

SUPREME COURT OF NEW JERSEY

IN THE MATTER OF RUTGERS, THE STATE UNIVERSITY OF NEW JERSEY, <i>Petitioner-Appellant,</i> and AFSCME LOCAL 888, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL- CIO, <i>Respondent-Respondent.</i>	Supreme Docket No. 090230 On appeal from: SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION Docket No. A-0277-23 Hon. Lisa Perez Friscia, J.A.D. Hon. Stanley L. Bergman, Jr., J.A.D.
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**AMICUS BRIEF ON BEHALF OF AMERICAN FEDERATION OF
TEACHERS, COMMUNICATIONS WORKERS OF AMERICA,
COUNCIL OF NEW JERSEY STATE COLLEGE LOCALS, LOCAL
5094, HEALTH PROFESSIONALS AND ALLIED EMPLOYEES, PART-
TIME LECTURER FACULTY CHAPTER, RUTGERS COUNCIL OF
AAUP CHAPTERS, AND UNION OF RUTGERS ADMINSTRATORS**

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PRELIMINARY STATEMENT

The Parties seeking leave to file as Amicus:

The Communications Workers of America (CWA) represents tens of thousands of public sector employees working throughout the State of New Jersey. CWA Locals 1040 and 1031 represent employees working at Rutgers, the State University of New Jersey (Rutgers or the University). CWA Local 1031 also represents employees at the State Colleges and Universities.

Rutgers Council of AAUP-AFT Chapters (RUAAUP) represents over 5,000 full time faculty, graduate assistants, postdoctoral associates and EOF counselors employed by Rutgers University.

Rutgers Adjunct Faculty Union (PTLFC-AAUP-AFT) Local 6324 represents adjunct faculty and lecturers employed by Rutgers University.

The Union of Rutgers Administrators (URA-AFT) represents a group of administrators employed by Rutgers University.

The Health Professionals & Allied Employees (HPAE) Local 5089 and Local 5094 represent a unit nurses and healthcare professionals at Rutgers Biomedical and Health Services Division.

The Council of New Jersey State College Locals (CNJSCL) represents thousands of faculty, professional staff and librarians employed at New Jersey's nine State Colleges and Universities.

The American Federation of Teachers, New Jersey, represents over 30,000 education employees in both K-12 public school districts and higher education.

The employees represented by these parties have a direct and vital interest in the outcome of this matter. Should the Court decide to overturn the well-reasoned decision of the Appellate Division below, these employees would be in jeopardy of losing the right to appeal discipline imposed upon them by their employer following an investigation conducted under Title IX. For that reason, the parties described above should be granted leave to appear as *amici curiae* in this matter.

The Question Certified and the University's Response

The Court certified the following question: "Does the grievance process for sexual harassment mandated by the federal government's Title IX rules preempt the process set forth in the terms of a collective negotiations agreement that allows employees to challenge their termination for just cause?"

The University, in its petition and reply brief in support of certification, acknowledges that a collective bargaining agreement can provide employees with rights in addition to those provided by Title IX regulations. (Reply Br. 9-10). Rutgers concedes that “unions and universities are free to negotiate [additional rights] so long as the terms do not conflict with Title IX.” (Id.) However, the University maintains that if “additional measure[s]” are negotiated they “must be applied equally for both the accused and the victim.” (Id.) According to Rutgers, “equal” application means an equal opportunity for the victim and the accused to present and question witnesses and inspect and review evidence. (Pet. at 13-14).

Petitioner’s reading of the regulation is wrong, and conflicts with that of its drafters. In its commentary on the amended regulations, the federal Department of Education has confirmed that Title IX’s regulations do not impose an “equal access” requirement with respect to collectively bargained appeal procedures, including binding arbitration. However, in the event the Court adopts Petitioner’s interpretation of the regulation over the DOE’s, the Court can simply require that equal access be provided to a complainant, either through their own representative or through the University that is obligated to prove just cause for discipline.

The Decision below and the potential effect of reversal:

New Jersey law grants public employees the right to appeal discipline to a neutral third-party arbitrator under the terms of a union contract. See N.J.S.A. 34:13A-5.3. Employees working for employers which have adopted Title 11A have a separate right to appeal discipline to the Civil Service Commission, and tenured employees in K-12 public schools and State Colleges and Universities have similar appeal rights under Title 18A. Rutgers has an elaborate policy that protects the rights of its tenured faculty and is also referenced in its collective negotiations agreements with its faculty union. In its decision below, the Appellate Division properly held that under a scope of negotiations analysis pursuant to the New Jersey Public Employer-Employee Relations Act (NJPEERA), Title IX regulations do not preempt arbitration of a grievance challenging the termination of a union member following a Title IX investigation. Affirming the ruling of the Public Employment Relations Commission (PERC), the court rejected the unprecedented claim made by Rutgers University that discipline imposed following a finding of responsibility under Title IX was final and unreviewable.

Rutgers now seeks to have the court's ruling reversed, raising, for the first time, principles of federal preemption to argue that Title IX's regulations are implicitly preemptive. This late-game change in tactics does Rutgers little

good, since Title IX's regulations neither expressly nor implicitly conflict with State law providing public workers with the right to appeal discipline. To the contrary, the Department of Education has stated that Title IX's regulations were not intended to prevent the employer from honoring rights contained in a union contract. Moreover, amendments made to the regulations in 2024, and related commentary by the DOE, further weaken the case for implied preemption.

More importantly, reversing the Appellate court's ruling would effectively repeal State laws and long-standing University policy which grant public employees the right to appeal discipline, whether it be pursuant to a union contract, Civil Service regulations, tenure laws, or University policy. Accepting Rutgers' argument would fundamentally rewrite public sector labor law and leave tens of thousands of workers charged with Title IX violations without the job protections and appeal rights which have been provided to them by our Legislature, collective negotiations agreements, or University policy. Indeed, a nefarious employer may seek to expand the use of Title IX to rid itself of employees without having to concern itself with a potential appeal. To ensure stable labor relations in the public sector and protect the legal and contractual rights of public employees, the decision of the court below must be affirmed.

PROCEDURAL HISTORY

On September 14, 2022, AFSCME Local 888 filed a grievance contesting the termination of its member, J.M. as without just cause. J.M. was terminated from employment following an investigation into allegations of inappropriate behavior conducted pursuant to Title IX and Rutgers' applicable Title IX policy.

On February 2, 2023, Rutgers filed a Scope of Negotiations Petition with the Public Employment Relations Commission (PERC) seeking to restrain arbitration on the basis that arbitration was preempted by Title IX regulations.

On August 23, 2023, PERC denied Rutgers' Petition. PERC found that Title IX's regulations were silent with respect to the appeal of disciplinary sanctions imposed following a Title IX investigation and observed that Rutgers' own Title IX policy required that discipline be imposed consistent with the terms of the union contract. Rutgers appealed that decision to the Appellate Division.

On December 13, 2024, the Appellate Division affirmed PERC's ruling. The court stated that "no explicit Title IX regulation dictated preemption of disciplinary sanctions" and also that a reading of the regulations "fails to

demonstrate a preemptive intention or conflict precluding Local 888's independent grievance procedure under the CNA..." (Aa17).

On March 28, 2025, the Court granted certification to hear the case.

STATEMENT OF MATERIAL FACTS

Amici hereby adopt the statement of facts set forth in the Appellate Division's decision (Aa4-9) which are hereby incorporated by reference.

LEGAL ARGUMENT

Point I

The court below correctly found that the 2020 Title IX¹ regulations do not preempt arbitration of a union grievance challenging discipline imposed after a Title IX investigation, and were not intended to do so. (Aa17)

At its core, the question before this Court is whether the process set forth in Title IX for investigating and deciding allegations of sexual harassment preempt the right of an employee to challenge any related discipline under the terms of their union contract. The court below correctly answered that question in the negative.

Like PERC before it, the Appellate Division was called upon to decide whether the procedure for determining complaints of sexual harassment set forth in Title IX’s regulations contained language which “expressly, specifically and comprehensively” established a process for appealing discipline imposed following a Title IX investigation. To answer that question, the court engaged in a comprehensive review of the applicable regulations, most notably 34 C.F.R. 106.45, as it existed in 2020. (Aa15-17). At the conclusion of that review, the court stated the obvious – that “contrary to Rutgers contention, no explicit Title IX regulation dictated preemption of

¹ Title IX regulations were amended in 2024. Those regulations, which are currently in effect, provide fewer protections to an employee charged by another employee with a Title IX violation. See Point II below.

disciplinary sanctions.” (Aa17). A brief review of the governing regulations confirms that conclusion.

In 2020, 34 C.F.R. 106.45 was entitled “Grievance procedure for formal complaints of sexual harassment” and set forth the basic requirements by which a recipient of federal funds received, investigated and ultimately decided a complaint alleging discrimination on the basis of sex. The regulation required equitable treatment (Section b.1.i), imposed a presumption of innocence (Section b.1.iv), identified options for the standard of review (Section b.1.vii), established minimum notice requirements (Section b.2) and set forth circumstances whereby a complaint may be dismissed. (Section b.3). The regulation also contained a process by which complaints of sex discrimination should be investigated (Section b.5) and hearings conducted (Section b.6). Each of these procedures applied before the point in time that discipline would be imposed, and none of them contained any language which foreclosed or otherwise addressed the right of a labor union to appeal a disciplinary sanction pursuant to the terms of a collectively negotiated agreement. Prior to the 2024 amendments, 34 C.F.R. 106.45(b)(8) required the recipient of funds to “offer both parties an appeal from a determination regarding responsibility, and from the recipient’s dismissal of a formal complaint” on certain limited bases, but nothing in Section (b)(8) expressly

spoke to an appeal of a disciplinary sanction. The 2020 regulation also required the recipient to notify the parties of the range of discipline that could be imposed, but that section of the regulation said nothing about how discipline might be appealed. See 34 C.F.R. 106.45(b)(1)(vi). There is nothing contained in the 2020 iteration of 34 C.F.R. 106.45 upon which to conclude that the Department of Education intended to prevent a union from pursuing a grievance challenging the discipline or discharge of a union member following a determination of responsibility. Since Title IX regulations only established a pre-disciplinary process, the Appellate court correctly upheld PERC's decision that the grievance filed by Local 888 could proceed to arbitration. That decision should be affirmed.

The University relies, in primary part, on 34 C.F.R. 106.45(b)(5), which establishes a grievance process for the investigation of a formal complaint – a process that precedes a live hearing. Notably, a live hearing was previously required by the 2020 regulations, but is no longer required by the amended 2024 regulations. The regulations cited by Rutgers in support of its claim for “implicit preemption” apply specifically to investigations, but do not apply to the live hearing requirement which was formerly part of the 2020 regulations, nor to the appeal rights that follow a determination regarding responsibility.

The 2020 regulation governing appeals from a “determination of responsibility,” 34 C.F.R. 106.45(b)(8), required the University to offer both parties an appeal based on certain limited grounds, including procedural irregularity, new evidence, or a conflict of interest or bias by the decision-maker. This regulation also permitted an appeal “on additional bases” provided the appeal was offered equally to both parties. However, the 2020 regulation governing appeals from determinations regarding responsibility do not contain equal participation or equal opportunity requirements, as do the regulations governing complaint investigations. Assuming that a post-discipline contractual grievance/arbitration process must comply with the 2020 Title IX regulations governing an appeal, 34 C.F.R. 106.45(b)(8), that regulation does not contain requirements that mirror those in the companion regulation governing investigations, 34 C.F.R. 106.45(b)(5).

Also noteworthy is that a contractual binding arbitration procedure not only provides additional rights to the accused employee – specifically the right to have an independent, neutral decision-maker² review the discipline – but it also affords access to a binding arbitration process to an employee to challenge the dismissal of a formal complaint. As is the case with virtually every

² The 2020 Title IX regulations required the investigator and the decision-maker to be free from conflicts of interest or bias, which is different than an independent third party mutually selected by the union and employer from a list of neutrals certified by PERC. The Title IX process permits the unilateral selection of the investigator, coordinator and decision-maker by the employer. They must be free of conflicts or bias, but they need not be neutral or independent.

collective negotiations agreement in the public sector, AFSCME's contract with Rutgers contains an enforceable non-discrimination provision. A union member whose Title IX complaint is dismissed pursuant to the regulatory process may file a grievance alleging sex discrimination or harassment based on the contract's non-discrimination provision. The union has a duty to fairly represent all members, including a member alleging discrimination on the basis of sex.

After finding that Title IX's regulations contained no express language preempting arbitration under a union contract, the court observed that "reading the Title IX regulations together fails to demonstrate a preemptive intention or conflict precluding Local 888's independent grievance procedure under the CNA...." (Aa17). In support of that conclusion, the court relied on New Jersey Turnpike Authority v. New Jersey Turnpike Supervisors' Ass'n, 143 N.J. 185, 195 (1996) which held that regulations promulgated under New Jersey's Law Against Discrimination did not preempt arbitration of discipline under a union contract. By looking to the intent of the Title IX regulations, the court extended its analysis beyond the plain text to determine whether there was an implicit conflict between the regulations and the negotiated grievance procedure of the Local 888 contract. Thus – contrary to the Petitioner's claim – the court below did consider whether there was either an express or implied

conflict which would warrant preemption. Finding neither, the court properly affirmed the Commission's decision.

The court also recognized - as had PERC - that Rutgers' Title IX Policy required that "the decision concerning discipline shall be consistent with the terms of all University Policies and the terms of any CNA (collective negotiations agreement) that may be applicable." (Aa18). Based on the language of its own governing policy, Rutgers understood Title IX's regulations to permit a union to appeal discipline pursuant to the terms of a union contract. Rutgers' policy correctly interpreted the regulations to apply to the pre-discipline determination process, and the union contract to apply to the post-discipline appeals process. The court's holding merely adopted and affirmed that interpretation, as PERC had done. Since Title IX's regulations do not foreclose (or address) the union's right to appeal discipline, and since that right is expressly recognized in Rutgers' Title IX Policy, there is simply no basis to reverse the decision of the court below.

The court's holding is further bolstered by the Department of Education's commentary on the 2020 amendments. Responding to a question about the need for specific language recognizing the right to appeal discipline under a union contract, the DOE stated that "*These final regulations do not preclude a recipient's obligation to honor additional rights negotiated by*

faculty in any collective bargaining agreement or employment contract...The Department has never impeded a recipient's ability to provide parties with additional rights as long as the recipient fulfills its obligations under Title IX." Rutgers University, 50 NJPER ¶31 fn. 6 (2023) *citing* 85 Fed. Reg. 30298, 30442. (Aa30). The DOE is clearly on record as stating that the 2020 amendments to Title IX's regulations were not intended to prevent a union from appealing a disciplinary sanction imposed following a Title IX investigation. Petitioner's claim that preemption should be implied from the language of the regulations is completely undone by the agency responsible for drafting that regulation.

This Court recently observed that "the case for federal preemption is particularly weak where Congress has indicated its awareness of the operation of state law and has nonetheless decided...to tolerate whatever tension there is between them." Hager v. M&K Construction, 246 N.J. 1, 30 (2021) *citing* Wyeth v. Levine, 555 U.S. 555, 575 (2009). That is precisely what the Department of Education did by recognizing that Title IX's regulations did not preclude, and were not intended to preclude, the pursuit of "additional rights negotiated...in any collective bargaining agreement." Whether one applies the standard of review applied by PERC (does the regulation expressly, specifically and comprehensively preempt arbitration) or the standards of

federal preemption urged by Petitioner (allowing for express or implied preemption) the result is the same. There is nothing contained in the Title IX regulations which speak to the right of a labor union to pursue a grievance after the Title IX hearing and determination process has concluded, and the DOE has confirmed that the regulations do not preempt that right. As such, the decision of the court below should be affirmed.

Point II

The 2024 amendments to Title IX's regulations and the related commentary by the DOE undermine the case for reversal. (Aa3)

Petitioner's claim of implied preemption is further undermined by several of the amendments made to Title IX's regulations in 2024, after PERC had decided Rutgers' Scope of Negotiations Petition. Furthermore, during the process of amending the regulations, the Department of Education reaffirmed that the regulations were not intended to interfere with rights conferred by a collective bargaining agreement. As such, the 2024 amendments to the governing regulation support the Appellate Division's decision to affirm PERC's ruling.

Among the language added to 34 C.F.R. 106.45 as part of the 2024 amendments is a new section (h)(4), which provides that "following an investigation and evaluation of all relevant and not otherwise impermissible evidence," the recipient of federal funds must "comply with §106.45...*before*

the imposition of any disciplinary sanctions against a respondent.” This new language is a clear indication that the procedures required by 34 C.F.R. 106.45 are intended to apply prior to the imposition of discipline. Similarly, the 2024 revisions to 34 C.F.R. 106.45 did away with the requirement that the recipient notify the respondent of the potential disciplinary penalties that may be imposed. In addition, the 2024 regulations do not contain a live hearing requirement. Nor do the 2024 regulations require a right to appeal a finding that an employee violated Title IX. 34 C.F.R. 106.45(d)(3) provides a complainant with the right to appeal the dismissal of a complaint, and 34 C.F.R. 106.45(i) requires that a recipient employer offer parties “an appeals process that, at a minimum, is the same as it offers in all other comparable proceedings.” However, the 2024 regulations do not mandate that an employee be afforded the opportunity to appeal a determination of responsibility.³ These revisions serve to further distance the Title IX process, which governs the handling and determination of a sex discrimination complaint prior to the imposition of discipline, from the rights afforded by a collective bargaining agreement, which come into play only after discipline has been imposed.

³ 34 C.F.R. 106.45(i) does mandate that post-secondary institutions offer the right of appeal to student complainants and student respondents consistent with the 2020 regulations. Employee complainants and employee respondents are not offered similar appeal rights.

The Department of Education’s comments to the 2024 amendments provide further support for the Appellate court’s decision. In support of its Scope Petition, Rutgers argued that Title IX regulations required that any additional provisions beyond those established by 34 C.F.R. 106.45 had to apply “equally to both parties,” and since the complainants did not have access to the union grievance procedure,⁴ it could not permit the respondent employee to pursue his contractual rights. Rutgers University, 50 NJPER ¶ 31, *6 (2023) (Aa27). In its comments to the 2024 amendments, the DOE specifically rejected that claim, noting that:

“The Department acknowledges that a recipient may use shared governance and collective bargaining to adopt additional rules and practices beyond those required by the final regulations and that some employees have additional rights created by shared governance and collective bargaining agreements. This is permissible under the final regulations and consistent with the Department's statement in the July 2022 NPRM that nothing in the final regulations precludes a recipient's Title IX grievance procedures from recognizing that employee parties have additional rights in a collective bargaining agreement or other shared governance policy. See 87 FR 41491. The Department also notes that as explained in the July 2022 NPRM and as discussed above, identical treatment is not always required in the application of any additional rules or practices, and, as such, the Department recognizes that employee parties may have distinct rights in a shared governance or collective bargaining agreement that are not applicable to parties who are not employees.

See 89 F.R. 33713-33714.

⁴ The Appellate court rejected that argument, finding that the Local 888 grievance process applied to complainants.

With this comment, the DOE directly contradicts Rutgers’ theory of the case. Contrary to Rutgers’ argument, recipients of federal funds under Title IX are free to adopt (or in this case, negotiate) additional procedures permitting a union member to appeal a disciplinary sanction, even though those procedures do not apply to the other party. The existence of contractual rights held by one party but not the other does not, standing alone, conflict with Title IX regulations. Rather, the DOE has affirmed that “*nothing in these regulations interferes with a recipient's ability to negotiate a grievance process within a collective bargaining agreement that is distinct from grievance procedures under Title IX.*” 89 F.R. 33647. The DOE’s interpretation of its own regulations is entitled to deference. See Auer v. Robbins 519 U.S. 452, 462 (1997); Madison v. Resources for Human Development, Inc., 233 F.3d 175, 186-187 (3rd Cir. 2000). Since the post-discipline appeals process set forth in the Local 888 contract is distinct from the pre-discipline complaint review process established by 34 C.F.R. 106.45, there is no conflict between the two, and therefore no basis upon which to find preemption. The decision below is consistent with the DOE’s understanding of its own regulations, as well as Rutgers’ governing Title IX policy, and should therefore be affirmed.⁵

⁵ In January 2025, the federal district court for the District of Eastern Kentucky held that the regulation relied upon here by Rutgers, 34 C.F.R. 106.45, was unconstitutional and thus invalid. See State of Tennessee v. Cardona, 762 F. Supp. 3d 615 (E.D. Ky 2025). That decision has not been appealed. See Tennessee v. McMahon, 2025 WL 848197 (6th Cir. 2025) (Aa39-41). In light of the decision of the United States Supreme Court in Trump v. CASA Inc. et. al.,

In its request for certification, Petitioner concedes that Title IX does not prohibit a union from negotiating a procedure to appeal discipline following a Title IX investigation. Specifically, Petitioner admits that “no rule precludes a school from offering a post-termination appeal” and agrees that “unions and universities are free to negotiate so long as their terms do not conflict with Title IX.” (Prb9-10). However, Petitioner argues that such a process “must be applied equally for both the accused and the victim.” (Prb10). The DOE’s comments refute that notion, and instead confirm that a negotiated disciplinary appeals process need not be available to both parties. Also, in this case, the union grievance procedure was available to both parties, since both complainants and respondents were members of Local 888. (Decision, p. 20). On these fact, Petitioner’s “equal access” argument fails.

Even if the Court were persuaded by Petitioner’s argument in a way that PERC and the Appellate Division were not, there is an easy fix. The Court could simply rule that in cases involving claims under Title IX, the negotiated grievance procedures contained in a collectively negotiated agreement must be read as applicable to both the complainant and the respondent. That could be accomplished either through the participation in the arbitration proceeding by the recipient - in this case the University whose interests are aligned with the

Case No. 24A884, 606 U.S. – (Decided June 27, 2025) it is unclear whether the court’s ruling invalidated the regulation nationwide. Given the court’s decision in Cardona, the future of 34 C.F.R. 106.45 is murky, at best.

complainant where there has been a finding of discrimination of harassment on the basis of sex – or by the more direct involvement of the complainant through her own representative or advisor. In that way, Petitioner’s “equal access” concerns would be fully resolved.

Having conceded that Title IX’s regulations do not prohibit a recipient from negotiating a disciplinary appeals process with a labor union representing its employees, Petitioner’s entire argument turns on the question of whether that process must be accessible to both sides. In its commentary to the amended regulations, the Department of Education gave a clear answer to that question; the fact that one party possesses appeal rights not held by the other party does not, standing alone, conflict with Title IX’s regulations. The decision the Appellate Division is entirely consistent with the DOE’s interpretation of its own regulations, and should therefore be affirmed. Should the Court see it differently, it is free to open the door of the union grievance procedure to both parties.

Point III

Reversal of the Appellate Court's decision would fundamentally rewrite public sector labor law and would open the door for abuse by employers seeking to deprive workers of their legal and contractual appeal rights. (Aa17).

As is often the case in matters pending before this Court, there is far more at stake here than a single arbitration hearing about a single case of alleged harassment. If the Court were to side with Petitioner and conclude that Title IX's regulations preempted an appeal to binding arbitration of discipline imposed following a Title IX investigation, State law governing the rights of public employees would be effectively repealed whenever an employee is disciplined for violating Title IX, resulting in tens of thousands of employees throughout New Jersey losing rights guaranteed to them by statute, contract or governing policy.

The right to appeal discipline pursuant to the terms of a collective negotiations agreement is enshrined at N.J.S.A. 34:13A-5.3, which provides:

Public employers shall negotiate written policies setting forth grievance and disciplinary review procedures by means of which their employees or representatives of employees may appeal the interpretation, application or violation of policies, agreements, and administrative decisions, including disciplinary determinations, affecting them, provided that such grievance and disciplinary review procedures shall be included in any agreement entered into between the public employer and the representative organization. Such grievance and disciplinary review procedures may provide for binding arbitration as a means for resolving disputes... In interpreting the meaning and extent of a provision of a collective negotiation agreement providing for grievance arbitration, a

court or agency shall be bound by a presumption in favor of arbitration. Doubts as to the scope of an arbitration clause shall be resolved in favor of requiring arbitration.

Pursuant to N.J.S.A. 34:13A-5.3, a public employer in New Jersey is required by law to negotiate over a procedure by which their employees can appeal discipline, and that process may include binding arbitration. Our Legislature has further created a presumption in favor of arbitration, and directed the courts and agencies to be guided by that presumption when questions of arbitrability arise. Reversing the decision of the Appellate Division below would effectively negate the rights accorded to unions and their members pursuant to N.J.S.A. 34:13A-5.3 and discard the presumption in favor of arbitrability imposed by our Legislature. Instead, public employers operating under Title IX would become judge, jury and executioner, leaving workers with no means by which to appeal a disciplinary sanction following a Title IX investigation, despite the protections afforded by their union contract. The facts of this case make that result dangerously clear.

Here, Local 888 had a contract with Rutgers University which provided that discipline could be imposed only for “just cause.” (Aa7). The Local 888 contract also provided that “the sole right and remedy of any employee who claims that he or she has been discharged...without just cause shall be to file a grievance through and in accordance with the grievance procedure.” (Aa7-8). Thus, the Local 888 contract was the only means by which an employee

discharged from employment could contest that decision. At the same time, 2020 Title IX regulations set forth a very limited basis for appealing a finding of responsibility – a requirement not found in the 2024 amended regulations. Compare 34 C.F.R. 106.45(b)(8) (2020) and 334 C.F.R. 106.45(d) and (i) (2025). Under the 2020 regulations, such an appeal could only be based on (a) procedural irregularity, (b) newly discovered evidence, or (c) bias or conflict of interest in the outcome. Id. As both PERC and the Appellate Division recognized, nothing in 34 C.F.R. 106.45 gave respondent the right to appeal the penalty imposed by Rutgers. In short, Petitioner asks the Court to deny this grievant, and indeed all union members, the right to appeal discipline under a CNA – a right provided by law – in favor of a process that does not afford that right. Siding with Petitioner would leave tens of thousands of public employees who rely on the protections of a union contract without recourse in the event they are disciplined or discharged following a Title IX investigation. That is exactly the opposite of what New Jersey law requires.

The deprivation of statutory rights in the event the Appellate Division decision is reversed is not limited to those provided by Title 34 and enshrined in union contracts. For public employers that have adopted Title 11A (Civil Service), a different disciplinary appeals process exists. Pursuant to N.J.S.A. 11A:2-14, public employees in a Civil Service jurisdiction have a right to

appeal major discipline (unpaid suspension of more than 5 days or termination) to the Civil Service Commission (CSC) within 20 days of a preliminary decision by the employer. By law, an employee in a Civil Service jurisdiction who is suspended without pay for more than five days or discharged from employment following a Title IX investigation would have the right to appeal that decision to the CSC. If this Court adopts Petitioner's preemption argument, then the right to file an appeal under N.J.S.A. 11A:2-14 would also be lost. Clearly, if 34 C.F.R. 106.45 preempts arbitration of discipline under a union contract, it must also preempt the identical appeal under civil service laws. Accepting Petitioner's argument would effectively repeal N.J.S.A. 34:13A-5.3 and N.J.S.A. 11A:2-14 to the extent those laws permit the appeal of discipline imposed by the employer after a Title IX investigation. Nothing contained in the language of the regulations could justify overturning the job protections and appeal rights afforded to public workers under New Jersey law.

Were the Court to reverse the Appellate Division, the damage done to employee rights would not stop there. N.J.S.A. 18A:60-2 provides that "no professor, associate professor, assistant professor, instructor, supervisor, registrar, teacher, or other person employed in a teaching capacity, so under tenure, shall be dismissed or subjected to a reduction in salary except for inefficiency, incapacity, conduct unbecoming a teacher, or other just cause..."

The same tenure rights are afforded to employees in the public schools pursuant to N.J.S.A. 18A:60-10. The existing rights of tenured faculty and public school teachers to appeal their dismissal or reduction in pay following a Title IX investigation would also be lost if the Court were to conclude that disciplinary appeal rights were preempted by Title IX's regulations. If Petitioner's argument is accepted, tens of thousands of employees whose jobs are protected by a just cause provision of a union contract, or by the appeal rights conferred by the Civil Service statute, or by the hard-earned grant of tenure, would lose those rights; in their place would be a set of regulations that offer no corresponding right to appeal discipline following a Title IX investigation. It is not hyperbole to say that Petitioner is asking this court to undo a principle that lies at the heart of the statutory scheme governing public employment: the right to challenge discipline or discharge from employment.

The Court has recognized that public employees may have a property interest in their employment pursuant to state law. See Bishop v. Wood, 426 U.S. 341, 344 (1976). Where a public employee can only be terminated "for cause after adequate hearing," that is sufficient to create such an interest. Santiago v. City of Vineland, 107 F. Supp. 2d. 512, 555 (D.N.J. 2000). Title 34 extends that protection through negotiated union contracts; Title 11A provides that protection by giving employees the right to appeal major discipline; Title

18A offers that protection to tenured faculty and teachers and long-standing policy at Rutgers grants that protection to tenured professors whom the University seeks to terminate. If the decision below is reversed, public employees would lose rights guaranteed to them not only by our laws, but also by contract and long-standing policy. Neither the express nor implied terms of Title IX's regulations support that disastrous result.

Reversal of the decision below would open the door to potential abuses by public employers. Recall that Title IX's regulations contain no provision by which an employee can appeal discipline imposed following a Title IX investigation. (Aa16). The right to appeal a finding of responsibility under Title IX is very limited, and does not include the right to appeal discipline. Rutgers University, 50 NJPER ¶ 31 *7 (2023) (Aa28). If the Court adopts Petitioner's argument, thousands of public employees will be left powerless to contest discipline, despite a comprehensive statutory scheme designed to grant them that right. Employers would have the unchecked, unreviewable right to fire employees under the guise of a Title IX investigation. Pursuant to the 2024 amended Title IX regulations, an employee accused of sex discrimination or harassment would not even be entitled to a hearing; a mere investigation would suffice. Savvy employers would quickly look to expand that right by applying the claim of implied preemption to other federal laws prohibiting

discrimination, such as Title IV, the ADA or the ADEA. Employers will argue that if discipline based on claims of sexual harassment cannot be appealed due to implied preemption, then other forms of discrimination prohibited by federal law should be no different. In such cases, the right of public employees to appeal discipline would be rendered meaningless. This Court has avoided descending that slippery slope before, and should do so again. See New Jersey Turnpike Authority, *supra*. The decision of the below should be affirmed.

Point IV

The Appellate court correctly concluded that the rights of the Title IX complainant are not lost or diminished by requiring the recipient of funds to comply with the terms of a union contract. (Aa20-21).

In its argument to the Court, Petitioner is likely to reassert its claim that the rights of the Title IX complainant will be negatively impacted if the recipient of funds is required to comply with a negotiated grievance procedure contained in a union contract. The Appellate Division rejected that claim, finding that the interests of the complainant can be protected at the arbitration hearing, at which Rutgers could “ensure that [the complainant’s] interests are weighed and introduce relevant evidence for the arbitrator’s consideration.” (Aa20). To that point, our courts have held that the rules of evidence are relaxed at arbitration, and that arbitrators have broad discretion to accept evidence by affidavit. See Fraternal Order of Police Penn-Jersey Lodge 30 v.

Delaware River Port Authority, 2013 WL 1315998 (App. Div. 2013) (Aa32-38). Therefore, a complainant that is hesitant or reluctant to testify at an arbitration hearing could seek to have their statement taken by affidavit, and it would be within the discretion of the arbitrator to admit such a statement. Any claim by Rutgers that it would be unable to fully present its case at an arbitration hearing is undermined by the broad discretion accorded the arbitrator to decide what evidence will be permitted, and in what form. The rights and interests of the complainant can be fully protected and asserted in that context.

This court grappled with these precise issues in New Jersey Turnpike Authority v. New Jersey Turnpike Supervisors' Ass'n, 143 N.J. 185 (1996). There, the Court held that negotiated grievance procedures for challenging discipline contained in a union contract were not preempted by the NJLAD's protections against sexual harassment and discrimination. To support its claim of preemption, the Turnpike argued that there was an "incompatibility between the respective statutory purposes to be served by collective negotiations of disciplinary matters and by the laws and policies against discrimination. Id. at 198. Petitioner makes the same claim here, asserting that arbitration would render the Title IX process meaningless. (Aa19). The Court rejected that claim as "exaggerated" and observed that when interpreting a CNA, the arbitrator

“must consider the LAD, employee welfare, and the strong public policy in favor of eradicating discrimination. Hence, the possibility of inconsistent results in arbitration proceedings and separate administrative or judicial actions under the LAD is sharply reduced.” Id. at 201. Ultimately the Court ruled that “laws that call for powerful protection and strict policies against discrimination by sexual harassment do not statutorily preempt or supersede the statutory authority of public employees and their representatives to negotiate disciplinary procedures, including binding arbitration...” Id. The result should be no different here. Under Turnpike Authority, laws and regulations prohibiting discrimination or harassment on the basis of sex remain viable and enforceable, in peaceful coexistence with the right of public employees to appeal discipline pursuant to a negotiated grievance procedure. Since the decision of the court below is entirely consistent with this Court’s holding in Turnpike Authority, the decision should be affirmed.

In this particular case, it is worth remembering that the complainant was a fellow union member, and had access to the union grievance procedure in the event she was unsatisfied with the conclusion reached by Rutgers’ Title IX investigation. As the Appellate Division noted, “the complainant was permitted to file a CNA grievance if she disagreed with the Title IX decision affecting a condition of her employment...” (Aa20). Based on the language of the Local

888 contract, the complainant and respondent stood on equal footing, not only with respect to the investigation and determination of the complaint, but also as to the ability to invoke their rights under the union contract after that investigation concluded. At no point in this matter did the respondent have rights which exceeded or superseded those enjoyed by the complainant.

Rutgers argues that permitting arbitration of discipline following a Title IX investigation would nullify the Title IX process, but that claim is a ruse. The Title IX regulations establish an internal process (that is, a process fully controlled by the employer) to determine whether allegations of misconduct can be substantiated. That process includes the introduction of evidence, the hearing of testimony, and the weighing of credibility. The 2020 regulatory process is no different than the one that applies to civil service employees, which provides for an initial hearing before the employer prior to the imposition of discipline. Pursuant to N.J.A.C. 4A:2-2.5(c) an employee may request a hearing before the employer within five (5) days of being served with a notice of discipline. If a hearing is requested, it is held before the appointing authority (the employer) or a designated representative. See N.J.A.C. 4A:2-2.6(a). The employee may be represented at the hearing, and both parties have the right to introduce evidence and call witnesses. See N.J.A.C. 4A:2-2.6. In substance, the internal hearing provided under Civil Service regulations

mirrors the process set forth in Title IX's regulations. Importantly, if discipline is issued following the departmental hearing conducted under N.J.A.C. 4A:2-2.6, the employee has a right to file an appeal with the Civil Service Commission within 20 days of the decision. N.J.A.C. 4A:2-2.6(d). Under Title 11A, the right to an initial hearing to determine allegations of misconduct does not bar the appeal of discipline; it is instead the first step in the disciplinary process. At its core, Title IX's regulations simply establish the baseline requirements for an internal hearing process to decide allegations of misconduct. That pre-disciplinary process is not negated by, nor does it preclude, an appeal of disciplinary sanctions imposed pursuant to that process. Based on applicable law, the Appellate Division got it right, and its decision to uphold PERC's ruling should be affirmed in all respects.

CONCLUSION

For the reasons set forth herein, *amici curiae* respectfully request that the decision of the Appellate Division be affirmed.

Respectfully submitted,

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