SUPREME COURT
OF THE STATE OF RHODE ISLAND

NO. SU-2019-0167-A

JANE DOE,
PLAINTIFF-APPELLANT,

v.

BROWN UNIVERSITY IN PROVIDENCE IN THE STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS, JONAH ALLEN WARD, AND YOLANDA CASTILLO-APPOLLONIO
DEFENDANTS-APPELLEES

APPEAL FROM THE SUPERIOR COURT OF RHODE ISLAND
CIVIL ACTION NO. PC-2017-4635

BRIEF OF DEFENDANTS-APPELLEES BROWN UNIVERSITY, JONAH ALLEN WARD, AND YOLANDA CASTILLO-APPOLLONIO

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I. STATEMENT OF FACTS AND PRIOR PROCEEDINGS[1]

A. Overview of the Case

In Plaintiff's first-filed lawsuit, she sued Brown University ("Brown" or the "University"), Jonah Allan Ward and Yolanda Castillo-Appollonio (collectively the "Brown Defendants") in the United States District Court for the District of Rhode Island, asserting claims against Brown under Title IX of the Education Amendments of 1972 ("Title IX"), 20 U.S.C. §§ 1681-88, and the equal protection clause of the Rhode Island Constitution, art. 1, sec. 2, and claims against each of the Brown Defendants under the Rhode Island Civil Rights Act of 1990 ("RICRA"), R.I.G.L. §§ 42-112-1 to -2.[2] Plaintiff sought to hold the Brown Defendants liable for events pre-dating and post-dating the November 2013 incident at issue in the litigation.

The Rhode Island Federal District Court (McConnell, J.) granted Brown's motion for judgment on the pleadings regarding Plaintiff's Title IX claim and abstained from addressing her state law claims. *Doe v. Brown University*, 270 F. Supp. 556 (D.R.I. 2017) (R.A. 111-24). The United States Court of Appeals for the First Circuit affirmed the final judgment in Brown's favor regarding Plaintiff's Title IX claim. *Doe v. Brown University*, 896 F.3d 127 (1st Cir. 2018) (R.A.

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[1] Citations to the Record Appendix are prefixed with the abbreviation "R.A." Pursuant to Rule of Appellate Procedure 17(c), Brown has filed a Supplemental Record Appendix containing four documents. For the Court's convenience, the Brown Defendants have stamped the documents to begin at page number R.A. 464, starting where Plaintiff's Appendix ended. The documents are: (1) Brown Defendants' reply to Plaintiff's objection to Rule 12(b)(6) motion to dismiss, filed in the Rhode Island Superior Court on December 6, 2018 (R.A. 464-77); (2) a letter issued by the Department of Education's Office for Civil Rights, Region 1 dated October 16, 2018, indicating its dismissal of Plaintiff's administrative Title IX complaint against Brown (R.A. 478-79); (3) *Brown University's Code of Student Conduct 2013-2014* (R.A. 480-501) and (4) *Brown University's Code of Student Conduct 2014-2015* (R.A. 502-23).

[2] Jonah Allen Ward was Brown's Senior Associate Dean for Student Life during the 2013-14 academic year. He resigned from the University during the fall of 2014, shortly after the start of the 2014-15 academic year.

232-46). The First Circuit ruled that Plaintiff failed to state a legally plausible Title IX claim against Brown because she was not excluded from participation in any of the University's programs or activities, as required to establish a private cause of action under Title IX. *Id.* at 130-33 (R.A. 238-46). As a matter of law, the final judgment in Brown's favor established substantively that the University has no Title IX liability to Plaintiff concerning any events pre-dating or post-dating the November 2013 incident.

In Plaintiff's second-filed lawsuit, she sued the Brown Defendants in the Rhode Island Superior Court (Providence County), reasserting her RICRA and equal protection claims. Notwithstanding that she has no Title IX claim against Brown, Plaintiff contended that she may still rely upon Title IX's judicial precedents and administrative regulatory requirements to litigate against the Brown Defendants under RICRA and the Rhode Island Constitution.[3] The trial justice (Long, J.) granted the Brown Defendants' motion to dismiss Plaintiff's complaint for its failure to state a claim upon which relief can be granted. The trial justice held that Plaintiff may not reassert under RICRA her legally futile Title IX claims. (R.A. 363-67). The trial justice dismissed Plaintiff's constitutional claim because an implied private right of action has not been recognized under article 1, section 2 of the Rhode Island Constitution. (R.A. 363). Plaintiff appeals the final judgment in favor of the Brown Defendants.[4]

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[3] Plaintiff contends that Title IX precedents support holding Defendants Ward and Castillo-Appollonio individually liable under RICRA, even though there is no individual liability in a Title IX cause of action, which must be asserted against the federal educational funding recipient only. *See Lipsett v. Univ. of Puerto Rico*, 864 F.2d 881, 901 (1st Cir. 1998) (Title IX liability may only arise against the educational institution, not any supervisory employees).

[4] In count IV of her state court complaint, Plaintiff pleads an equal protection claim against Brown under article 1, section 2 of the Rhode Island Constitution. (R.A. 256). Yet, on appeal, she claims that she is proceeding under the article's antidiscrimination clause. Pl. Brief at 7, 28-39.

Just as she argued before the Rhode Island Federal District Court in her first-filed lawsuit and the Superior Court below, Plaintiff argues again on appeal here that alleged Title IX violations should enable her to litigate educational gender discrimination claims against the Brown Defendants under RICRA and the Rhode Island Constitution. (R.A. 250-57). Relying predominantly upon federal Title IX case law, Plaintiff contends that the Brown Defendants should be held liable for alleged events, both pre-dating and post-dating the alleged November 2013 assault, even though she never participated or intended to participate in any Brown educational program or activity during either time period. Specifically, in her pre-assault claim, she contends there was an alleged "heightened risk" on Brown's campus because the University did not allegedly adopt or enforce its policies in compliance with Title IX. *See* Compl. at ¶¶ 34-35 (R.A. 254, 256); Pl. Brief at 20-22 (citing Title IX case law). In her post-assault claim, she contends that the Brown Defendants acted with alleged "deliberate indifference" to her reporting of the assault, as that standard has been defined by the United States Supreme Court's Title IX precedent established in *Gebser v Lago Vista Indep. Sch. Dept.*, 524 U.S. 274, 287-88 (1998), and *Davis as Next Friend of La Shonda D v. Monroe Cty, Bd. of Educ.*, 526 U.S. 629, 640 (1999). Pl. Brief at 16-18, 22-25 (citing Title IX "deliberate indifference" cases). Yet, in her complaint, Plaintiff pleads that the Brown Defendants acted with "what amounts to *reckless or callous indifference* to the Plaintiff's protected rights," which is a lesser standard than "*deliberate indifference*." *See* Compl. at ¶¶ 39, 43, 47 (R.A. 254-56) (emphasis added). In her brief, Plaintiff does not address what she actually pleads in her RICRA counts as the purported required "indifference" to support liability under the state statute. Instead, she cites to and relies upon only Title IX's deliberate indifference standard, which she apparently contends should also be the controlling standard under RICRA, despite what she pleads in her complaint.

If adopted, Plaintiff's positions regarding state law would have the wide-ranging impacts upon the state's colleges and universities. Again, Plaintiff argues that, applying Title IX's "instructive" principles, RICRA and the Rhode Island Constitution should allow a non-participant in a school's programs or activities to sue for educational gender discrimination, even when Title IX itself does not allow for such a cause of action as a matter of clearly established federal law. Further, Brown, a private university, is not a state actor subject to the constitutional equal protection claim stated in Plaintiff's complaint. Plaintiff relies upon federal Title IX case law predominantly, which she portrays as "instructive" but apparently not preclusive, to request that the Court expand a federal educational funding recipient's obligations and potential liabilities under Rhode Island law, beyond what the Supreme Court has recognized in a federal Title IX private cause of action and what federal agencies, particularly the Department of Education, have required administratively in their Title IX regulatory oversight of federal educational funding.

By her own strategic choice, Plaintiff elected to forego common law causes of action and has instead continuously litigated by asserting statutory and constitutional claims premised upon Title IX obligations. As the Rhode Island Federal District Court stated, "Ms. Doe makes no claim under common law premises liability or any other non-statutory claim." 270 F. Supp. 3d at 559 n. 4 (R.A. 114). The Court should refrain from creating the requested new state law theories of statutory and constitutional liability premised upon Title IX principles, especially where the Plaintiff has no Title IX claim as a matter of law.

Also, at the outset, Brown wishes to correct a factual inaccuracy that Plaintiff has repeatedly asserted. She contends that, as a "visitor or guest" on Brown's premises during the November 2013 incident, she was "covered and protected" by Brown's "*Title IX and Gender Equity Policy*," which she did not attach to her state court complaint or any of her filings, nor has

she included the document in the Record Appendix. She appears to be alluding to Brown's *Sexual and Gender-Based Harassment, Sexual Violence, Relationship and Interpersonal Violence and Stalking Policy* ("Title IX Policy"), which the University adopted effective as of September 2015. *See Doe v. Brown Univ.*, 327 F. Supp. 3d 397, 415 (D.R.I. 2018) (noting that Brown adopted its Title IX Policy at the start of the 2015-16 academic year); *Doe v. Brown Univ.*, 210 F. Supp. 3d 310, 315-17 (noting the year-long process resulting in Brown's adoption of the Title IX Policy effective September 2015). Specifically, Brown's adoption of its Title IX Policy derived from its Task Force on Sexual Assault convened during the 2014-15 academic year, which "included members of Brown's administration, faculty, and student body, to review Brown's practices, policies, and procedures addressing issues of sexual assault and sexual misconduct." 210 F. Supp. 3d at 316. Brown's Title IX Policy was not enacted as of the November 2013 incident or when Plaintiff interacted with Brown thereafter, so she incorrectly references its provisions.[5] During the 2013-14 and 2014-15 academic years, the operative policy was Brown University's *Code of Student Conduct*, which lists sexual misconduct among the offenses against Brown's community standards and delineates the University's student conduct procedures. (R.A. 480-501, 502-23).[6]

As argued below, the trial justice correctly granted Brown's motion to dismiss Plaintiff's complaint and entered a final judgment in the Brown Defendants' favor. None of Plaintiff's issues on appeal justify the reversal of the judgment. First, the Court should reject Plaintiff's contention

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[5] Plaintiff correctly states that, in 2015, Brown participated in a Campus Climate Survey on Sexual Assault and Sexual Misconduct. Pl. Brief at 21. However, Plaintiff wrongly criticizes Brown for doing so. On the contrary, as is evident from Brown's convening of its Sexual Assault Task Force during the 2014-15 academic year and its participation in the referenced survey, the University was addressing sexual assault issues carefully and thoughtfully.

[6] The Brown Defendants have previously informed Plaintiff that she is citing to the wrong policy, when she references Brown's Title IX policy that was not in effect during any of the events pled in her complaint. *See* Brown Defendants' reply to Plaintiff's objection to Rule 12(b)(6) motion to dismiss at p. 8, n.3 (R.A. 471).

that RICRA enables her, as a non-participant in any Brown program or activity, to pursue a Title IX-based educational gender discrimination claim that is not actionable under Title IX. Second, the Court should hold that principles of issue preclusion prevent Plaintiff from seeking to re-litigate her legally futile Title IX claim under the guise of state law. Third, the Court should not recognize an implied cause of action under article 1, section 2 of the Rhode Island Constitution.

B. Title IX's Statutory Requirements, Administrative Oversight, and Implied Cause of Action

For purposes of the issues on appeal, it is helpful to overview Title IX's statutory text, federal administrative regulatory oversight of educational funding, and United States Supreme Court precedent addressing the limited implied private right of action under the federal civil rights statute. Starting with its text, Title IX prohibits discrimination "on the basis of sex" of any person in an educational program or activity receiving federal funding. 20 U.S.C. § 1681(a). Specifically, Title IX prescribes that "[n]o person in the United States shall, on the basis of sex, shall be excluded from participation in, be denied the benefits of, or be *subjected to discrimination under any educational program or activity receiving federal financial assistance*." *Id.* (emphasis added). Title IX mandates nondiscrimination as a condition to receive federal funding in any education program or activity. *Id.* Title IX applies to federally-funded schools at all levels of education, including elementary schools, secondary schools, and higher education institutions. When any part of an institution or a school district receives federal funding, all of the recipient's operations are covered by Title IX. *Id.* at § 1687.[7] It is undisputed that Brown is subject to Title IX.

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[7] Title IX contains a number of exceptions, such as exemptions for educational institutions controlled by a religious organization and those whose primary purpose is training for military service or the merchant marine. 20 U.S.C. §§ 1681(a)(1)-(9).

As the Supreme Court has held, Title IX directs federal agencies which distribute education funding to establish requirements to effectuate the nondiscrimination mandate and allows the agencies to enforce their funding requirements, including ultimately the right to suspend or terminate the funding. *Gebser*, 524 U.S. at 287-88 (1998). Administrative enforcement of Title IX typically focuses upon the recipient's institutional policies and their implementation.[8] Federal agencies may issue regulations and orders to enforce Title IX's requirements. 20 U.S.C. § 1682.[9]

Title IX does not expressly provide for a private right of action. The Supreme Court has recognized a limited implied right of action under Title IX, which allows for the recovery of monetary damages. *Franklin v. Gwinnett Cty. Pub. Schs*, 503 U.S. 60 (1992); *Cannon v. Univ. of Chi.*, 441 U.S. 677 (1979). Because Congress enacted Title IX under the United States Constitution's Spending Clause (Art. I, § 8, cl. 1), "private damages are available only where recipients of federal funding had adequate notice that they could be held liable for the conduct at issue." *Davis*, 526 U.S. at 640. A law, such as Title IX, that relies on Congress's spending power essentially offers a deal to federal funding recipients. The federal government provides funding, and the recipient agrees to certain conditions. In order for such a funding agreement to be knowing and voluntary, the recipient must have fair notice of what obligations and liabilities it is assuming.

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[8] Under the Education Amendments of 1974, the Secretary of Education is directed to promulgate regulations concerning the prohibition of sex discrimination in federally funded education programs. Pub. L. No. 93-380, §§ 884, 88 Stat. 484 (1974) (codified at 20 U.S.C. § 1681 note). The Department of Education has promulgated Title IX regulations that apply to federally funded educational institutions. 34 C.F.R. § 106.2. The Department's regulations bar federal funding recipients from excluding individuals or denying the benefits of any education program or activity on the basis of sex. 34 C.F.R. § 106.31(a).

[9] In both her federal and state court complaints, Plaintiff pled that "[o]n October 11, 2014, Ms. Doe filed a complaint against Brown University with the Office for Civil Rights ("OCR") at the Department of Education. Fed. Comp. at ¶ 36 (R.A. 8); St. Compl. at ¶ 26 (R.A. 253). In her brief, Plaintiff fails to note that, on October 16, 2018, OCR dismissed her administrative Title IX complaint against Brown because "the same or similar allegations based on the same operative facts were filed against the University in federal court." (R.A. 478-79).

As the Supreme Court held in *Davis*, "a recipient of federal funds may be liable in damages under Title IX only for its own misconduct. The recipient itself must 'exclud[e] [persons] from participation in, . . . den[y] [persons] the benefits of, or . . . subject[t] [persons] to discrimination' to be liable under Title IX. The Government's enforcement power may only be exercised against the funding recipient, see § 1682, and [the Supreme Court has] not extended damages liability under Title IX to parties outside of the scope of this power." *Id.* at 641 (citations omitted).

Under Title IX, a funding recipient may only be held civilly liable upon proof of its own intentional gender discriminatory conduct. *Id.* at 642. The Supreme Court has specifically rejected the application of agency principles to impute Title IX liability to a funding recipient and also declined to impose the equivalent of a negligence standard. *Id.* (citing *Gebser*, 524 U.S. at 283). In a private Title IX cause of action, the recoverable injury is the deprivation of an *educational opportunity in the funding recipient's programs or activities*. *Id.* at 650 (identifying injury as "harassment that can be said to deprive victims the *access to the educational opportunities and benefits provided by the school.*") (emphasis added).

Gebser and *Davis* state the requirements to hold an educational funding recipient liable under Title IX for damages arising from sexual harassment in its programs or activities. *Gebser* prescribes the standards applicable to a funding recipient's response to reported faculty-on-student sexual harassment, and *Davis* prescribes the standards applicable to the recipient's response to reported student-on-student sexual harassment. Liability attaches only if a funding recipient acts with "deliberate indifference" upon its "actual notice" of the sexual harassment. *Gebser*, 524 U.S. at 290-91; *Davis*, 526 U.S. at 642. "Deliberate indifference" sets a "high bar for plaintiffs to recover under Title IX." *Davis*, 526 U.S. at 643. Deliberate indifference must "at a minimum, 'cause [students] to undergo' harassment or 'make them liable or vulnerable' to it." *Id.* at 645.

The "deliberate indifference standard" does not require that funding recipients "can avoid liability by only purging their schools of actionable peer harassment or that administrators must engage in particular disciplinary action." *Id.* at 648. Rather, a funding recipient's response to harassment will amount to deliberate indifference only where its "response to the harassment or lack thereof is clearly unreasonable in light of known circumstances." *Id.*

Under *Gebser* and *Davis*, Title IX liability is based only upon the recipient's "own failure to act" in response to known sexual misconduct within its educational programs or activities, not the misconduct itself. Thus, an institution will not be liable absent a showing of deliberate indifference, regardless of whether the underlying conduct of the sexual harassment or assault could be characterized as egregious. *See, e.g., Doe ex rel. Doe v. Dallas Indep. Sch. Dist.*, 220 F.3d 380, 381-82, 384, 388 (5th Cir. 2000) (finding no Title IX liability on the part of a school district for a third-grade teacher's sexual molestation of several students over a four-year period, explaining that under the Supreme Court's "high" standard for liability, a federal funding recipient is liable for damages under Title IX only when a plaintiff can show the funding recipient acted with deliberate indifference in response upon its actual notice of the alleged abuse).

Applying Title IX's statutory text and the Supreme Court's Title IX precedent to Plaintiff's first-filed lawsuit, the Rhode Island Federal District Court initially and the First Circuit on appeal ruled that Brown has no Title IX liability because Plaintiff was not a participant in or ever intended to be a participant in any of Brown's educational programs or activities. She was not ever deprived of any educational opportunity in Brown's programs or activities. Plaintiff seeks to minimize the result in her federal court lawsuit, by claiming that she lost simply based upon mere pleading technicalities and nothing else. On the contrary, the federal court litigation adjudicated

fundamental, substantive legal requirements necessary to hold a federal funding recipient liable under Title IX, which Plaintiff cannot meet as a matter of law.

C. The Federal District Court's Judgment in Brown's Favor on Plaintiff's Title IX Claim

On November 16, 2014, Plaintiff filed her initial lawsuit against the Brown Defendants in the Rhode Island Federal District Court. (R.A. 4-13, Fed. Compl.). Plaintiff alleged a Title IX cause of action against Brown (*id.* at ¶¶ 45-52), separate claims under RICRA against Brown and two of its deans (Jonah Allan Ward and Yolanda Castillo-Appollonio) (*id.* at ¶¶ 53-67), and an equal protection claim against Brown under article 1, section 2 of the Rhode Island Constitution (*id.* at ¶¶ 68-73).

In her federal court complaint, Plaintiff alleged that, on November 21, 2013, she was a freshman at Providence College when she was socializing with fellow students in a bar in the Providence area. (*Id.* at ¶¶ 14-15). She alleged that she was drugged against her knowledge and will, and transported by taxi to a Brown residence hall where she was sexually assaulted by three Brown students. (*Id.* at ¶ 15). On or about February 3, 2014, Plaintiff reported the sexual assault to the Providence Police Department. (*Id.* at ¶ 17). A Brown University Department of Public Safety detective was present during the meeting. (*Id.*). In response to Plaintiff's reporting, the Providence Police Department commenced a criminal investigation. (*Id.* at ¶¶ 18-21).

On June 19, 2014, Brown notified Plaintiff that she had a right to file a complaint against the accused Brown students "pursuant to the University's Code of Student Conduct" while the criminal investigation was ongoing. (*Id.* at ¶ 28). Plaintiff alleged, however, that Brown never notified her of "her right to file a Title IX complaint, or any other rights to which she was entitled under Title IX[.]" (*Id.* at ¶ 29).

Almost a year after the incident, in September 2014, Plaintiff provided Brown with a written statement detailing the sexual assault, as well as documents from the criminal investigation, and she alleged that she "again requested response and redress pursuant to Title IX." (*Id.* at ¶¶ 33-34). In October, 2014, Plaintiff filed a Title IX administrative complaint against Brown with the Department of Education's Office for Civil Rights, which is charged with Title IX administrative enforcement overseeing federal funding recipients, alleging "that Brown had unlawfully refused to redress her complaint under Title IX, and . . . had failed to provide prompt, equitable and effective response and redress related to sexual assault." (*Id.* at ¶ 36).[10] In her administrative filing, Plaintiff complained to the federal government that Brown, as a recipient of federal funds, violated Title IX in the manner in which it was addressing the reported incident through its internal procedures, thereby denying her the benefits of educational programs or activities at Providence College and making her feel unsafe in "the general Providence area." (*Id.* at ¶¶ 39-40).

On June 21, 2016, Brown informed Plaintiff that it had determined not to proceed with an internal student conduct process against the three students who allegedly sexually assaulted her. (*Id.* at ¶ 43). Plaintiff claimed, as a result of the Brown Defendants' conduct, she was forced to withdraw from Providence College and her "access to educational programs or activities [at Providence College] has been interfered with and denied." (*Id.* at ¶¶ 41, 44).[11]

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[10] As noted *infra*, OCR dismissed Plaintiff's Title IX administrative complaint. (R.A. 478-79).

[11] As Brown noted in its answer filed in the federal court lawsuit, Plaintiff's allegations omit many material facts that occurred after she reported the assault to the Providence Police Department in February 2014. (R.A. 14-16). After the criminal investigation, a grand jury convened in August 2014 to determine whether criminal charges should be brought against two Brown students. The grand jury returned a "no true bill," finding the evidence was insufficient to establish probable cause that a sexual assault occurred. (R.A. 15). After the grand jury's determination, Brown sought to obtain evidence from the criminal investigation and grand jury proceedings, which was not provided to the University, and also requested Plaintiff's cooperation in its investigation, which was purportedly not provided upon the advice of her legal counsel. (R.A. 15-16).

Plaintiff pled the following Title IX assertions in her allegations common to her federal and state law claims:

- "[W]hen [B]rown University knew or should have known of the reported sexual assault of [Plaintiff] by several of its students," the University had a Title IX obligation to "take immediate and effective steps to stop the harassment, prevent recurrence, and remedy its effects; to conduct an adequate, reliable and impartial investigation; and to afford [Plaintiff] a prompt and equitable grievance process and resolution. The University's obligations were mandatory, were not relieved by any concurrent law enforcement investigation, and existed independent of whether [Plaintiff] filed a formal complaint or otherwise requested action." (*Id.* at ¶ 24).

- "At all relevant times, Defendants failed to afford [Plaintiff] the rights and protections to which she was entitled pursuant to Title IX and Rhode Island state law, and acted with deliberate indifference by failing to address her sexual assault or provide redress under Title IX." (*Id* at ¶ 26).

- "Upon information and belief, Defendants created a hostile environment and/or increased the risk of harm to [Plaintiff] prior to her sexual assault by failing to properly enforce Title IX and provide redress to victims of sex-based harassment, discrimination and violence." (*Id.* at ¶ 27).

- "Brown University's policies and procedures related to sexual assault, as outlined in the Brown University's sexual misconduct policy and Code of Student Conduct, deviated substantially from the Title IX standards." (*Id.* at ¶ 28).

In her federal court lawsuit, Plaintiff's contention that Brown violated Title IX was the predicate for her claim under the federal statute, as well as her RICRA and equal protection claims.

With respect to count I of her federal court complaint asserting a Title IX violation (*id.* at ¶¶ 45-52), Plaintiff alleged that Brown violated "Title IX and acted with deliberate indifference <u>after</u> the sexual assault of [Plaintiff] by failing to enforce Title IX and failing to take prompt, equitable and effective response and redress to the Plaintiff pursuant to Title IX standards." (*Id.* at ¶ 48). Also, she alleged that Brown "violated Title IX and created a hostile environment <u>prior</u> to the assault of [Plaintiff] by failing to lawfully enforce Title IX in the response and of sex-based violence and assaults about which it knew or should have known." (*Id.* at ¶ 49). She claimed that

Brown's policies failed to comply with Title IX and were discriminatory based on sex (*id.* at ¶ 50); Brown's decision "not to enforce Title IX was intentional and discriminatory based on sex" (*id.* at ¶ 51); and Brown's alleged Title IX violations denied her "access to educational opportunities and benefits [at Providence College]" (*id.* at ¶ 52).

With respect to her claims under RICRA pled in counts II-IV against Brown and two of its deans, Plaintiff asserted that the Brown Defendants' "deliberate failure to enforce Title IX violated the Plaintiff's rights to equal protection of the law, created a hostile education environment, and substantially interfered with her access to education opportunities and benefits." (*Id.* at ¶¶ 54, 60, 65). Although not explicitly stated, Plaintiff contended under RICRA that Brown's "failure to enforce Title IX" on its campus created a "hostile education environment" for her at Providence College and "substantially interfered with her access to education opportunities and benefits" not at Brown, but rather at Providence College.

Similarly, in her claim against Brown in count V asserting an equal protection violation under the Rhode Island Constitution, Plaintiff contended that Brown committed a constitutional tort "on the basis of her sex and violated her right to equal protection of the laws by failing to comply with Title IX." (*Id.* at ¶ 71). She further contended that Brown violated the Rhode Island Constitution by "maintaining a policy, custom or practice of discrimination" in violation of Title IX and applying and enforcing policies and procedures that "failed to comply with Title IX standards." (*Id.* at ¶ 72).

Although Plaintiff's federal court complaint alleged separate causes of action under Title IX, RICRA, and the Rhode Island Constitution, each claim was premised entirely on a viable Title IX educational gender discrimination claim for interference with her access to educational opportunities and benefits at Providence College. Stated plainly, Plaintiff's federal court

complaint alleged that Brown's failure to use its internal campus disciplinary process against the accused Brown students constituted a Title IX violation, which was simultaneously a violation of RICRA and the Rhode Island Constitution. Thus, if her Title IX claim failed, the other claims would also fail.

Under Federal Rule of Civil Procedure 12(c), the Brown Defendants moved for judgment on the pleadings with respect to each count of Plaintiff's federal court complaint. In her opposition, Plaintiff specifically argued that RICRA's interpretation must look to its federal counterpart, here Title IX. (R.A. 87). She contended that she pled a plausible RICRA claim because "[Plaintiff] and women as a class were subject to discrimination on the basis of their gender *as a result of the Defendant's failure to enforce Title IX*." (R.A. 87-88) (emphasis added). She further contended that her RICRA claim should survive because "[f]or all the reasons set forth in section III.A.2, and III.A.3, *supra*, Defendants were required by federal law to address known acts of harassment or obvious risks of gender-based harassment, which were under its control, including the sexual assault of Jane Doe. The defendants' deliberate indifference to sex-based harassment and violence, both before and after the sexual assault of Jane Doe, was a gender-based denial of 'the full and equal benefit of all laws, . . .'" (R.A. 88).[12]

Regarding her equal protection claim, Plaintiff argued that it should not be dismissed because Brown "discriminated against the Plaintiff and women as a class by failing to enforce Title IX in the response and redress of sex-based discrimination, and by enacting a discriminatory

[12] Sections III.A.2 and III.A. of Plaintiff's opposition memorandum argued that her Title IX claim should survive because Brown was "deliberately indifferent after the assault of Jane Doe, in violation of Title IX" and the factual allegations "set forth an adequate claim of pre-assault liability under Title IX." (R.A. 77-87).

sexual harassment policy." (R.A. 89). Again, Plaintiff referenced specifically "sections III.A.2 and III.A.3," which were her Title IX arguments. (*Id.*).

The Rhode Island Federal District Court granted the dispositive motion with respect to the Title IX claim. 270 F. Supp. 3d at 559-63 (R.A. 115-22). The court held that Plaintiff's "status as a non-student [of Brown], regardless of her allegations that the Court accepts as true, removes her from Title IX's private-cause-of-action umbrella of protection." *Id.* at 563 (R.A. 122). Dismissing the federal law claim, the court declined to exercise supplemental jurisdiction over her RICRA and constitutional claims. *Id.* at 563-64 (R.A. 122-23). Plaintiff appealed the final judgment to the First Circuit.

D. The First Circuit's Ruling Affirming the Judgment

On July 18, 2018, the First Circuit affirmed the judgment in Brown's favor. The federal appellate court stated clearly that, under Title IX, a recipient of federal educational funding may be liable if its "deliberate indifference" subjects a participant in its programs or activities to sexual harassment. 896 F.3d at 130 (citing *Gebser*, 524 U.S. at 283 and *Davis*, 526 U.S. at 644) (R.A. 239-40).

The First Circuit held that "this case turns on whether Doe's complaint, on its face, pleads sufficient facts to establish a claim for relief under Title IX. And it does not." *Id.* at 131 (R.A. at 241). Focusing on § 1681(a)'s statutory text, the court held that "a potential Title IX plaintiff seeking relief for being 'subjected to discrimination under' an education program must be a participant, or at least have the intention to participate, in defendant's educational program or activity[.]" *Id.* at 131-32 (R.A. at 242). The First Circuit held that "the 'discrimination' that Title IX prohibits is not the acts of sexual assault or sexual harassment in and of themselves, but rather the differential treatment by a funding recipient of persons of a particular sex *who are taking part or trying to take part in its educational program or activity but are suffering acts of sexual*

harassment or assault that undermine their educational experience." *Id.* at 132 (R.A. 242-43) (emphasis added). And this, according to the court, was "where Doe's complaint [was] lacking." *Id.* (R.A. 243).

Applying the Supreme Court's precedent interpreting the limited scope of a Title IX cause of action against a federal funding recipient, the First Circuit held that § 1681(a)'s "'subject to discrimination under' clause is circumscribed to persons who experience discriminatory treatment while participating, or at least attempting to participate, in education program or activities provided by the defendant institution[.]" *Id.* at 132 (citing *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 520-21 (1982), and *Davis*, 526 U.S. at 650-52)) (emphasis in original) (R.A. 243-44). Specifically, as the First Circuit stated, *Davis* requires that, for a school to be held liable, its deliberate indifference must "[] be said to deprive the victims of access to the educational opportunities or benefits provided by the school." *Id.* (quoting *Davis*, 526 U.S. at 650) (emphasis added in original).

Although Plaintiff alleged she suffered "substantial interference with her access to educational opportunities or benefits" at Providence College, as a result of Brown's alleged indifference to her alleged assaults, "her complaint did not allege that she participated or even would have participated in *any of Brown's educational programs or activities*." *Id.* at 133 (R.A. 245) (emphasis added). Thus, even accepting all of Plaintiff's allegations as true, the First Circuit held that her complaint was substantively devoid of any facts explaining how Brown's alleged indifference "deprive[d] [Doe] of access to educational opportunities *provided by [Brown]*." *Id.* (citing *Davis*, 526 U.S. at 650) (emphasis added).

Consequently, Plaintiff's complaint, "on its face, failed to establish that she had been 'subjected to discrimination under [a Brown] education program or activity.'" *Id.* (citing 20 U.S.C.

§1681(a)). Thus, Plaintiff's claim was legally futile because that she failed to show that Brown violated Title IX by discriminating against her *as a participant in its educational programs or activities*. *Id.*

E. The Rhode Island Superior Court Proceedings in Plaintiff's Second-Filed Lawsuit

After exhausting her judicial avenues in federal court, Plaintiff turned to the Rhode Island Superior Court, seeking to reassert her legally futile Title IX arguments through claims pled under RICRA and the Rhode Island Constitution's Equal Protection Clause. (*Compare* Fed. Ct. Compl. at R.A. 4-13 with State Ct. Compl. at R.A. 250-57). The gravamen of her state court complaint is premised again on her claim that Brown is liable to her based upon alleged violations of Title IX. *See* State Ct. Compl. at ¶¶ 1, 22, 24-26, 33-35 (R.A. 250-54).

Specifically, just as she pled previously in federal court, Plaintiff alleges that the Brown Defendants "discriminated against [her] on the basis of her sex and failed adequately to respond to her sexual assault . . . which . . . subjected her to a hostile environment [at Providence College] and denied her access to educational opportunities[.]" (R.A. 250, ¶ 1). Plaintiff's primary predicate is her contention that "the Defendants *failed to afford Ms. Doe the rights and protections to which she was entitled pursuant to Title IX* and Rhode Island state law, and acted with deliberate indifference by failing to adequately respond to her sexual assault[.]" (R.A. 253, ¶ 33) (emphasis added). Plaintiff also alleges that the Brown Defendants failed to provide her with information "for the various stages of her Title IX complaint, and other information to which she was entitled under Title IX." (*Id.*, ¶ 29). She claims that the Brown Defendants "failed to adequately respond to her sexual assault or provide redress to victims of sex-based harassment, discrimination, and violence, including Jane Doe." (*Id.*, ¶ 32). She contends that "[a]t all relevant times, Brown University's policies and procedures related to sexual assault, as outlined in the Brown University

sexual misconduct policy and Code of Student Conduct were discriminatory on the basis of sex." (R.A. 253-54, ¶ 34). And, in her most expansive reassertion of her failed Title IX claim, she alleges that "[a]t all relevant times, Brown University's policies and procedures relating to sexual assault, as outlined in Brown University's sexual misconduct policy and the Code of Student Conduct, deviated substantially from the Title IX standards . . . ." (R.A. 254, ¶ 35).

As is evident in her restated allegations, Plaintiff seeks to turn this state court litigation, into an expansive examination of Brown's Title IX compliance for a period that she describes as "at all relevant times," even though she has no Title IX claim against Brown as a matter of law. Further, although not pled as a Rule 23 class action, her allegations (and her likely intended scope of discovery) seemingly equate to one.

Before the trial court, Plaintiff opposed the Brown Defendants' motion to dismiss by citing predominantly to Title IX case law. (R.A. 296-302, 307-08). Plaintiff also acknowledged her intention to litigate Title IX regulatory requirements. Specifically, citing to the Department of Education's nondiscrimination mandate in its Title IX regulations enacted in 1975, Plaintiff asserted that "it is strong evidence of intentional discrimination that a school would fail to comply with such a clear and basic regulatory mandate for over forty years." (R.A. 301). Such Title IX regulatory contentions against Brown, even if they were true (which they are not), are not the proper subjects of a private lawsuit, especially in a second-filed state court lawsuit after the federal judiciary has held, as a matter of law, that Plaintiff does not have a Title IX cause of action. *See Gebser*, 521 U.S. at 292 ("We have never held, . . ., that the implied private right of action under Title IX allows recovery in damages for violation for these sorts of administrative requirements.") (addressing the plaintiff's claim that a school district failed to promulgate and publicize an effective policy and grievance procedure for sexual harassment claims).

In a bench ruling issued on February 6, 2019, the trial justice stated that, in addition to reviewing the four corners of Plaintiff's complaint, she considered the following documents: Plaintiff's complaint in the federal lawsuit, the rulings entered by the Rhode Island Federal District Court and the First Circuit, and the filings before the First Circuit. (R.A. 363). Plaintiff assented to the trial justice's review of the prior filings in the federal court lawsuit. (*Id.*)

Regarding Plaintiff's constitutional claim against Brown, the trial justice held that "Article 1, Section 2 [of the Rhode Island Constitution] does not grant Ms. Doe a private right of action." (*Id.*). Regarding Plaintiff's RICRA claim against each of the Brown Defendants, the trial justice reviewed the statute's history and its intended causes of action. (*Id.* at 364). She described Plaintiff's RICRA claim as asserting "two different bases":

> (1) the Defendants violated RICRA by failing to afford her the rights and protections to which she was entitled to pursuant to Title IX and Rhode Island state law, and acted with deliberate indifference by failing to adequately respond to her sexual assault or provide redress for sex-based harassment, discrimination and violence, and
>
> (2) Brown University's gender-equity policy subjected her to different and worse treatment compared to other civil rights harm, which disparate treatment constitutes intentional discrimination.

(*Id.* at 365). The trial justice noted that Plaintiff concedes "that the [alleged] Title IX violations are relevant" to her state law claims. (*Id.*)

The trial justice ruled that "[b]ased on the federal complaint, the court decisions of the District of Rhode Island and First Circuit and the filings in the First Circuit, as well as the parties' written submissions and oral arguments on January 23, 2019, it is clear that issue preclusion is established in this matter." (*Id.* at 366). She also found that Plaintiff's reliance upon *Liu v. Striulli*, 36 F. Supp. 562 (D.R.I. 1996), was misplaced because the case is distinguishable from Plaintiff's

claims. (*Id.* at 366-67).[13] After granting the Brown Defendants' motion to dismiss, the trial justice entered a final judgment in their favor, which Plaintiff timely appealed.

II. STANDARD OF REVIEW

The Court has held that, in its appellate review of a motion to dismiss pursuant to Rule 12(b)(6), it applies the same standard as the hearing justice. *Chase v. Nationwide Mutual Fire. Ins. Co.*, 160 A.3d 970, 973 (R.I. 2017). It assumes the allegations set forth to be true, and resolves any doubts in favor of the complaining party. *Id.* The Court generally confines its review to the four corners of the complaint. *Id.* (citation omitted). "There is, however, a narrow exception for documents the authenticity of which are not disputed by the parties; for official public records; for documents central to the plaintiffs' claim; or for documents sufficiently referred to in the complaint." *Id.* (citing *Alternative Energy Inc. v. St. Paul Fire & Marine Ins. Co.*, 267 F.3d 30, 33 (1st Cir. 2001)).

"A motion to dismiss may be granted only when it is established beyond a reasonable doubt that a party would not be entitled to relief from the defendant under any set of conceivable facts that could be proven in support of its claim." *Id.* (internal quotation marks omitted). Further, the Court has "long held that [it] can affirm the judgment of the Superior Court on grounds not actually relied upon by the trial court to justify its ruling." *Moseley v. Fitzgerald*, 773 A.2d 254, 258 (R.I. 2001) (quoting *State v. Lynch*, 770 A.2d 840, 847 (R.I. 2001)).

Also, a trial judge's findings on questions of law are reviewed *de novo* by this Court. *Casco Indem. Co. v. O'Connor*, 755 A.2d 779, 782 (R.I. 2000). Issue preclusion presents a question of law to be reviewed *de novo*. *Id.* (citation omitted).

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[13] On appeal, Plaintiff relies again upon *Liu* and misstates its holding. (Pl. Brief at 15, 24, 27). The Brown Defendants addresses *Liu infra* to show that the trial justice correctly distinguished the case.

III. ISSUES ON APPEAL

1. Whether RICRA affords a broader cause of action to assert gender discrimination against a federal educational funding recipient than the implied Title IX cause of action recognized by the Supreme Court.

2. Whether Plaintiff's RICRA and equal protection claims, which are premised entirely upon Title IX-based allegations, are barred under the doctrine of issue preclusion.

3. Whether the Court should recognize an implied cause action under article 1, section 2 of the Rhode Island Constitution.

IV. ARGUMENT

A. Plaintiff's RICRA counts against the Brown Defendants fail to state a claim upon which relief can be granted.

1. The Court should not interpret RICRA to allow a broader claim against the Brown Defendants than what is legally permissible against Brown under Title IX.

RICRA states in relevant part:

> (a) All persons within the state, regardless of race, color, religion, sex, disability, age, or country of ancestral origin, have, except as is otherwise provided, or permitted by law, ***the same rights to make and enforce contracts***, to inherit, purchase, to lease, sell, hold, and convey real and personal property, to sue, be parties, give evidence, and ***to the full and equal benefit of all laws and proceedings, for the security of persons and property***, and are subject to like punishment , pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
>
> (b) For purposes of this section, the right to "***make and enforce contracts***, to inherent, purchase, to lease, sell, hold, and convey real and personal property" includes the making, performance, modification and termination of contracts and rights concerning real or personal property, and the enjoyment of all benefits, terms, and conditions of the contractual and other relationships.
>
> . . . .

R.I.G.L. § 42-112-1 (emphasis added).

Plaintiff invokes RICRA's "make and enforce contracts" and the "full and equal benefit of all laws and proceedings for the security of persons" clauses. Specifically, in her RICRA counts pled in her state complaint, Plaintiff alleges that each Brown Defendant "interfered with the personal, contractual, and property rights of the Plaintiff and with her right to the full and equal benefit of all laws and proceedings for the security of persons." (R.A. at 254-55, ¶¶ 38, 42, 46). These allegations duplicate her RICRA claims as pled initially in federal court. (R.A. 10-11, ¶¶ 54, 59, 64).

In 1990, the General Assembly enacted RICRA in response to *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), in which the Supreme Court narrowly interpreted 42 U.S.C. § 1981, The Civil Rights Act of 1866, by holding that the federal statute afforded protection against race discrimination in contract formation only. *Ward v. City of Pawtucket Police Dept.*, 639 A.2d 1379, 1381 (R.I. 1994). Although the General Assembly incorporated nearly identical language to that used in 42 U.S.C. § 1981 in its enactment of RICRA, the state statute adopted a more expansive definition of protected contractual rights than its federal counterpart under *Patterson's* interpretation. *Horn v. Southern Union*, Co., 927 A.2d 292, 297-98 (R.I. 2007) (citing § 42-112-1(b)) (Suttell, J., dissenting).[14]

RICRA is intended "to mirror the federal cause of action provided by § 1981." *Eastridge v. R.I. Coll.*, 966 F. Supp. 161, 169 (quoting *Moran v. GTech Corp.,* 989 F. Supp. 84, 90-92 (D.R.I 1997)). To state a claim under § 1981, and therefore under RICRA, the plaintiff must show that: (1) she is a member of a class protected by the statute; (2) the defendants discriminated against her on the basis or her protected status; and (3) the discrimination implicated one or more of the

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[14] In 1991, Congress amended § 1981 in response to the *Patterson* decision. *Horn*, 927 A.2d at 297-98, n.15 (Suttell, J. dissenting).

activities listed in the statute, including the right to make and enforce contracts. *See Hammond v. Kmart Corp.*, 733 F.3d 360, 362 (1st Cir. 2013) (citing *Garrett v. Tandy Corp.*, 295 F.3d 94, 98 (1st Cir. 2002)).

Although Plaintiff was not a Brown student in November 2013 and has never, before or after that date, participated or intended to participate in any of Brown's educational programs or activities, she contends that RICRA enables her to litigate a Title IX-based educational gender discrimination claim against Brown, as well as two of its deans (Jonah Allen Ward and Yolanda Castillo-Appollonio) individually. Pl. Brief at 19 ("Doe need not allege or prove that she was deprived of educational opportunities at Brown University to proceed under RICRA.").[15] Plaintiff's contention derives from the mere fact that RICRA's text at § 42-112-1 does not duplicate Title IX's text at 20 U.S.C.§ 1681(a) that a person must be "subjected to discrimination *under any education program or activity receiving Federal financial assistance*." (Italics added). Plaintiff's statutory analysis of RICRA and comparison to Title IX's text are gross oversimplifications.

While modeled after the federal racial discrimination statute, 42 U.S.C. § 1981, and incorporating nearly identical language as that federal statute, RICRA expands its protections to prohibit "instances of discrimination based on age, sex, religion, disability, and national origin." *Horn*, 927 A.2d at 298 (citing *Rathburn v. Autozone, Inc.*, 361 F.3d 62, 67 (1st Cir. 2004)). RICRA is not identically worded to several federal civil rights statutes with which it is often concurrently pled and interpreted in litigation, such as Title IX, Title VII of the Civil Rights Act of 1964, and the Americans with Disabilities Act.

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[15] As noted *infra*, the implied cause of action under Title IX may be asserted against the federal funding recipient only. *Lipsett*, 864 F.2d at 901.

Contrary to Plaintiff's contention, merely because § 42-112-1 of RICRA and § 1681(a) of Title IX are not identically written in their codification, the state statute does not thus afford broader rights than Title IX in educational gender discrimination lawsuits against federal funding recipients. The Court has held that state civil rights statutes, such as RICRA, should be interpreted consistently with their federal counterparts, unless there is a clear statutory indication otherwise. *DeCamp v. Dollar Tree Stores, Inc.*, 875 A.2d 13, 21 (R.I. 2005); *Neri v. Ross-Simons, Inc.*, 897 A.2d 42, 48 (R.I. 2006); *Newport Shipyard, Inc. v. Rhode Island Comm. for Human Rights*, 484 A.3d 893, 898 (R.I. 1984). Plaintiff advocates that the Court should abandon its well-established statutory framework and interpret RICRA to be broader in scope than Title IX in educational gender discrimination lawsuits against federal funding recipients.

While relying upon Title IX case law predominantly and portraying it as "instructive," Plaintiff actually wants this Court to disregard Title IX precedent, as established by the Supreme Court and carefully examined by the First Circuit in its adjudication of Plaintiff's first-filed lawsuit, to allow her to litigate under RICRA an expansive Title IX-based lawsuit against each of the Brown Defendants, even after her Title IX claim against Brown was dismissed as a matter of law. Simply put, if the Court adopts Plaintiff's statutory analysis, the effect would be to overrule the First Circuit's adjudication in the first-filed lawsuit and interpret RICRA to supplant Title IX.

In federal court lawsuits where plaintiffs have raised Title IX and RICRA claims concurrently, the two statutes have been interpreted as identical in their scope. *See, e.g.*, *Doe Next Friend v. City of Pawtucket*, 374 F. Supp. 3d 188, 203 (D.R.I. 2019) (dismissing RICRA claim because the Title IX claim failed and noting that the federal district court "looks to federal law construing analogous civil rights statutes in accessing discrimination claims under RICRA"); *Doe v. Brown Univ.*, 327 F. Supp. 3d at 413 (the plaintiff's RICRA gender discrimination claim "rises

and falls with [his] Title IX claim"). *Cf. Wills v. Brown Univ.*, 184 F.3d 20, 25 n.2 (1st Cir. 1999) (noting that throughout the trial court proceedings, the parties treated the plaintiff's RICRA gender discrimination claim as paralleling her Title IX claims for hostile environment and quid pro quo discrimination). And, significantly, this is precisely the statutory interpretation that Plaintiff advocated before the Rhode Island Federal District Court when arguing against the dismissal of her RICRA claim, where she asserted "Jane Doe and women as a class were subject to discrimination on the basis of their gender as a result of *Defendants' failure to enforce Title IX. For all the reasons set forth in section III.A.2 and III.A.3. [Plaintiff's Title IX arguments], Defendants were required by federal law* to address known acts of harassment or obvious risks of gender-based harm, which were under its control, including the sexual assault of Jane Doe." (R.A. 87-88) (emphasis added). Now contradicting her earlier position, Plaintiff asserts that she "does not allege that the RICRA claims are dependent on valid Title IX claims." Pl. Brief at 25. *See Gaumond v. Trinity Repertory Co.*, 909 A.2d 512, 520 (R.I. 2006) (a court should judicially estop a litigant from "deliberately changing positions according to the exigencies of the moment") (quoting *New Hampshire v. Maine*, 532 U.S. 742, 749-50 (2001)).

While requesting that the Court recognize a broader scope of claimants who may proceed with educational discrimination lawsuits under RICRA, Plaintiff has also pled a lesser standard of proof than Title IX's "deliberate indifference" requirement, by alleging that the Brown Defendants' "actions or inactions . . . amounted to reckless or callous indifference to the Plaintiff's protected rights." (R.A. 254-55, Compl. at ¶¶ 39, 43, 47). If Title IX precedent is merely "instructive" to suit the convenience of Plaintiff's arguments and not binding to the RICRA analysis, her interpretation raises fundamental questions. How would the RICRA liability analysis alter (and, if so, to what extent) the Supreme Court's Title IX precedents in *Gebser* and *Davis*,

thereby create differing standards of institutional liability in the educational context under Title IX and RICRA ("deliberate indifference" versus "reckless or callous indifference")? Plaintiff has never explained her legal support for a "reckless or callous indifference" standard and what specific factual proof would be necessary under it (compared to what must be shown under *Gebser's* and *Davis'* deliberate indifference analysis). Yet, despite pleading in her complaint that she must show only "reckless or callous indifference" under RICRA, Plaintiff has continuously cited to and relied upon Title IX's "deliberate indifference" standards in her legal memoranda and briefs before the federal and state courts when seeking to support her RICRA counts against the Brown Defendants. Also, on what basis and under what standards may employees, such as Ward and Castillo-Appollonio, be held personally liable under RICRA for educational discrimination claims, when Title IX allows for a private cause of action only against the funding recipient (Brown), not its individual employees?

These are just two of the fundamental questions with broad and altering implications posed by Plaintiff's contention that, in claims of gender discrimination in education, RICRA should be interpreted more broadly than Title IX. The impacts of RICRA's interplay with Title IX go well beyond this single case and the Brown Defendants. The result will impact directly all of the state's recipients of federal funding in education (school districts and institutions of higher education), who are subject to federal administrative oversight under Title IX and private causes of action as defined by Supreme Court precedent. Further, if individual liability exists, it will impact all deans, superintendents and senior administrators, who will be subject to claims under RICRA but not Title IX.

As another significant concern, Plaintiff's expansively pled complaint clearly seeks to turn this litigation into her examination of Brown's Title IX regulatory compliance for a period that she only generally describes as "[a]t all relevant times." (R.A. 253-54, ¶¶ 32-35). Plaintiff's trial court memoranda (before the Federal District Court and Rhode Island Superior Court) and appellate briefs (before the First Circuit and now this Court) have been replete with her assertions attacking Brown's policies as "facially discriminatory" or not in compliance with federal Title IX regulations (R.A. 81-84, 220-224, 300-02; Pl. Brief 20-22). Even after her first-filed suit was dismissed because she has no Title IX claim as a matter of law, Plaintiff still wants to litigate a wide-ranging examination of Brown's policies and critique their implementation over time periods spanning before and after November 2013. As *Gebser* held, whether a federal funding recipient's policies comply with applicable regulatory requirements is a matter for federal administrative oversight, not judicial lawsuits. *Gebser*, 524 U.S. at 291-92. Plaintiff wrongly wants to transform our state courts into a forum for judicial review to test college and university policies for their Title IX compliance, comparable to the administrative reviews undertaken by federal agencies.

Both the Rhode Island Federal District Court and First Circuit acknowledged that Plaintiff has raised "very serious allegations" regarding the issues of sexual assault. 270 F. Supp. 3d at 564 (R.A. 123); 896 F.3d at 133 (R.A. 246). Yet, as the federal courts held and the state trial justice correctly did as well, Plaintiff's allegations must meet the legal requirements of the causes of action that she has pled. RICRA should not be contorted and expanded in the manner advocated by Plaintiff. For reasons addressed below, just as Plaintiff did not have a legally plausible Title IX claim against Brown, her RICRA claims against the Brown Defendants fail to state a claim upon which relief can be granted.

2. **The doctrine of issue preclusion bars Plaintiff's reassertion of her legally futile Title IX claims under the guise of RICRA.**

a. **The preclusive effect of the federal judgment is governed by federal law, which is essentially the same as Rhode Island law.**

The term "*res judicata*" is commonly used to refer to two preclusion doctrines: collateral estoppel or "issue preclusion," and *res judicata* or "claim preclusion." *Plunkett v. State*, 869 A.2d 1185, 1188 (R.I. 2005) (internal citations omitted). This case implicates the doctrine of issue preclusion. "Issue preclusion, ..., bars successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment, even if the issue occurs in the context of a different claim." *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008) (internal quotation marks and citations omitted); *see also Trainor v. Greider*, 91 A.3d 360, 362 (R.I. 2014) (mem.) (noting that issue preclusion "bars relitigation of any factual or legal issue that was actually decided in previous litigation between the parties, whether on the same or a different claim").

Where the issue of fact or law was litigated and resolved in a federal court action, the preclusive effect of the federal court judgment is determined by federal common law. *Taylor*, 553 U.S. at 891. If the federal court resolved an issue in its exercise of federal question jurisdiction under 28 U.S.C. §1331, as the First Circuit did in the first-filed lawsuit, federal common law determines the preclusive effect of the federal court judgment in this second-filed lawsuit. *See Heck v. Humphrey*, 512 U.S. 477, 488 n. 9 (1994) ("state courts are bound to apply federal rules in determining the preclusive effect of federal court decisions on issues of federal law."). Under federal common law, the elements of issue preclusion are:

> " (1) both proceedings involve the same issue of law or fact, (2) the parties actually litigated that issue in the prior proceeding, (3) the prior court decided that issue in a final judgment, and (4) the resolution of that issue was essential to judgment on the merits."

Robb Evans & Assocs., LLC v. United States, 850 F.3d 24, 32 (1st Cir. 2017) (quoting *Global NAPs, Inc. v. Verizon New Engl., Inc.*, 603 F.3d 71, 95 (1st Cir. 2010)). The Court has held the application of issue preclusion under federal law is essentially the same as Rhode Island law. *Reynolds v. First NLC Fin. Servs.*, 81 A.3d 1111, 1118, n.5 (R.I. 2014).

b. Plaintiff's RICRA claim is barred by issue preclusion because it is premised upon Title IX allegations.

i. The "make and enforce contract" clause

Under § 1981 and RICRA by analogy, "to satisfy the foundational pleading requirement" for a claim based on interference with a contract, the plaintiff "must allege that he [or she] was actually denied the ability either to… perform…or to enjoy the fruits of a contractual relationship," by reason of the discriminatory conduct, *see Hammond v. Kmart Corp.,* 733 F.3d 360, 362 (1st Cir. 2013), and, in the context of a contract between the plaintiff and a third party, that the defendant both "possessed sufficient authority to significantly interfere" with that contract, and "actually exercised that authority to the plaintiff's detriment." *See Painter's Mill Grill, LLC*, 716 F.3d 342, 351 (7th Cir. 2013) (quoting *Harris v. Allstate Ins. Co.*, 300 F.3d 1183, 1197 (10th Cir. 2002)). A § 1981 claim, and a RICRA claim by analogy, is similar to the common-law tort of tortious interference with contract rights, except that discriminatory animus must be shown as the motivating factor underlying the interference. *See Muhammed v. Oliver*, 547 F.3d 874, 878 (7th Cir. 2008). To establish a *prima facie* claim for intentional interference with contractual relations, the aggrieved party must demonstrate "(1) the existence of a contract; (2) the alleged wrongdoer's knowledge of the contract; (3) his [or her] intentional interference; and (4) damages resulting therefrom." *Lomastro v. Iacovelli*, 126 A.3d 470, 474 (R.I. 2015) (internal citations omitted).

Plaintiff entered into an education contract with Providence College. *See Gorman v. St Raphael Academy,* 853 A.2d 28, 34 (R.I. 2004) (stating that "a student and private university

relationship is essentially contractual in nature"). Plaintiff alleges that the Brown Defendants "interfered" with her "contractual...rights[,]" – pursuant to her educational contract with Providence College - which caused "substantial interference with her access to educational opportunities or benefits" at the college. (R.A. 254-56, ¶¶ 40, 44, 48). Further, Plaintiff alleges that the Brown Defendants' failure "to adequately respond to her sexual assault or provide [her] redress...subjected her to a hostile education environment and denied her access to educational opportunities" at Providence College. (R.A. 250, ¶ 1). Because the First Circuit has adjudicated that Plaintiff has no actionable claim against Brown for a Title IX violation (either before or after the November 13, 2013 incident), she is collaterally estopped from reasserting under RICRA the question of whether the Brown Defendants interfered with her educational opportunities at another school by Brown's alleged failure to comply with Title IX's obligations in its programs or activities.

Also, as the trial justice properly held, Plaintiff's reliance upon the Rhode Island Federal District Court's decision in *Liu v. Striulli* is inaccurate and misplaced. Contrary to Plaintiff's contention, *Liu* does not support her ability to litigate Title IX issues under RICRA, after a judicial determination that there is no legal basis for a Title IX cause of action. (R.A. 366-67). *Liu* adjudicated a Providence College graduate student's lawsuit against Providence College and a Providence College professor, alleging that the professor sexually harassed her and interfered with her Providence College education. 36 F. Supp. 2d at 458-62. The student asserted several federal and state law causes of action, including Title IX and RICRA claims concurrently pled against both Providence College and the professor. *Id.* at 462-63.

The court ruled in favor of Providence College regarding both the Title IX and RICRA claims. *Id.* at 463-66, 469-70. In its Title IX analysis, the Court relied upon the Supreme Court's

precedents, particularly *Gebser's* analysis of an institution's liability for its response to faculty-on-student sexual harassment. *Id.* at 463-66. The court declined to impose vicarious liability under Title IX, as espoused by the plaintiff, which would have directly contravened *Gebser's* mandate that an institution may be held civilly liable for only its own intentional discrimination in its programs or activities. *Id.* at 465-66. The plaintiff's Title IX claim also failed because she did not show that an official of the College, who had "authority to take corrective action" had actual knowledge of the professor's sexual harassment. *Id.* at 465 (quoting *Gebser*). The court concluded that the plaintiff "failed entirely to demonstrate a [Title IX] cause of action under the standard enunciated by the Supreme Court in *Gebser* . . ." *Id.* at 466.

The plaintiff's RICRA claim against Providence College similarly failed as a matter of law. *Id.* at 469-70. The court concluded that, like Title IX, RICRA requires a showing of "intentional discrimination," which could not be shown through the vicarious liability arguments asserted by the plaintiff, just as they were fatal to her Title IX claim. *Id.* Contrary to what Plaintiff argues again on appeal, *Liu* did not hold that there is a broader scope of liability against a federal funding recipient under RICRA than there is under Title IX. Nothing in *Liu's* analysis so states or even comes close to making any such suggestion.

Separately in *Liu*, the plaintiff asserted that the Providence College professor should be held individually liable under Title IX, but the claim failed as a matter of law because a Title IX lawsuit may only be filed against the federal funding recipient. *Id.* at 472. The court allowed the plaintiff's RICRA claims to proceed against the professor individually, but for reasons that are not analogous to Plaintiff's RICRA claims against the Brown Defendants. The plaintiff presented sufficient evidence that her professor, a Providence College employee, sought directly and intentionally to interfere with her education at the college where he taught and she was enrolled,

by targeting the plaintiff and threatening to take actions against her that would terminate her visa status, which would thereby end her pursuit of a doctorate degree and enrollment at the college. *Id.* at 479.

Just as Plaintiff asserted in defense of her RICRA claims before the Rhode Island Federal District Court (R.A. 87) and the trial court below (R.A. 299-30), she again offers only an incomplete and conclusory analysis of *Liu,* contorting its holdings to try to support RICRA claims against the Brown Defendants and avoid the dispositive effect of issue preclusion. (Pl. Brief at 24, 27). The trial justice correctly held that *Liu* is clearly distinguishable from what Plaintiff alleges against the Brown Defendants in her RICRA claims and does not save them from dismissal. (R.A. 366-67).

ii. The "full and equal benefits of all laws and proceedings for security of persons" clause

Plaintiff has not stated specifically the applicable "laws and proceedings" upon which she bases this part of her RICRA claim, but the only plausible law is Title IX, and its prohibition against gender discrimination in the federal funding recipient's educational programs or activities. The First Circuit has rendered a final judgment specifically determining that Plaintiff has no Title IX claim against Brown because she was not participating in, and had not ever sought to participate in, in any of Brown's educational programs or activities (either before or after November 2013). Again, Plaintiff asks the Court to cast aside the dispositive impact of the First Circuit's dispositive adjudication, which was not a mere procedural result arising solely from pleading technicalities as she wrongfully seeks to downplay the ruling. Plaintiff lost her Title IX lawsuit, as a matter of substantive law, based upon Title IX's statutory text and the Supreme Court's precedent interpreting the limited implied cause of action that may be brought against a recipient of federal

educational funding. Plaintiff is not legally entitled to a second chance to assert under RICRA a previously adjudicated Title IX claim.

3. Even if not barred by issue preclusion, Plaintiff's RICRA claim fails as a matter of law when applying Title IX principles.

The above-stated issue preclusion analysis compels the dismissal of Plaintiff's reasserted Title IX claims through RICRA. However, if the Court deems that RICRA claim is not barred by issue preclusion and applies Title IX principles to review the merits of the pled RICRA counts, the Brown Defendants would still have no liability to Plaintiff under either her "post-assault" and "pre-assault" claims, even accepting the truth of her allegations. Brown addresses below the "post-assault" theory first because it is predominantly what Plaintiff has pled and argued and is the more commonly asserted claim in Title IX lawsuits. By contrast, the "pre-assault" theory seeks to hold a federal funding recipient liable for the assault itself, which is less frequently asserted and allowed in Title IX lawsuits.

a. The post-assault claim[16]

Despite pleading a standard of "reckless or callous indifference," Plaintiff argues on appeal that the Brown Defendants interfered with her Providence College education by acting with "deliberate indifference" after Brown first learned of the incident upon her reporting to law enforcement. Pl. Brief at 16-19, 22-25. As noted above, the Supreme Court has prescribed the Title IX "post-assault" liability standard through two cases - *Gebser* (pertaining to reported faculty-on-student sexual harassment) and *Davis* (pertaining to reported student-on-student sexual harassment). As the First Circuit has applied the Supreme Court's precedent, to state a "post-assault," "deliberate indifference" claim against a federal funding recipient for an alleged hostile

[16] Plaintiff argued a post-assault Title IX theory before both the Rhode Island Federal District Court (R.A. 77-80) and the First Circuit (R.A. 149-60).

educational environment in instances of student-on-student sexual harassment, a plaintiff must show:

> (1) that he or she was subject to "severe, pervasive, and objectively offensive" sexual harassment by a school peer, . . . (2) that the harassment caused the plaintiff to be deprived of educational opportunities or benefits . . . (3) [that the funding recipient] knew of the harassment, (4) in its programs or activities and (5) it was deliberately indifferent to the harassment such that its response (or lack thereof) is clearly unreasonable in light of known circumstances.

Porto v. Town of Tewsbury, 488 F.3d 67, 72-73 (1st Cir. 2007) (quoting *Davis*, 526 U.S. at 650).

Plaintiff was not subjected to sexual harassment by "a school peer." Further, she cannot meet the causation requirement under *Davis*, which is fundamental to the deliberate indifference analysis:

> The language of Title IX itself – particularly when viewed in conjunction with the requirement that the recipient have notice of Title IX's prohibitions to be liable for damages – also cabins the range of misconduct that the statute proscribes. ***The statute's plain language confines the scope of prohibited conduct based upon the recipient's degree of control over the harasser and the environment in which the harassment occurs. If a funding recipient does not engage in harassment directly, it may not be liable for damages unless its deliberate indifference "subject[s]" its students to harassment. That is, the deliberate indifference must, at a minimum, "cause [students] to undergo" harassment or "make them vulnerable" to it.***

Davis, 526 U.S. at 644-45 (citing to dictionary definitions of "subject") (emphasis added).

> Moreover, because the harassment must occur ***"under" "the operations of' funding recipient,***" see 20 U.S.C. § 1681(a); § 1867 (defining "program or activity"), the harassment must take place in a context subject to [the funding recipient's] control.

Id. at 645 (citing to dictionary definitions of "under") (emphasis added).

> These factors combine to limit a recipient's damages liability to circumstances wherein the recipient exercises ***substantial control over both the harasser and the context in which the harassment occurs. Only then can the recipient be said to "expose" its students to harassment or "cause" them to undergo it "under" the recipient's programs.***

Id. (emphasis added).

As the Supreme Court held, *Davis'* causation analysis requires the showing that a school's deliberate indifference caused *its students* to undergo further harassment or be made vulnerable to subsequent harassment *within its educational programs or activities*. No such facts have been pled by Plaintiff, who was enrolled in November 2013 at another institution, was the victim in an alleged single assault at that time, and did not subsequently participate in (or ever attempt to participate in) any of Brown's programs or activities.

Under Title IX principles, Brown has no post-assault liability to Plaintiff because she did not suffer any "recoverable injury." *Davis*, 526 U.S. at 650. Plaintiff suffered no deprivation of "access to the educational opportunities and benefits" at Brown. *Id.* The alleged post-assault, hostile educational environment to which Plaintiff claims to have been subjected would have been only at Providence College. If Brown had conducted student misconduct proceedings against the accused students and found them responsible under its student conduct code, Brown had no authority to control their actions or movements outside of its programs or activities. Properly cast, Plaintiff's post-assault arguments do not merely rely on *Davis* as "instructive," but actually seek to ignore or extend the Supreme Court's holding, particularly the causation requirement. *Id.* at 644 ("Deliberate indifference makes sense as a theory of direct liability under Title IX only where the funding recipient has some control over the alleged harassment. A recipient cannot be directly liable for its indifference where it lacks authority to take remedial action.").

b. The pre-assault claim[17]

In addition to the more typically asserted Title IX post-assault claim, some courts have recognized, in very limited situations, that schools may be liable under Title IX for the physical

[17] Plaintiff argued a pre-assault Title IX theory before both the Rhode Island Federal District Court (R.A. 80-87) and the First Circuit (R.A. 219-226).

and psychological damages resulting from the sexual assault itself, if the school's actions or inactions prior to the assault rendered the victim more vulnerable to such an assault. Such claims are sometimes referred to as "heightened risk" assertions, *see Doe 1 v. Baylor University,* 240 F. Supp. 3d 646, 658 (W.D. Tex. 2017), but to be actionable, the "heightened risk" must be "so great that [it is] almost certain to materialize if nothing is done." *Doe v. Stegall,* 367 F.3d 668, 672 (7th Cir. 2004).

With respect to a Title IX pre-assault, deliberate indifference claim, courts have generally addressed "risk" situations where (1) the school has actual knowledge that there have been prior acts of assault against the plaintiff by other third-party assailants; *see, e.g., Doe v. University of Tennessee,* 186 F. Supp. 3d 788, 805 (M.D. Tenn. 2016) (citations omitted) or (2) where the school has actual knowledge that an assailant has previously assaulted victims other than the plaintiff; *see, e.g, Facchetti v. Bridgewater College,* 175 F. Supp. 3d 627, 640 (W.D. Va. 2016). Neither scenario is pled in Plaintiff's complaint.

Courts have rejected a theory of actual knowledge (necessary for deliberate indifference Title IX liability) merely based upon the school's general knowledge of the risk of sexual assault. *See, e.g., Doe I v. Bibb County School District,* 83 F. Supp. 3d 1300, 1307 (M.D. Ga. 2015); *see also Schaefer v. Las Cruces Pub. Sch. Dist.,* 716 F. Supp. 2d 1052, 1081 (D.N.M. 2010) ("The Defendants had actual knowledge of three prior incidents of sexual assault by different assailants against different victims, but the most that can be said about the sexual assault to which AS was a victim—the only assault for which the Schaefers seek a remedy—is that the Defendants were put on notice that it was a possibility."). Stated directly, a university's "general knowledge that student-on-student sexual assault may occur in the school setting is insufficient for Title IX liability." *Bibb County,* 83 F. Supp. 3d at 1310.

A very limited exception is a Tenth Circuit decision in *Simpson v. University of Colorado at Boulder*, 500 F.3d 1170 (10th Cir. 2007), where the court held that liability may be premised on an "official policy" of the funding recipient school. *Simpson*, however, involved a university sanctioned recruiting program for prospective football players, and the plaintiffs – who were students at the university – alleged they had been sexually assaulted by both university football athletes and recruits during one such recruiting program. 500 F.3d at 1172-73. The Tenth Circuit found that the university sanctioned football recruiting program was sufficient to raise Title IX liability questions because the "[coach], whose rank in the [university's] hierarchy was comparable to that of a police chief in municipal government, had a general knowledge of the serious risk of sexual harassment and assault during the college-football recruiting efforts." *Id.* at 1184.

In her first-filed federal court lawsuit, Plaintiff relied upon *Simpson* before both the Federal District Court and the First Circuit to argue that Brown should be subject to Title IX pre-assault liability. (R.A. 80-81, 220-22). Neither federal court found that *Simpson's* reasoning afforded her with a pre-assault Title IX claim against Brown. Plaintiff's citation to *Simpson* again on appeal here (Pl. Brief at 17) is another example of her desire to re-litigate an issue that was adjudicated in the prior litigation, by trying to recast it under the guise of RICRA.

In sum, Plaintiff's complaint lacks any factual averments to support a claim that the Brown Defendants knew that her alleged assailants had previously sexually assaulted anyone, creating a heightened risk that they could assault someone else; that the Brown Defendants knew that Plaintiff herself had been previously sexually harassed or assaulted, creating a heightened risk that she would be assaulted; or that she was sexually assaulted during a Brown supported and sanctioned program similar to *Simpson*. Thus even if not barred by issue preclusion, Plaintiff's

pre-assault RICRA claim still fails, as a matter of law, to state any Title IX-based claim upon which relief can be granted.

B. Plaintiff fails to state a constitutional claim against Brown upon which relief can be granted.

Count IV of Plaintiff's complaint asserts a constitutional tort claim captioned as "Violation of R.I. Const., art. 1, § 2; Equal Protection." (R.A. 256). Plaintiff wants to reassert her legally futile Title IX-based claims under the Rhode Island Constitution. Plaintiff's intention is clear in paragraph 54 of her complaint, where she alleges "[Brown] maintained a policy, custom or practice of discrimination against Plaintiff and other female victims of sex-based harassment, discrimination, and violence." (R.A. 256). Although not stated expressly, the "policy," "custom," or "practice" must relate to issues of Brown's Title IX compliance, and Plaintiff has no Title IX claim against Brown.

In addition to being barred by issue preclusion like her RICRA claims, Plaintiff's constitutional claim fails for two other reasons. First, the equal protection clause applies only to persons or entities acting under the color of state law, and Brown is not a state actor. Second, the Court has not recognized, and should not recognize here, an implied a private right of action for damages under art. 1. sec.2.

1. There is no state action to support an equal protection claim against Brown.

The title of art. 1, sec. 2 states: "Laws for good of whole – Burdens to be equally distributed – Due process – Equal protection – No right to abortion granted." Minus the clause for abortion, the text provides in pertinent part:

> All free governments are instituted for the protection, safety, and happiness of the people. All laws, therefore, should be made for the good of the whole; and the burdens of the state ought to be fairly distributed among its citizens. *No person shall be deprived of life, liberty or property without due process of law, nor shall any person be denied equal protection of the laws. No otherwise qualified person*

> *shall, solely by reason of race, gender or handicap be subject to discrimination by the state, its agents or any person or entity doing business with the state.*

R.I. Const. art. 1, sec. 2 (emphasis added). The two italicized sentences were added in 1986 and contain three distinct clauses (a due process clause, an equal protection clause, and an antidiscrimination clause). *See Jones v. Rhode Island*, 724 F. Supp. 25, 34-35 (D.R.I. 1989).

The due process and equal protection clauses are limitations on the power of the state, state actors, or persons or entities acting under color of state law. *See Tomaiolo v. Malinoff*, 281 F.3d 1, 11 (1st Cir. 2002) (noting that the Rhode Island Supreme Court has engaged in a state action inquiry with respect to the due process and equal protection clauses of art. 1, sec. 2) (citing *Kleczek v. Rhode Island Interscholastic League, Inc.*, 612 A.2d 734, 735-36 (R.I. 1992)). Plaintiff alleges that she was "a member of a protected class entitled to equal protection of the laws" and that Brown, "by and through its agents discriminated against [her] on the basis of her sex and violated her right to equal protection of the laws." (R.A. 256, ¶¶ 51-52). Plaintiff, however, does not plead that Brown was a state actor or acting under the color of state law at the time of the alleged equal protection violations, nor does she plead any facts that could plausibly lead to that conclusion. More importantly, there are no facts at all to support any allegation or finding that Brown, a private institution of higher education, was a state actor to subject it to an equal protection claim. In fact, the First Circuit has held that "Brown University is not a state actor subject to federal jurisdiction under § 1983." *Klunder v. Brown Univ.*, 778 F.3d 24, 34 (1st Cir. 2015).

The Rhode Island Constitution's antidiscrimination clause has no analog in the federal constitution. *Kleczek*, 612 A.2d at 738 (noting "Rhode Islanders' adopted an equal-protection clause *and* an antidiscrimination clause" in article 1, section 2) (emphasis added). Within count IV, without stating specifically that she is invoking the antidiscrimination clause and in a purely conclusory allegation, Plaintiff asserts that Brown is an entity "'doing business with the state' of

Rhode Island within the meaning of R.I. Const. art. 1, § 2.'" (R.A. 256, ¶ 50). The "doing business with the state" phrase is exclusive to the antidiscrimination clause, which should not be conflated with, the equal protection clause.

As count IV is captioned and pled, Plaintiff raises only a constitutional right of action for damages under the equal protection clause. (R.A. 256). During the Rule 12(b)(6) hearing before the trial justice, Plaintiff advocated that there is a constitutional "right to sue for violations of equal protection." (R.A. 342). On appeal, Plaintiff now claims that she is actually proceeding under the antidiscrimination clause. Pl. Brief at 28-39. Essentially seeking to amend her complaint through her appeal, Plaintiff requests that the Court allow her to proceed on her "claim[] under . . . the Antidiscrimination Clause of Article 1, Section 2 of the Rhode Island Constitution." *Id.* at 39. This is another example of Plaintiff's shifting positions seeking to avoid adverse rulings and distort what she has been asserting from the start.

Plaintiff should be held to what she actually pled in her complaint and argued to the trial justice during the Rule 12(b)(6) hearing. By doing so, the Court need not address the question of whether to recognize a private cause of action under the antidiscrimination clause. *See Taylor v. State of R.I. Dept. of Mental Health*, 726 F. Supp. 895, 901 (D.R.I. 1989) ("Although Article 1, Section 2 of the [] Rhode Island Constitution specifically provides that the state shall not discriminate on the basis of race, gender, or handicap, Plaintiff curiously chose to sue only under the "equal protection" clause. This Court, therefore, need not evaluate whether the new antidiscrimination clause provides a distinct cause of action for the discriminatory conduct proscribed thereunder.").

2. The Court should exercise judicial restraint and decline to create an implied private right of action under article 1, section 2.

Plaintiff requests that the Court recognize for the first time an implied cause of action under

article 1, section 2. The Court's analysis is framed by *Bandoni v. State*, 715 A.2d 580 (1998), its seminal case for determining whether to recognize a private cause of action under the Rhode Island Constitution. The Court has not had occasion to interpret and apply the antidiscrimination clause, or its "doing business with the state" phrase. Since the amendment of the state's constitution in 1986, the Court has never recognized an implied right of action under the equal protection clause (which is what Plaintiff pled in her complaint) or the antidiscrimination clause (which is where Plaintiff focuses her appeal).

Under *Bandoni*, this Court emphasized that deference to the legislative branch with respect to the creation of new causes of action is the most significant concern. Borrowing the federal constitutional doctrine articulated in *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971),[18] the Court addressed in *Bandoni* whether to create a constitutional tort action against individual state or municipal officials for violating article 1, section 23 titled "Rights of victims of crimes." 715 A.2d at 586. The Court held, that before undertaking the *Bivens* analysis with respect to the state constitution, it first must address "the threshold question" of whether the constitutional provision at issue is "self-executing;" that is, does it set forth a "sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed be enforced, or [does] it merely indicate principles, without laying down rules by means of which those principles may be given the force of law?" *Id.* (internal quotation marks and citation omitted). The Court ultimately determined that the article 1, section 23 was not self-executing, and stated it was "unnecessary to

[18] *Bivens* is the standard by which federal courts determine whether a provision of the federal constitution should give rise to an implied right to bring action for damages against governmental officials alleged to have violated a citizen's constitutional rights. *Bandoni*, 715 A.2d at 586. The Court has noted that the Supreme Court has "dramatically curtailed its holding in *Bivens*[.]" *Id.* at n.8 (surveying Supreme Court rulings declining to recognize constitutional causes of action).

reach the second question concerning whether this Court should recognize a cause of action for damages derived directly from the victims' rights amendment." *Id.* at 587.

Particularly, the Court emphasized that "even if we were to conclude that article 1, section 23, is self-executing, this fact alone would not necessarily support a claim for damages[,]" *id.* at 594-95, stating that, "principles of judicial restraint prevent us from creating a cause of action for damages in all *but the most extreme circumstances* . . . . Instead we are of the opinion that the creation of a remedy in the circumstances presented by this case should be left to the body charged by our Constitution with this responsibility[,]" the General Assembly. *Id.* at 595 (emphasis added). *See* R.I. Const. art. 6, sec. 1 ("The general assembly shall pass all laws necessary to carry this Constitution into effect."). "Under our form of government... the function of adjusting remedies to rights is a legislative responsibility rather than a judicial task, . . . Therefore, notwithstanding our appreciation of the efforts of the General Assembly and the delegates to the 1986 Constitutional Convention and our sympathy for [the plaintiffs], we are of the opinion that if a cause of action for damages that are due to an official's failure to apprise crime victims of their rights is created, it must originate from the floor of the General Assembly and not from the bench of the Supreme Court." *Id.* at 596.

This fundamental principle of judicial restraint, as applied in *Bandoni*, has long been a feature of the Court's jurisprudence, not only with requests to recognize implied constitutional causes of action, but also with respect to its approach to its common law and statutory interpretation functions. *See State v. Lead Industries Ass'n.*, 951 A.2d 428, 436 (R.I. 2008) (holding that "principles of judicial restraint prevent [courts] from creating a cause of action for damages in all but the most extreme circumstances."); *DeSantis v. Prelle,* 891 A.2d 873, 881 (R.I. 2006) (determining there was no implied right of action under the state's Open Meetings statute,

and stating, "[t]o do otherwise, even if based on sound policy and the best of intentions, would be to substitute our will for that of a body democratically elected by the citizens of this state and to overplay our proper role in the theater of Rhode Island government."); *Accent Store Design, Inc. v. Marathon House, Inc.*, 674 A.2d 1223, 1226 (R.I. 1996) ("We long have held, however, that the creation of new causes of action is a legislative function.").

Moreover, the Court has never used its judicial power to find an implied cause of action for damages under the state constitution. Especially under the alleged facts and travel of this case (through both the federal and state court systems), the Court should not take the extraordinary step requested by Plaintiff and recognize for the first time an implied right of action for damages arising under article 1, section 2 of the Rhode Island Constitution. *See* Patrick T. Conley and Robert G. Flanders, Jr., *The Rhode Island State Constitution* 61-63 (Oxford Univ. Press 2011) (stating that "it is still an open question whether the due process and equal protection clauses of the 1986 constitution are self-executing or whether they are unenforceable without enabling legislation that does not yet exist"; that "the [C]ourt has been chary to date about recognizing a direct right of private action under the Equal Protection Clause"; and that "[t]here is little case law concerning the antidiscrimination clause").

Respectfully, in the context of the extraordinary action that Plaintiff requests, it is important to recognize again what clearly remains as her primary litigation focus. As is evident from her pleadings and arguments throughout both trial courts and the resulting appeals after her claims failed to survive past the pleadings, Plaintiff has sought continuously to embark on a wide-ranging Title IX-based examination of Brown's policies and procedures and their implementation, even going so far as to argue that she should be allowed to probe through discovery questions of Brown's Title IX regulatory compliance, perhaps reaching as far back as forty-five years ago when

the Department of Education enacted Title IX regulations in 1975 (*see* R.A. 301). Such Title IX compliance issues are the exclusive oversight of federal administrative agencies, and they do not justify the creation of a new state law constitutional cause of action to examine them.

Contending that article 1, section 2 should be deemed to be self-executing, Plaintiff's analysis is legally flawed. For example, on page 31 of her brief, Plaintiff relies upon the Equal Rights Amendment, but the Court has stated that the "the delegates to our Constitutional Convention did not vote on an ERA and did not propose one to the people for ratification. Such a resolution was never reported out of committee. To argue that we have adopted what is in effect an ERA in article 1, section 2, is to argue a proposition that has no foundation in fact." *Kleczek*, 612 A.2d at 640.

Appropriately, the Court has adhered to its long-standing judicial philosophy that the creation of new causes of action – in the constitutional, statutory, and common law context – is a legislative function. Before the legislature, "the myriad of complex issues presented by the imposition of liability can be fully debated in public." *Bandoni*, 715 A.2d at 595. *See also Gorham v. Robinson*, 57 R.I. 1, 10, 186 A. 832, 838 (1936) (The General Assembly is vested with all legislative power, except so far as expressly limited by the state's constitution). Respectfully, the Court should adhere to its tradition of judicial restraint and decline Plaintiff's extraordinary request that it recognize a new constitutional tort arising by implication under article 1, section 2 of the Rhode Island Constitution.

V. CONCLUSION

For the above-stated reasons, the Brown Defendants request that the Court affirm the final judgment entered in their favor.

Respectfully Submitted,

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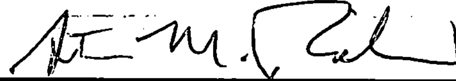
By Their Attorneys,



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CERTIFICATE OF SERVICE

I certify that, on February 26, 2020, I served Defendants' brief and their supplemental appendix upon the following counsel of record via electronic mail and overnight delivery:

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