select. He overlooks, for example, the Title IX requirements regarding remedies. Those requirements

include not only the obligation that remedies be provided as noted above (id. § 106.45(b)(1)(i)), but also that the institution's process must "describe the range of possible disciplinary sanctions and remedies or list the possible disciplinary sanctions and remedies" that may be implemented. Id. § 106.45(b)(1)(vi).

The rules also require that the written determination of responsibility include "[a] statement of, and rationale for . . . any disciplinary sanctions the recipient [the school] imposes on the respondent [the harasser], and whether remedies designed to restore or preserve equal access to the recipient's education program or activity will be provided by the recipient to the complainant [the victim]." Id. § 106.45(b)(7)(ii)(E). Remedies also must be "effective[ly] implement[ed]" by the school's Title IX Coordinator as part of the grievance process. Id. § 106.45(b)(7)(iv). Those requirements regarding disciplinary sanctions and remedies further demonstrate that discipline is weaved into the Title IX grievance process.

And then there is the fact that appeals also are covered by the Title IX rules. See id. §§ 106.45(b)(1)(viii), (b)(8). Although institutions need only allow appeals of a determination of responsibility, institutions nonetheless may permit a broader range of appeals, such as of disciplinary actions, as part of their grievance process. If institutions choose to do so, because such an expansion of appeals would constitute additional "provisions, rules, or practices" in the

grievance process, they would be subject to the Title IX requirement that they "must apply equally to both [the victim and the accused]." Id. § 106.45(b).

The Attorney General argues that the "the procedures under the Title IX Regulation and set forth in the CNA did apply equally to the complainant and respondent here." AG brief at 34 (emphasis in original). That argument about the procedures applying equally, of course, cannot be taken literally. The CNA procedures involve an arbitration, which has not even commenced. And the examples cited by the Attorney General for such equal treatment all concern the Title IX process administered by Rutgers (see AG brief at 34); no examples are provided for how the parties would be treated under the CNA arbitration process. On that point, Rutgers already has explained how the arbitration would not result in equal treatment. See Petition at 13-15, 19.

In whatever way they are defined, "the procedures and permissible bases" for appeal are part of the "basic requirements for [the] grievance process" according to the Title IX rules. Id. § 106.45(b)(1), (b)(1)(8). All this is to say that the Title IX process is not relegated to pre-disciplinary matters.

The Title IX regulatory history undergirds that conclusion. When it promulgated these rules, one objective of the U.S. Department of Education (the Department) was to "refrain[] from second guessing a [school's] ***disciplinary*** decisions." Final 2020 Title IX Rules, 85 Fed. Reg. 30026, 30044 (May 19,

2020) (emphasis added). Furthermore, the Department noted that, under the Title IX rules, a post-termination arbitration would "require[] a hearing with cross-examination." Ibid. If the Title IX rules were truly pre-disciplinary as the Attorney General posits, then the Department would have had no reason to seek to protect disciplinary decisions or to require anything regarding post-termination arbitration.

Finally, the Attorney General states, as the Appellate Division suggested, that the CNA arbitration process applies equally to the victim because her union could file a grievance on her behalf if her assailant had not been terminated. See AG brief at 34-35. The Attorney General cites no authority for that proposition, and Rutgers can find none. Even a broad definition of a grievance does not permit a colleague to grieve the disciplinary action taken or not taken against their co-worker. And, even if they could, victims who are either non-union-member employees or students would have no such right under the CNA. See Petition at 19-20.

C. The Subjects Of The Title IX Process Here And The Requested Arbitration Are Not "Different," And The Cases Relied On By Amicus Curiae Are Inapposite.

The Attorney General argues that the mandatory Title IX process and the requested arbitration would "address separate, albeit related, issues:" the former being a Title IX violation and the latter being just cause for a termination. AG

brief at 28-29. The two issues, however, are not "separate;" rather, they are inextricably linked. As noted above, a determination of responsibility under the Title IX process must state and explain "any disciplinary sanctions the recipient [school] ***imposes*** on the respondent [harasser]. 34 C.F.R. § 106.45(b)(7)(ii)(E) (emphasis added). The rule describes such disciplinary action in the present tense, meaning the imposition of discipline, if any, is decided at the time the determination is made, not at some later interval removed from the Title IX process.

That is what happened in this case. The sanctions decision-maker, Mr. John Malley, wrote, in part:

> In light of the finding by a preponderance of the evidence following the hearing in this matter (as part of which the Respondent received notice of the allegations and had an opportunity to be heard) that Respondent violated Policy 60.1.33, and having considered all data available to me, **I find there is just cause to terminate the Respondent's employment with Rutgers University effective immediately**. . . .

[Pa126 (emphasis in original).]

Thus, because the Title IX decisionmaker found "just cause" to terminate the harasser's employment, no daylight exists between that decision and what would be the issue in the requested arbitration.

Nonetheless, the Attorney General claims that it is possible for Rutgers to comply with both the Title IX process and the requested arbitration process. The

flaw of his argument, once again, rests on a misunderstanding of the two processes. Not only is the Title IX process broader than the Attorney General views it, but none of the pertinent Title IX requirements could be met by the arbitration requested under this CNA. In its Petition for Certification, Rutgers detailed at least eight instances in which the arbitration would fail and conflict with Title IX rules, including how the victim would have no rights under the CNA process.

The Attorney General responds by saying, "Nothing in the [Title IX] Regulation requires that these specific rights be afforded to the parties during a post-disciplinary proceeding." AG brief at 33. But that is not so. At least three critical requirements of the Title IX process apply explicitly "***throughout*** the grievance process." 34 C.F.R. § 106.45(b)(5) (emphasis added). They are: (1) to "provide an equal opportunity to the parties to present witnesses" and other evidence (34 C.F.R. § 106.45(b)(5)(ii)); (2) to "provide the parties with the same opportunities to have others present during any grievance proceeding" (id. § 106.45(b)(5)(iv)); and (3) to "provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation." Id. § 106.45(b)(5)(vi).

For further emphasis, the rule makes clear that the parties' right to have others present applies during "any" grievance proceeding." Id. § 106.45(b)(5).

In that way and the other ways mentioned above, the requirements that assure the rights of victims are part of one, holistic Title IX process, including the determination of remedy. Those rights are not assured under the CNA process. Under that circumstance, it is not possible to comply with both the Title IX process and the one contained under the CNA.

To support his argument that the Title IX grievance process and the one found under the CNA regulate different subjects, the Attorney General cites three cases. Those cases are inapposite.

The first two cases, Virginia Uranium, Inc. v. Warren, 587 U.S. 761 (2019) and Pennsylvania v. Navient, 967 F.3d 273 (3d Cir. 2020), are easily distinguishable. First, the case here is an express preemption case, whereas Virginia Uranium and Navient were not. See Virginia Uranium, 587 U.S. at 768 (Atomic Energy Act contains no express provision regarding mining and in fact specifically ***excluded*** mining); Navient, 967 F.3d at 290 (Higher Education Act "does not expressly preempt claims to the extent they are alleging affirmative misrepresentations"). Thus, the analytical context for the conflict discussion in those two cases differs widely from this case.

Moreover, the parties seeking to find implied preemption in both Virginia Uranium and Navient were attempting to "elevate abstract and unenacted legislative desires above state law," whereas here the Title IX regulations

expressly state in 34 C.F.R. § 106.6(h) that any CNA grievance procedures may not conflict with the mandatory process set forth in 34 C.F.R. § 106.45.

In addition, the issues in Virginia Uranium and Navient were qualitatively different from the issues in this case. The question presented in Virginia Uranium was whether the Atomic Energy Act preempts state mining regulations. The question in Navient was whether the Higher Education Act preempts state regulation of misrepresentations in student lending. Those questions have nothing to do conceptually or otherwise with the question presented here, namely, whether two formal hearing processes that cover the same subject—an incident of sexual harassment—conflict with one another.

As for the third case, the Attorney General relies heavily on this Court's decision is New Jersey Turnpike Authority v. New Jersey Turnpike Supervisors Association, 143 N.J. 185 (1996). That reliance is misplaced. First, the legal issue in NJ Turnpike Authority differs entirely from the present case. As recognized by the Attorney General, NJ Turnpike Authority dealt with the preemptive effect of a state law under state preemption principles. Thus, NJ Turnpike Authority cannot provide substantive guidance on the issues here.

Equally important, there is a stark contrast between the law at issue in NJ Turnpike Authority and the law in this case. In the former, New Jersey's Law Against Discrimination (LAD) creates an incentive for employers to adopt their

own policies to investigate and remedy sexual harassment in the workplace. There is no statutorily mandated policy that employers must follow. By contrast, Title IX regulations present a highly detailed framework of rules and processes that employers must follow, or they suffer the consequences of being in violation of those regulations. Thus, comparing the generalized incentives created under the LAD with the intricate structure of the Title IX rules is inapt.

As a final point, the pre-disciplinary vs. post-disciplinary dichotomy, on which the Attorney General puts so much emphasis, does not exist in this case because the Title IX rules do, in fact, cover both pre- and post-disciplinary processes. Moreover, for all practical purposes, a Title IX grievance process that includes a hearing and results in a sanction for a sexual harassment incident does not address a "different subject" than a CNA grievance process that includes a hearing and also would result in a sanction for a sexual harassment incident. In fact, both processes cover the same subject—the severity and appropriate punishment for the sexual harassment incident itself. To argue otherwise blinks reality.

D. The Attorney General Acknowledges The Possibility That An Arbitrator Will Undermine A Title IX Grievance Process.

The Attorney General argues that this Court has no need to fear an arbitrator "second-guessing" the result of a Title IX grievance determination because such an eventuality is "highly unlikely." AG brief at 38. Those two

words, however, betray the Attorney General's argument. Saying that something is "highly unlikely" is to acknowledge that it may occur. The possibility that an arbitrator could reverse or undermine a Title IX grievance determination is enough to trigger preemption—and such possibility is hardly remote. That is because an arbitrator cannot reasonably determine just cause for discipline without also considering the alleged misconduct in the first instance. In this case, the arbitrator must make findings about the underlying conduct of the union member at issue to determine whether there was "just cause" to terminate him.

Nothing in the law—or the general arbitration rules or the parties' CNA—limits an arbitrator's ability to engage in such fact finding, let alone requires an arbitrator to accept the findings of a prior Title IX grievance determination. As a result, an arbitrator could a render a decision directly at odds with a Title IX grievance determination and the disciplinary sanctions to be imposed. And when that occurs, compliance with both federal and state regulations becomes "a physical impossibility," and the arbitration determination "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Brown, 468 U.S. at 501 (citation omitted).

One telling example of how an arbitrator, when reviewing an employee's discharge for just cause, can make a factual determination that diverges from the

one made by an employer is contained in Local No. 153, Office and Professional Employees International Union, AFL-CIO v. Trust Company of New Jersey, 105 N.J. 442 (1987). In that case, a bank terminated the employment of a teller for cashing a forged check. The teller's stated reason for her conduct was that the bank manager had given her a "shorthand" form of approval. The bank determined that the teller's reason was unsupported.

The teller's union then challenged the termination on just cause grounds, arguing that the bank had lacked just cause to discharge her. The parties submitted the issue to an arbitrator who heard the teller's testimony and found, contrary to the bank's determination, that she was credible. As a result, the arbitrator reinstated the teller's employment, a decision that was confirmed by the Superior Court and affirmed on appeal by both the Appellate Division and the Supreme Court. Id. at 446-47.

Indeed, New Jersey law supports an arbitrator's wide latitude to make factual findings about grievance decisions. New Jersey has a "strong preference for judicial confirmation of arbitration awards" to promote the State's interest in the finality of arbitrations and, therefore, public sector arbitration decisions are subject to "very limited" judicial review. Linden Bd. of Educ. v. Linden Educ. Ass'n, 202 N.J. 268, 275-76 (2010) (quoting Middletown Twp. PBA Local 124 v. Twp. of Middletown, 193 N.J. 1, 10 (2007)). "An arbitrator's

award is not to be cast aside lightly" and will be confirmed "so long as the award is reasonably debatable." Id. at 276 (citations omitted).

The New Jersey Arbitration Act, N.J.S.A. 2A:24-1 to -11, which governs the arbitration of collective negotiations agreements, states that a reviewing court may vacate an arbitration award only in the following instances:

> a. Where the award was procured by corruption, fraud or undue means;
>
> b. Where there was either evident partiality or corruption in the arbitrators, or any thereof;
>
> c. Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause being shown therefor, or in refusing to hear evidence, pertinent and material to the controversy, or of any other misbehaviors prejudicial to the rights of any party;
>
> d. Where the arbitrators exceeded or so imperfectly executed their powers that a mutual, final and definite award upon the subject matter submitted was not made.
>
> [N.J.S.A. 2A:24-8(a)-(d).]

Thus, there is a high bar to challenging an arbitrator's findings of fact and decisions, which can be reviewed only if a party has proof of things like "corruption," "fraud," or "evident partiality." "[A] reviewing court may not substitute its own judgment for that of the arbitrator, regardless of the court's view of the correctness of the arbitrator's interpretation." N.J. Transit Bus Operations, Inc. v. Amalgamated Transit Union, 187 N.J. 546, 554 (2006).

In sum, arbitrators can, and do, make their own factual findings separate and apart from any prior investigation or determination. They also must evaluate the underlying conduct to decide whether "just cause" exists to terminate an employee. It follows, therefore, that a CNA grievance arbitration inevitably will make compliance with both Title IX regulations and the CNA arbitration a "physical impossibility" and, at a minimum, "stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Under federal preemption, the CNA process must yield.

CONCLUSION

The Court should not be persuaded by the arguments of Amicus and instead should reverse the Appellate Division's judgment.

Respectfully submitted,

SILLS CUMMIS & GROSS P.C.

Dated: September 2, 2025

By: */s/ Peter G. Verniero*
Peter G. Verniero
Michael S. Carucci

Counsel for Petitioner Rutgers, the State University of New Jersey