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OF THE STATE OF RHODE ISLAND

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Civil Action 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 PLAINTIFF-APPELLANT JANE DOE

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I. STATEMENT OF FACTS AND PRIOR PROCEEDINGS

The Plaintiff's Complaint involves an action for damages pursuant to the Rhode Island Civil Rights Act of 1990 (RICRA), R.I. Gen. Laws Ann. § 42-112-1(a) and Article 1, §2 of the Rhode Island Constitution. This action arises out of and relates to the sexual assault of Jane Doe, then a freshman at Providence College, by three Brown University football players on the Brown University campus in November 2013. Jane Doe alleges that the conduct by Brown University and its individually named employees (collectively hereinafter "Brown" or "Brown University") violated the Rhode Island Civil Rights Act ("RICRA") and Article I, Section 2 of the Rhode Island Constitution and each law's mandate that no person be subject to discrimination on the basis of sex. Specifically, Doe alleges that Brown failed to investigate the assault or hold any disciplinary proceedings against the three student-perpetrators, which was discriminatory conduct that caused her harm. Doe also alleges that Brown had discriminatory policies in place at the time of her sexual assault which increased the risk of harm and substantially contributed to her assault.

A. The Incident.

In November 2013, Jane Doe was a freshman at Providence College. Record Appendix ("R.A."), p. 251, ¶11. On November 21, 2013, she was at a bar in Providence, Rhode Island, when she was drugged, taken by taxi to a Brown University dormitory by Brown University students, and sexually assaulted by three Brown University football players. *Id.* at ¶ 12. Several days later, Ms. Doe received treatment at a Massachusetts hospital related to the assault. *Id.* at ¶13.

On February 3, 2014, Ms. Doe reported the incident to both the City of Providence and Brown University Police. *Id.* at ¶14. The Providence Police issued search warrants for the cell

phones and Brown University dorm rooms of the Brown student-perpetrators. R.A., p. 252, ¶¶15-17. The cell phones revealed communications between the students-perpetrators that referenced raping Ms. Doe and contained explicit photographs of Doe taken at the time of the assault. *Id.* at ¶18. One communication stated: "YO LIKE CLASSIC [STUDENT] THO… NO INVITE JUST WALKS IN AND STARTS RAPING [JANE DOE]." *Id.* Laboratory test results of Ms. Doe's hair indicated the presence of two over-the-counter drugs commonly used to incapacitate rape victims. R.A., p. 253, ¶27. Brown had knowledge of the communications and laboratory test results at all relevant times. R.A., pp. 252-253, ¶¶19-20, 27.

B. Brown University's Discriminatory Conduct.

At the time Jane Doe was raped, the Brown University Code of Student Conduct set forth a "Title IX and Gender Equity" policy ("the Policy"). The Policy was in place to protect the safety of individuals, like Jane Doe, who were subject to sex discrimination, including sexual harassment and sexual assault, on Brown's campus. The Policy was published on the Brown University website and stated:

> **This policy applies broadly to** the entire University community… and **visitors or guests of Brown University** ("Invitees"); all collectively together known as "Covered Persons." This policy pertains to acts of Prohibited Conduct committed by or against Covered Persons **when: (i) the conduct occurs on Brown University premises**.

Title IX and Gender Equity Policy, BROWN UNIVERSITY (retrieved Feb. 15, 2015, 11:10 AM), https://www.brown.edu/about/administration/title-ix/policy (emphasis added). "Prohibited conduct" under the policy included sexual assault. *Id.* It set forth steps that Brown was obligated to take in response to a reported sexual assault, including an investigation, remedial and protective measures for victims, and sanctions against offending students. *Id.*

Despite Brown's knowledge of the incident and subsequent findings of the police investigation, the University and its employees declined to apply Brown's Code of Student Conduct Gender Equity policy and declined to investigate the assault that was reported by Ms. Doe. R.A., pp. 252-253, ¶¶21-31. On September 5, 2014, more than seven months after Ms. Doe reported the incident to Brown University, Defendant Castillo-Appollonio notified Ms. Doe that the University would conduct an "inquiry" to determine whether the students accused of sexually assaulting Ms. Doe had violated the Brown University Code of Student Conduct. R.A., p. 252, ¶23.

Thereafter, Defendants failed to conduct any investigation or disciplinary proceedings against the three Brown University football players accused of the rape and failed to communicate with Ms. Doe regarding the investigation. R.A., p. 253, ¶¶29-31. On June 21, 2016, the University informed Ms. Doe that it never completed any investigation and had abandoned all disciplinary action against the three assailants. *Id.* at ¶31.

It is Brown University's position that it had no duty to respond to Doe's assault in this case because she was not a student of Brown University at the time the assault occurred. This position is contradicted by Brown's own Student Conduct policies, which explicitly set forth that they apply to visitors and guests of the University. Brown was obligated to take steps in response to the sexual assault of Jane Doe. At the very least, Brown had a responsibility to investigate Doe's claims and discipline the offending students, but intentionally declined to do so. Doe reported her sexual assault to an institution that represented to her and to the public that it had a policy to address gender-based harms suffered by individuals, such as Doe, who were assaulted on the Brown University campus. Instead, Brown informed its three student-assailants that Doe

had reported them for rape, and then took no steps to reasonably investigate or respond to the assault.

As a result of Brown's discriminatory conduct and failure to respond, Doe suffered serious physical, emotional, psychological, and educational harm. R.A., p. 254, ¶36. Doe feared for her safety and well-being in the Providence area, where her assailants were residing without consequences. *Id.* Brown University and Providence College have neighboring urban campuses in downtown Providence. Brown is one of Rhode Island's largest private employers, holds substantial property and influence in the Providence area, and does business with the state. R.A., p. 256, ¶50. Doe was ultimately forced to withdraw from Providence College and move away from the Providence area. R.A., p. 254, ¶36.

C. <u>History and Travel of the Case.</u>

Plaintiff's claims were originally filed in the United States District Court for the District of Rhode Island on November 14, 2016. R.A., pp. 4-13. Plaintiff also alleged violations of Title IX of the Education Amendments of 1972 ("Title IX"). R.A., pp. 9-10. Title IX prohibits discrimination on the basis of sex in any education program or activity that receives federal funding. 20 U.S.C. §1681(a). Although the statute itself does not expressly authorize a private right of action, in 1979, the Supreme Court of the United States ("SCOTUS") held that an implied right private right of action exists under Title IX to redress sex discrimination by educational institutions. *See Cannon v. Univ. of Chicago*, 441 U.S. 677, 717 (1979) (Title IX is enforceable through an implied private right of action); *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 76 (1992) (the implied right of action under Title IX supports a claim for monetary damages). In 1999, SCOTUS announced that an educational institution may be subject to civil liability under Title IX when they demonstrate "deliberate indifference" to known acts of sexual

violence on their campus. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 653-654 (1999).[1]

In this case, Doe alleged, in-part, that Brown University's failure to investigate or address her reported sexual assault amounted to "deliberate indifference" to the assault under Title IX and violated Rhode Island law. R.A., pp. 4-13. In January 2017, Brown University filed a motion to dismiss Doe's claims, arguing that Doe did not have standing to pursue a Title IX claim because she was not a student of Brown University at the time of the assault. R.A., pp. 34-67. The District Court agreed, and erroneously held that "Ms. Doe's status as a non-student, regardless of her allegations that the Court accepts as true, removes her from Title IX's private-cause-of-action umbrella of protection." R.A., p. 122. On September 6, 2017, the District Court dismissed Plaintiff's Title IX claims and declined to extend supplemental jurisdiction over Plaintiff's state law claims, which were dismissed without prejudice. R.A., pp. 111-124. The Court held that: "the RICRA claim raises substantial question[s] of state law that are best resolved in state court … And as to the claim under the Rhode Island Constitution, the First Circuit Court of Appeals … noted that weighing in on state law issues should be avoided particularly when interpretation of state constitution is involved. As such, the Court declines to exercise supplemental jurisdiction over the state law claims. They are dismissed without prejudice." R.A., p. 123 (internal citations omitted).

Doe appealed the dismissal of her federal claims to the First Circuit Court of Appeals and, on September 28, 2017, re-filed her state law claims in Rhode Island Superior Court. Discovery in the current state court matter was stayed by agreement of the parties pending the outcome of the federal claims.

On July 18, 2018, the First Circuit affirmed the ruling of the District Court, but rejected

[1] "Deliberate indifference" is a response that is "clearly unreasonable in light of the known circumstances." *Davis*, 526 U.S. at 648-649.

the District Court's holding that a private remedy does not exist under Title IX for victims of sex discrimination who are not students or staff at the offending school. R.A., pp. 232-246. The First Circuit recognized that a victim does not need to be an enrolled student at the offending institution to have standing to pursue a Title IX private right of action. R.A., p. 244, n. 6. However, the Court restrictively interpreted Title IX to require a plaintiff to allege that she was denied access to the offending institution's programs or activities, such as its libraries, computer labs, vocational resources, campus tours, public lectures, sporting events, etc. R.A., pp. 245-246. The First Circuit dismissed Doe's Complaint for failure to allege that she was denied access to educational programs or activities at Brown University. *Id.*

The current Complaint involves an action for damages pursuant to RICRA and Article 1, §2 of the Rhode Island Constitution. R.A., pp. 250-257. Doe argues that the discriminatory conduct she alleged violated Title IX similarly violates Rhode Island state law. *Id.* On October 16, 2018, Brown University filed a 12(b)(6) Motion to Dismiss Doe's Complaint, which was granted on February 6, 2019. R.A., pp. 258-287, 359-368. The Court wrongfully determined that Doe's state law claims were dependent upon valid Title IX claims. R.A., pp. 363-368. Because the First Circuit had previously ruled on Doe's Title IX claims, the Trial Court held that issue preclusion was established with respect to the RICRA claims and granted Brown's Motion to Dismiss. *Id.* Additionally, the Trial Court erroneously held that Article I, Section 2 of the Rhode Island Constitution did not grant Ms. Doe a private right of action. R.A., p. 363.

II. ERRORS CLAIMED

1. The trial court erred as a matter of law in holding that Doe's RICRA claims were precluded by the prior dismissal of a federal Title IX claim. R.A., pp. 363-368.

2. The trial court erred as a matter of law in holding that Article I, §2 of the Rhode Island Constitution does not grant Doe a private right of action. R.A., p. 363.

III. STATEMENT OF APPLICABLE STANDARD OF REVIEW

This is an appeal from the trial court's dismissal of Plaintiff's claims pursuant to Brown University's 12(b)(6) Motion to Dismiss. In reviewing the grant of a motion to dismiss pursuant to Rule 12(b)(6), this Court applies the same standard as the hearing justice, accepting all allegations in the Complaint as true and resolving any doubts in the Plaintiff's favor. *Tri-Town Const. Co. v. Commerce Park Assocs. 12, LLC*, 139 A.3d 467, 478 (R.I. 2016).

The Supreme Court will affirm the granting of a motion to dismiss under Rule 12(b)(6) only when it is clear beyond a reasonable doubt that the plaintiff would not be entitled to relief under any conceivable set of facts that might be proven. *Hendrick v. Hendrick*, 755 A.2d 784, 793 (R.I. 2000), quoting *Bruno v. Criterion Holdings, Inc.*, 736 A.2d 99, 99 (R.I. 1999). Rule 12(b)(6) does not deal with the likelihood of success on the merits, but rather with the viability of a plaintiff's bare-bones allegations and claims as they are set forth in the complaint. *Hyatt v. Vill. House Convalescent Home, Inc.*, 880 A.2d 821, 823 (R.I. 2005). The Court must analyze each of the counts in the Plaintiff's Complaint "in light of the notably lenient standards of our Rule 12(b)(6) jurisprudence," accepting all allegations in the complaint as true and resolving any doubts in the Plaintiff's favor. *Id.* at 823-824; *Multi-State Restoration, Inc. v. DWS Properties, LLC*, 61 A.3d 414, 416. (R.I. 2013).

In most instances, one drafting a complaint in a civil action is not required to draft the pleading with a high degree of factual specificity. *Hyatt*, 880 A.2d at 824. To survive a Rule 12(b)(6) motion to dismiss, the plaintiff's claim need only be "plausible" on its face, meaning that the factual allegations are sufficient to support the reasonable inference that the defendant is

liable for the misconduct alleged. *Chhun v. Mortg. Elec. Registration Sys., Inc.*, 84 A.3d 419, 422 (R.I. 2014); *Grajales v. Puerto Rico Ports Authority*, 682 F.3d 40, 49 (1st Cir. 2012) (commenting that the "paucity of direct evidence is not fatal in the plausibility inquiry. 'Smoking gun' proof of discrimination is rarely available, especially at the pleading stage… The plausibility threshold simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of the illegal conduct.").

IV. SPECIFIC QUESTIONS RAISED ON APPEAL

1. Whether Rhode Island law recognizes a cause of action under the Rhode Island Civil Rights Act of 1990, R.I. Gen. Laws Ann. § 42-112-1(a), against a University that fails to prevent, respond to, and/or remedy known acts of sex discrimination on its campus, by its students.
2. Whether the dismissal of Doe's federal Title IX claim can preclude her from pursuing separate state law claims, which were dismissed without prejudice from the pendant federal action and have never been litigated.
3. Whether a private right of action exists under the Antidiscrimination Clause of Article I, Section 2 of the Rhode Island Constitution for a Plaintiff who alleges that she was "subject to discrimination by … [an] entity doing business with the state."

V. ARGUMENT

A. Brown University's failure to prevent, respond to, and remedy reported sexual assaults on its campus, by its students, constitutes actionable discrimination under the Rhode Island Civil Rights Act.

The Rhode Island Civil Rights Act provides that "[a]ll persons within the state, regardless of race, color, religion, sex, disability, age, or country of ancestral origin, have… the same rights

to make and enforce contracts... and to the full and equal benefit of all laws and proceedings for the security of persons and property..." R.I. Gen. Laws Ann. § 42-112-1(a). RICRA offers broad protection against all forms of discrimination, and its language is "decidedly victim-oriented." *Liu v. Striuli*, 36 F. Supp. 2d 452, 478 (D.R.I. 1999); *Ward v. City of Pawtucket Police Dept.*, 639 A.2d 1379, 1381 (R.I. 1994).

Rhode Island law "mandates that courts read the RICRA as broadly as possible – which means that if individuals discriminate in ways that violate the statute, then they must be liable under it." *Liu*, 36 F. Supp. 2d at 478, citing *Ward*, 639 A.2d at 1381-1382; *Iacampo v. Hasbro Inc.*, 929 F.Supp. 562, 573 (D.R.I. 1996) (RICRA broadly prohibits discrimination, including, for example, disparate impact, disparate treatment, retaliation, and harassment). Although RICRA's protections have traditionally been applied to discrimination in employment, the statute clearly reaches beyond the employment discrimination setting. *See Felkner v. R.I. Coll.*, 203 A.3d 433, 447-450 (R.I. 2019) (valid RICRA claim where student alleged violation of First Amendment rights to freedom of speech and expression by college); *Liu*, 36 F. Supp. 2d at 478 (valid RICRA claim where student alleged sexual harassment by university professor).

The extent of RICRA's protections against discrimination in education has not been fully examined by this Court. It is well-settled that sexual harassment is a form of sex discrimination prohibited by the statute. *DeCamp v. Dollar Tree Stores, Inc.*, 875 A.2d 13, 22 (R.I. 2005). The Plaintiff's Complaint asks this Court to recognize, as a form of discrimination prohibited by RICRA, a university's failure to reasonably prevent, respond to, and remedy known acts of sex discrimination – including sexual harassment and sexual assault – on its campus, by its students. This type of conduct has long been recognized as discriminatory by the federal courts and should similarly be prohibited under Rhode Island state law, which is more broad and protective than

federal law.

1. **The development of Title IX law is instructive in determining the application of RICRA to Brown's discriminatory conduct.**

Title IX was created to address gender inequity in education. 20 U.S.C. §1681 *et seq.* Like RICRA, Title IX broadly prohibits discrimination based on sex. *Id.* The statute was enacted in 1972 and provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance…" 20 U.S.C. §1681(a). Unlike RICRA's sweeping protections, the reach of Title IX is limited and applies only to educational institutions that receive federal funding. *Id.*

The Supreme Court's recognition of a private right of action for damages under Title IX has given rise to two general avenues for Title IX claims. The traditional Title IX claim typically alleges an official policy of sex discrimination by a school or university in admissions, administration, or athletic programming. *See Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290-291 (1998) (distinguishing claims involving an "official policy" of discrimination from those seeking to hold an institution liable for the discriminatory acts of an individual). A school's widespread mishandling of reports of sexual assault on its campus may be considered an "official policy of sex discrimination" which creates a heighted risk of sexual assault and violates Title IX. *See e.g., Doe 1 v. Baylor Univ.*, 240 F. Supp. 3d 646, 661-662 (W.D.Tex. 2017) (students alleging widespread pattern of discriminatory responses to females' reports of sexual assault sufficiently stated Title IX claim based on official policy of sex discrimination that heighted risk of assault to plaintiffs); *Doe 12 v. Baylor Univ.*, 336 F. Supp. 3d 763, 779-783 (W.D. Tex. 2018) (allegations that Baylor had a custom or policy of inadequately handling and even discouraging reports of peer sexual assault constituted an official policy of discrimination that created a

heightened risk of sexual assault to plaintiffs); *Simpson v. Univ. of Co. Boulder*, 500 F.3d 1170, 1178 (10th Cir. 2007) (reversing summary judgment for university because unsupervised player-host program for football recruits was official policy of discrimination that made plaintiff vulnerable to sexual assault by nonstudent recruits).

Additionally, the federal courts also recognize claims under Title IX for intentional discrimination based on a school's or university's "deliberate indifference" to known harassment. R.A. 238-239, *Doe v. Brown University*, 896 F.3d 127, 130 (1st Cir. 2018) (The Supreme Court has recognized an implied private right of action to enforce Title IX ... which... encompasses intentional sex discrimination in the form of a recipient's deliberate indifference.") Under Title IX, a school's failure to prevent or remedy sexual harassment or sexual assault among students is conduct by the school that can be considered intentional discrimination in violation of the statute. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 633 (1999). Under federal common law, a school may be liable for damages under Title IX for student-on-student harassment when the plaintiff can demonstrate: (1) he or she was subject to severe, pervasive, and objectively offensive sexual harassment; (2) the harassment caused the plaintiff to be deprived of educational opportunities or benefits; (3) the funding recipient was aware of such harassment; (4) the harassment occurred in the funding recipient's programs or activities; and (5) the funding recipient was "deliberately indifferent" to the harassment, meaning that its response, or lack thereof, was clearly unreasonable in light of the known circumstances. *Porto v. Town of Tewksbury*, 488 F.3d. 67, 72-73 (1st Cir. 2007); *Davis*, 526 U.S. at 633.

Deliberate indifference "may be found... when an institution's response to known discrimination is clearly unreasonable in light of the known circumstances... [or] when remedial action only follows after a lengthy and unjustified delay." *Hayut v. State Univ. of N.Y.*, 352 F.3d

733, 751 (2d Cir. 2003); *see e.g., Williams v. Bd. of Regents of Univ. Sys. Of Ga.*, 477 F.3d 1282, 1296-1297 (11th Cir. 2007) (reversing dismissal of Title IX claim where university acted with deliberate indifference to sexual assault of student by waiting eight months before conducting a disciplinary hearing of student-perpetrators); *Doe v. Town of Stoughton*, No. 12-10467-PBS, 2013 WL 6195794, at *3 (D. Mass. Nov. 25, 2013) (deliberate indifference where school decided not to discipline offending student); *Doe v. Bradshaw*, No. 11-11593-DPW, 2013 WL 5236110, at *11 (D. Mass. Sept. 16, 2013) (whether inadequate investigation constitutes deliberate indifference is a fact question for the jury).

A school will be liable for damages under Title IX when its deliberate indifference to known harassment "subjects" students to harassment, meaning that it causes students to undergo harassment or makes them liable or vulnerable to it. *Davis*, 526 U.S. at 630. However, an institution's deliberate indifference need not actually cause a victim to undergo further harassment. *Crandell v. N.Y. Coll. Of Osteopathic Med.*, 87 F. Supp. 2d 304, 316-317 (S.D.N.Y. 2000) (plaintiff who was sexually harassed by former professor sufficiently alleged post-incident hostile environment although professor was not present on campus following her assault). Even where a victim withdraws from school immediately following an assault and is not actually vulnerable to continued harassment, a school's clearly unreasonable response to the assault will expose the institution to Title IX liability. *See e.g.*, *Williams*, 477 F.3d at 1297 (plaintiff's immediate withdrawal from school after being raped by multiple student-athletes did not preclude Title IX claim; university continued to subject her to discrimination in the form of the university's failure to take any precautions to prevent future attacks by the rapists or "like-minded" students).

In this case, Jane Doe alleges two types of intentional discrimination by Brown

University: (1) that Brown University had a widespread policy of mishandling sexual assault on its campus, which constituted an official policy of sex discrimination that increased the risk of sexual assault to Jane Doe; and (2) that Brown University's response to the sexual assault of Jane Doe was clearly unreasonable in light of the known circumstances. Federal courts have long recognized, within the plain language of Title IX, the duty of educational institutions to adequately prevent, respond to, and remedy sexual harassment or sexual violence, including sexual assault, on their campuses, by their students. Like Title IX, the language of the Rhode Island Civil Rights Act is plain and broadly prohibits sex discrimination. If a school's official policy of, or deliberate indifference to, sex discrimination on its campus constitutes discrimination under Title IX, the broader and more protective language of RICRA also clearly prohibits it.

The First Circuit did not reach the merits of Doe's discrimination claims because it dismissed her Title IX claims on the grounds that Doe did not plead sufficient facts to establish that she was "subjected to discrimination *under any education program or activity*" at Brown University. See 20 U.S.C. §1681 ("No person in the United States shall, on the basis of sex... *be subjected to discrimination under any education program or activity* receiving Federal financial assistance..."). The First Circuit interpreted the statutory language of Title IX literally, to require a plaintiff to show that she has been deprived of access to educational programs or activities at the offending institution. RICRA does not contain any similar statutory language restricting conduct prohibited by the statute to that which occurs "under programs or activities" of an offending institution. Doe need not allege or prove that she was deprived of educational opportunities at Brown University to proceed under RICRA.

2. **The Plaintiff's Complaint shows clear evidence of discriminatory conduct by Brown University to survive a Rule 12(b)(6) Motion to Dismiss.**

Doe's Complaint more than satisfies the liberal notice pleading standard under Rhode Island state law, which is decidedly more broad than the federal court's "plausibility" standard and permits dismissal of a party's claims "only if it appears beyond a reasonable doubt that a plaintiff would not be entitled to relief under any conceivable set of facts." *DiLibero v. Mortg. Elec. Registration Sys., Inc.*, 108 A.3d 1013, 1015 (R.I. 2015). The Court should not eliminate this victim's right to pursue her claims, and Doe should be permitted to conduct discovery to prove her case. Brown had a widespread policy of mishandling reports of sexual assault prior to the assault of Jane Doe. When Doe reported to Brown University that she had been sexually assaulted by three Brown students, the University chose to ignore it. This clear evidence of discrimination by Brown precludes dismissal of Doe's claims, particularly at this early stage of the litigation and without the benefit of discovery.

a. **Brown University failed to prevent, respond to, and remedy reported sexual assaults on its campus prior to the sexual assault of Jane Doe, which constituted an official policy of sex discrimination that substantially contributed to cause Doe's assault.**

Doe alleges that Brown University's discriminatory sexual harassment policies, practices, and procedures, prior to the sexual assault of Jane Doe, subjected women, including Doe, to an increased risk of sex-based harassment and violence. Brown's clearly unreasonable response to Doe's sexual assault is strong evidence that Brown responded in a similarly inadequate manner to cases of sex-based harassment and violence prior to the sexual assault of Jane Doe.

There is clear evidence that forcible sexual offenses on the Brown University campus were significantly increasing at the time of Doe's assault in November 2013, which was reported

in February 2014. Colleges and universities are required by federal law to disclose information about crime on and around their campuses.[2] *See* Jeanne Clery Disclosure of Campus Security and Campus Crime Statistics Act ("Clery Act"), 20 U.S.C. §1092(f). In 2012, the year prior to Doe's assault, Brown reported 16 forcible sex offenses on its campus. *2015 Annual Security Report*, BROWN UNIVERSITY, p. 40 (retrieved Dec. 16, 2019, 3:00 PM), https://www.brown.edu/about/administration/public-safety/sites/brown.edu.about.administration.public-safety/files/uploads/ASR_FinalCopy_%2010-1-15.pdf. By 2013, that number had increased more than 30%, to 21 reported forcible sex offenses. *Id.* In 2014, the number of reported forcible sex offenses on Brown's campus had increased more than 100%, to 43. *Id.* These numbers strongly suggest that sexual assault on Brown's campus was increasing and not being adequately addressed by the University and its employees.

Only after Doe's assault did Brown begin to take any meaningful steps to address the sexual assault problem on its campus. For example, in 2015, Brown participated in a Campus Climate Survey on Sexual Assault and Sexual Misconduct. *Report on the AAU Campus Climate Survery on Sexual Assault and Sexual Misconduct*, BROWN UNIVERSITY, (retrieved Dec. 16, 2019, 3:00 PM), https://www.brown.edu/web/documents/climatesurvey/Brown_U_Climate_Survey_Report_Westat_2015.pdf. The project was designed to address "the concerns related to the incidence and prevalence of sexual assault and sexual misconduct at Brown University." *Id.* at 1. At that time, 25% of female undergraduates reported that they had experienced sexual assault since entering Brown University. *Id.* at 14. Only 38% of female undergraduates believed that it was very or extremely likely that campus officials would take reports of sexual

[2] Generally, the Rhode Island Supreme Court looks to Federal jurisprudence for guidance or interpretation of Rule 12(b). *Chhun*, 84 A.3d at 422. The First Circuit has held that a court may consider matters of public record and facts susceptible of judicial notice in deciding a Rule 12(b)(6) motion. *Guadalupe-Baez v. Pesquera*, 819 F.3d 509, 514 (1st Cir. 2016).

misconduct seriously. *Id.* at 10. Only 15% of female undergraduates believed that it was very or extremely likely that there would be a fair investigation by Brown in the event of a report of sexual misconduct, and only 11.9% of female undergrads believed it was very or extremely likely that campus officials would take action against the offender. *Id.*

The statistics from the Brown survey cited above strongly suggest a systemic mishandling of complaints of sexual assault by Brown University and its employees. This conduct is recognized under federal law to constitute an "official policy" of sex discrimination. *See e.g.*, *Doe 1 v. Baylor Univ.*, 240 F. Supp. 3d 646, 661 (W.D.Tex. 2017) (plaintiff adequately plead "official policy of discrimination" claim under Title IX where she alleged that sexual assault was "rampant" on Baylor's campus, that Baylor mishandled and discouraged reports of sexual assault, and that Baylor's response to these circumstances "substantially increased" the risk that plaintiffs and others would be sexually assaulted). This conduct is similarly prohibited by RICRA, which is broader and more protective than Title IX. Such evidence of discrimination by Brown precludes dismissal of Plaintiff's claims at this early stage of the litigation, without the benefit of any discovery.

b. <u>Brown University discriminated against Doe by ignoring her report that she was sexually assaulted by three Brown University football players on the Brown University campus.</u>

Doe also alleges that Brown University discriminated against her by intentionally failing to respond to or redress her sexual assault. This is strong evidence, even at this early stage of the litigation, that Brown's response to Doe's assault was "clearly unreasonable in light of the known circumstances." This failure to act constitutes actionable discrimination under RICRA.

The Plaintiff alleges that Brown and its employees significantly and unjustifiably delayed taking any action on behalf of Jane Doe, and when it did, its actions were inadequate and

incomplete. In February 2014, Doe reported, in-person, to the Brown University police that she had been drugged and raped on the Brown University campus by three Brown University football players. R.A., p. 251, ¶14. Following Doe's report, Brown University learned of text messages exchanged among the student-perpetrators, bragging that they had raped Jane Doe. R.A., p. 252, ¶¶15-20. Brown had knowledge of Doe's sexual assault and corroborating text message evidence, yet Brown delayed even initiating an investigation until *more than seven months* after Doe had reported the assault to the school. R.A., p. 252, ¶23. Thereafter, Brown failed to complete the investigation, failed to take any disciplinary action against the three students accused of raping Jane Doe, and failed to inform Jane Doe that her case had been terminated without resolution. R.A., p. 253, ¶¶29-31. In the federal context, an unreasonable delay in the investigation of a reported sexual assault constitutes "deliberate indifference" under Title IX. *See* Section V.A.1., *supra*.

Brown had control over and the authority to investigate and discipline the three student-perpetrators accused of raping Jane Doe, but declined to do so. This conduct by Brown University was egregious. Colleges and universities regularly discipline their students for code of conduct violations, from infractions such as cheating and alcohol use to more serious violations including harm to persons or property, yet three students credibly accused of raping a young woman were not even investigated by the institution that enrolled them.

Brown had the authority and capacity to redress Jane Doe's harm. It invited her to file a grievance on Brown's campus pursuant to Brown's Code of Student Conduct. R.A., p. 252, ¶21. It notified her that it would conduct an investigation of the assault. *Id.* at ¶23. Brown's Code of Student Conduct expressly stated that third-party guests and visitors, like Jane Doe, were protected by University policies and could pursue remedies if they experienced sexual

harassment and violence on Brown University property. Brown had the capacity to take remedial and/or corrective measures in the form of investigating and taking disciplinary actions against the offenders and deliberately chose not to do so.

This discriminatory conduct at a minimum made Jane Doe vulnerable to further harassment by her assailants, who knew she had reported her rape to the University, but who were not being held accountable. Jane Doe has alleged that Brown's actions and inactions caused and/or made her vulnerable to further harassment and caused physical and psychological harm which interfered with her access to educational opportunities, eventually causing her to withdraw from school.

Brown's discriminatory conduct also violated RICRA because it interfered with Doe's contractual relationship with Providence College, which is prohibited by the statute. As a result of Brown's misconduct, Doe's academic performance suffered materially, and she was forced to withdraw from college. A student's relationship with an institution of higher learning is contractual in nature, and RICRA does not limit liability for interference with that contractual relationship to the parties to the contract. *Liu v. Striuli*, 36 F. Supp. 2d 452, 478 (D.R.I. 1999). RICRA's language is uniformly broad, and third parties such as Brown University and its employees may be liable under RICRA where, as here, their discriminatory conduct caused interference with Doe's contractual relationship with Providence College. *See Liu*, 36 F. Supp. at 478-479 (plaintiff alleged valid RICRA claim against defendant-individual for interference with Plaintiff's contractual relationship with her college, where abuse by defendant caused plaintiff's academic performance to suffer materially, even though defendant was not a party to the contract).

These facts are sufficient to survive a motion to dismiss on the issue of Brown's

intentional discrimination. The state has a compelling interest in addressing and preventing discrimination against its female citizens. Rhode Island law, which mandates that all women be free from gender-based discrimination, cannot permit a university to turn a blind eye to sexual assault that occurs on its campus, by its students. To hold otherwise would allow Brown to knowingly permit acts of discrimination, on its campus, by its students or employees, including the most extreme forms of gender-based harms such as rape and sexual assault. Such an outcome is not consistent with the objectives of RICRA – to broadly prohibit all forms of discrimination and to protect whole classes of people from harm.

B. Doe's RICRA claim is not precluded by the prior dismissal of her federal Title IX claim, because the RICRA claim was dismissed without prejudice from the pendant federal action and has never been litigated.

The trial court erred as a matter of law in holding that Doe's RICRA claims were precluded by the prior dismissal of her federal Title IX claims. In so holding, the trial court erroneously determined that "the action or inaction by Brown and the Brown employees vis-à-vis Ms. Doe has been alleged to violate Title IX and, therefore, alleged to be discriminatory action or inaction [under RICRA]." R.A., pp. 366-367. Although Doe's claims under RICRA and Title IX arise out of the same basic set of facts, Doe does not allege that the RICRA claims are dependent on valid Title IX claims. To the contrary, Doe asked the trial court to recognize Brown's conduct as described in the Complaint and Section V.A.2, *supra*, as intentional discrimination independently prohibited by RICRA. The trial court declined to reach this key issue and improperly characterized Doe's RICRA claims as an attempt to re-litigate her federal Title IX claims. The record is clear that Doe's claims seek an independent state law basis to address Brown's discriminatory conduct, and the doctrine of collateral estoppel has no application here.

"Under the doctrine of collateral estoppel, 'an issue of ultimate fact that has been actually litigated and determined cannot be re-litigated between the same parties or their privies in future proceedings.'" *Casco Indem. Co. v. O'Connor*, 755 A.2d 779, 782 (R.I. 2000), quoting *Commercial Union Insurance Co. v. Pelchat*, 727 A.2d 676, 680 (R.I.1999). Collateral estoppel applies "when the case before [the Court] meets three requirements: (1) the parties are the same or in privity with the parties of the previous proceeding; (2) a final judgment on the merits has been entered in the previous proceeding; (3) the issue or issues in question are identical in both proceedings." *Foster-Glocester Reg'l Sch. Comm. v. Bd. of Review*, 854 A.2d 1008, 1014 (R.I. 2004), citing *Lee v. R.I. Council 94*, 796 A.2d 1080, 1084 (R.I.2002).

A mechanical application of the doctrine of collateral estoppel "is capable of producing extraordinarily harsh and unfair results." *Casco Indem. Co.*, 755 A.2d at 782 (internal citations and quotations omitted). "To avoid unfairness, courts have declined to apply collateral estoppel in situations in which the doctrine would lead to an inequitable result." *Id.* An important limitation on the doctrine is that "'collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate that issue in the earlier case.'" *Id.* at 783, quoting *Allen v. McCurry*, 449 U.S. 90, 95 (U.S. 1980).

This case involves the sexual assault of a young woman, on Brown University's campus, by three Brown University football players. The issue before this court is whether the conduct by Brown University, both before and after the sexual assault of Ms. Doe, violated Rhode Island law and its mandate that no person be subject to discrimination on the basis of sex. Although the Plaintiff's state and federal claims arise out of the same basic set of facts, the Plaintiff's claims under RICRA have never been litigated, and there has been no final judgment on the merits of these claims to implicate the doctrine of collateral estoppel. The Federal District Court declined

to extend supplemental jurisdiction over these claims and dismissed them without prejudice, determining that they raised substantial questions of state law. The Plaintiff is entitled to pursue her independent state law claims, notwithstanding the federal court's dismissal of her Title IX claim.

Rhode Island law explicitly affords victims of discrimination broader rights to sue than the rights afforded under federal law and Title IX. *Liu v. Striuli*, 36 F. Supp. 2d 452, 478 (D.R.I. 1999) (commenting that RICRA offers broad protection against all forms of discrimination, and its language is "decidedly victim-oriented."). Those broad rights have not been addressed in this action, and the Plaintiff is entitled to pursue them in the state court. Even where a plaintiff does not have a right to sue under Title IX, she may pursue independent claims against a defendant for discriminatory conduct under the more protective standards articulated by Rhode Island law. *See Liu*, 36 F. Supp. 2d at 472 (dismissing plaintiff-student's Title IX claim against professor, but allowing Plaintiff to proceed with RICRA claim for alleged sexual harassment by professor).

Moreover, to the extent the Plaintiff argues that Brown University failed to comply with federal mandates and regulations, she is entitled to do so. While noncompliance with a regulation is not per se discriminatory, it is strong evidence of intentional discrimination that a school failed to comply with clear and basic regulatory mandates, such as those articulated by Title IX. Brown argues that the issue of its noncompliance with Title IX regulations is barred by the doctrine of collateral estoppel. This position is without merit. Whether Brown failed to comply with the Title IX requirements is neither an issue identical to any issue in the prior federal court proceeding, nor was it litigated or necessarily decided in the prior proceeding. *See State v. Pacheco*, 161 A.3d 1166, 1173–1174 (R.I. 2017) (noting that for collateral estoppel to apply, identity of the issues requires that "the issue sought to be precluded must be identical to the issue in the prior

proceeding; . . . the issue must actually [have been] litigated; and . . . the issue must necessarily have been decided.").

The issue litigated and decided in the related federal court claim was whether Jane Doe had a private right of action under Title IX against Brown University, even though she was not a student of the University at the time of the assault. The federal litigation did not address whether Brown complied generally with Title IX regulations and mandates. The legal issues before this Court are separate and distinct from those decided in the prior federal proceedings. There is no identity of issues. The doctrine of collateral estoppel does not apply.

C. Doe has a private right of action under Article I, Section 2 of the Rhode Island Constitution because she was subject to discrimination by an entity doing business with the state.

The trial court erroneously concluded, without explanation, that Article I, Section 2 of the Rhode Island Constitution does not grant Ms. Doe a private right of action. R.A., p. 363. This holding is inconsistent with the plain language of the Constitution and the legislative intent of its Antidiscrimination Clause: to expressly prohibit sex-based discrimination by any entity doing business with the state.

Article I, Section 2 of the Rhode Island Constitution provides that, "[n]o 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. I, § 2. Unlike its federal analog, Article 1, Section 2 goes beyond the guarantees of due process and equal protection of the laws and includes an antidiscrimination provision embedded in the language of the Constitution itself, manifesting the drafters' intent to provide greater and more extensive rights than those granted

by the federal Constitution. Jane Doe alleges that Brown University – an entity that does substantial business with the state of Rhode Island – discriminated against her on the basis of her gender. The University does not dispute that it does substantial business with the state.

This Court has not had occasion to interpret and apply the Antidiscrimination Clause of Article I, Section 2 of the Rhode Island Constitution. To determine whether a provision of the Constitution gives rise to the private right of action for damages, the Court looks to the standards articulated in *Bandoni v. State*, 715 A.2d 580 (R.I. 1998) (adopting the federal court analysis set forth in *Bivens v. Six Unknown Agents of Fed .Bur. of Narcotics*, 403 U.S. 388 (1971) for determining whether a private right of action exists under a provision of the constitution). First, the Court must determine whether the provision "suppl[ies] '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 force of law.'" *Bandoni*, 715 A.2d at 586, *quoting Davis v. Burke*, 179 U.S. 399, 403 (1900). In other words, the Court must determine whether the provision is self-executing. If the Court determines that the provision is self-executing, the Court must then decide whether it will recognize a cause of action for damages derived directly from the provision of the constitution. *Bandoni*, 715 A.2d at 587.

The Antidiscrimination Clause of Article I, Section 2 of the Rhode Island Constitution is self-executing. This Court should recognize a private cause of action for damages derived from the provision. To hold otherwise would render the Constitution's prohibition of discrimination meaningless.

1. **The Antidiscrimination Clause of Article I, Section 2 is self-executing.**

In determining whether a particular constitutional provision is self-executing, the Court in *Bandoni* adopted the analytical framework set forth by the Vermont Supreme Court in *Shields v. Gerhart*, 658 A.2d 924, 928 (Vt. 1995):

> First, a self-executing provision should do more than express only general principles; it may describe the right in detail, including the means for its enjoyment and protection. . . . [Second, o]rdinarily a self-executing provision does not contain a directive to the legislature for further action. . . . [Third, t]he legislative history may be particularly informative as to the provision's intended operation. . . . Finally, a decision for or against self-execution must harmonize with the scheme of rights established in the constitution as a whole.

Bandoni, 715 A.2d at 587.

The legislative history of Article I, Section 2 provides strong evidence that the drafters of the Antidiscrimination Clause intended for it to be self-executing, and so the Plaintiff addresses the Third Criterion first.

a. **The Third Criterion: the drafters of the Antidiscrimination Clause intended the provision to be self-executing.**

The language of Article I, Section 2 was adopted by voters in 1986 following the 1986 Constitutional Convention. R.A., p. 374. Prior to 1986, Article I, Section 2 of the Rhode Island Constitution was considered to be advisory and not mandatory in nature. R.A., p. 372. The drafters amended Article I, Section 2 to include promises of equal protection, due process, and anti-discrimination. *Id.* The Committee Report stated that including these protections in the state constitution "would create an independent state foundation for individual rights." *Id.* The Committee intended that the state should not permit discrimination on the basis of gender or race and declared that such discrimination is "untenable in a democratic society." *Id.*

The Antidiscrimination Clause in Article I, Section 2 was the combination of two 1986 Constitutional Convention Resolutions: the Equal Rights Amendment (Resolution 86-00002(A)) and the Handicapped Rights Amendment (Resolution 86-00008). R.A., p. 372.

The Equal Rights Amendment declared that: "[n]o otherwise qualified person shall, solely by reason of a condition of race or gender be subject to discrimination by the state, its agents or any person or entity doing business with the state." R.A., p. 379. This Resolution was approved by the Committee on Citizen Rights and passed by the full Convention. R.A., p. 407. In drafting the Amendment, the Citizen Rights Committee's stated goal was that the "state should not permit discrimination, on the basis of gender or race, to exist[,]" and that such discrimination was not justified. R.A., p. 379. The Committee recognized that discrimination based on race and gender was pervasive in the country and that such discrimination was "repugnant to one of the goals of the convention: to ensure equal enforcement of constitutional rights." R.A. p. 380. (emphasis added). The Committee believed that "[a] stand against discrimination based on race and gender should be expressed in the fundamental law of the state." *Id.* The drafters commented:

> What this resolution does is to elevate to Constitutional status, the rights of the citizen of Rhode Island not to be discriminated against solely on the basis of the condition of race or gender. This would afford the citizens a higher degree of protection … This resolution states that which is considered a basic human right … **It will give our Supreme Court a clear dictate not dependent on existing statutory law that discrimination on the basis of race or gender will not be tolerated**."

R.A., pp. 391, 394.

The framers intended to protect people from discrimination based on race and gender and provide an enforcement mechanism in the courts.

The Equal Rights Amendment was combined with the Handicapped Rights Amendment to form the current Antidiscrimination Clause. R.A., p. 372. The original draft of the Handicapped Rights Amendment read "[n]o otherwise qualified handicapped individual shall, solely by reason of handicap, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity of the state, its agents, or any person or entity doing business with the state." R.A., p. 384. This Resolution was also approved by the Committee on Citizen Rights and passed by the full Convention. R.A., p. 372. The Citizens Rights Committee Report discussing the Handicapped Rights Amendment explicitly sets forth that **"[t]his resolution is meant to be self-enforcing and it is the committee's intent that a handicapped person shall receive judicial, legislative and executive enforcement of these rights**." R.A., p. 387.

The Committee on Style and Drafting combined the Handicapped Rights Amendment with the Equal Rights Amendment to create what is now known as the Antidiscrimination Clause of Article I, Section 2. R.A., p. 430-431. The Antidiscrimination Clause was passed by the full Convention on June 26, 1986 and adopted by the voters in November of that year. R.A., p. 374. The annotated edition of the Constitution released by the Rhode Island Secretary of State in 1988 notes the drafters' specific intent that the Handicapped Rights provision be self-executing – indicating that this intent carried through to the final version of the provision. *Id.*

The framers intended the Antidiscrimination Clause as a whole to be self-executing and to provide a judicial remedy for victims of discrimination. The final version of the provision wove together the discrimination protections for race and gender with the discrimination protections for handicapped individuals. The Committee acknowledged that "the Constitution of Rhode Island is the means by which we express, in the most solemn terms, our most profound

social commitments." R.A., p. 377. In combining the provisions, the framers intended that individuals discriminated against on the basis of handicap and those discriminated against on the basis of race and gender were entitled to protection. Otherwise, the provision would carry no weight and be rendered useless to all those discriminated against on the basis of race and gender.

In applying the four-prong test of *Bandoni*, the legislative history is highly persuasive that the framers intended the Antidiscrimination Clause of Article I, Section 2 to be self-executing.

b. **The First Criterion: the Antidiscrimination Clause sets forth specific, enforceable rights.**

The first criterion requires the Court to consider whether the Antidiscrimination Clause of Article I, Section 2 articulates specifically enforceable rights, including the means by which these rights may be enjoyed or protected. *Bandoni*, 715 A.2d at 587.

The plain language of Article I, Section 2 provides a concrete, mandatory, and affirmative statement that "[n]o person shall be deprived of life, liberty, or property without due process of law, nor shall any person be denied equal protection under the law." Art. I, Section 2 (emphasis added). It goes further still, providing that, "[n]o 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." Art. I, Section 2 (emphasis added). This constitutional provision is not a mere recitation of general principles; rather, it provides clear and explicit constitutional protections. Doe is entitled to those protections.

In *Bandoni*, this Court was asked to determine whether a private right of action existed under the Victims' Rights Amendment (Article 1, Section 23). That case arose from a drunk driving accident, and the plaintiffs alleged that state officials had disregarded their constitutional duties under the Victims' Rights Amendment by failing to advise them of their rights as crime

victims. *Id.* at 582-583. As a result, the Bandonis alleged that they were deprived an opportunity to object to the plea bargain entered into by the state and the drunk driver, and to demand restitution. *Id.*

The Court in *Bandoni* ultimately determined that the Victims' Rights Amendment was not self-executing. With regard to the first criterion, this Court noted that when the delegates to the Constitutional Convention gathered in 1986, victims' rights legislation existed which was already three years old. *Id.* at 588. The Court noted that despite the explicit rights set forth in the Victims' Bill of Rights statute, the framers of the Constitution elected to model Article 1, Section 23 after the much broader Legislative Purpose provision of the statute, which indicated only general principles that "crime victims are treated with dignity, respect, and sensitivity, and whenever possible, receive financial compensation from the perpetrators of the crimes..." *Id.* The Court held that "the fact that the framers chose to model the victims' rights amendment from the broad contours of [the Victims' Bill of Rights] Legislative Purpose provision, knowing full well that other sections ... contained more specific rights as well as the means by which these rights may be enjoyed and protected is highly persuasive to our conclusion that article 1, section 23, espouses only general principles and is therefore not self-executing." *Id.*

The Victims' Rights Amendment had a unique legislative history which is not present in the current case. To the contrary, the legislative history of Article I, Section 2 (as previously discussed at the Third Criterion) strongly supports the conclusion that the provision is self-executing. Unlike the Victims' Rights Amendment in *Bandoni*, the Antidiscrimination Clause of Article I, Section 2 is more than a simple general statement of principles—it provides concrete and enforceable rights which further support the conclusion that the provision is self-executing.

c. The Second Criterion: the Antidiscrimination Clause contains no directive to the legislature to implement the provision.

The Antidiscrimination Clause of Article I, Section 2 contains no directive, express or implied, that the legislature act to implement the provision and its enforcement. This weighs in favor of the conclusion that Article I, Section 2 is self-executing. *See Bandoni*, 715 A.2d at 593 (noting the lack of mandate ordinarily tips the scales in favor of a conclusion the provision is self-executing), *see also*, *Shields*, 658 A.2d at 929 (noting that the lack of directive ordinarily weighs in favor of a conclusion that the provision is self-executing).

In *Bandoni*, the Court held that, while the lack of directive was generally indicative of a self-executing provision, it was not conclusive with respect to the Victims' Rights Amendment because of the general nature of rights articulated in the Amendment. *Bandoni*, 715 A.2d at 593. As discussed above, the rights articulated in Article I, Section 2 are concrete and enforceable, not simply general in nature; because there is no legislative directive within Article I, Section 2, the provision is self-executing.

d. The Fourth Criterion: recognizing the Antidiscrimination Clause as self-executing harmonizes with the whole of the Constitution.

The Fourth Criterion of the *Bandoni* test asks this Court whether a determination that the Antidiscrimination Clause is self-executing would harmonize with the scheme of rights established in the Rhode Island Constitution as a whole. *Bandoni*, 715 A.2d at 594. Recognizing a self-executing right to be free from discrimination based on race, gender, or handicap and to seek redress for its infringement comports with the general constitutional scheme. *Shields*, A.2d at 930.

Article I, Section 2 is devoted entirely to Constitutional Rights and Principles. Unlike *Bandoni*, where the Victims' Rights Amendment was the lone provision with respect to victims'

rights or anything of the sort, Article I, Section 2 provides individual rights, including the right to be free from discrimination. This is in addition to the other individual rights enumerated within Article I, like freedom of speech, freedom of religion, and freedom from unreasonable searches and seizures, among others. The scheme of the Constitution – specifically Article I – is that of protecting individual rights and providing more expansive protection of those rights than offered by the United States Constitution. Including provisions protecting those individual constitutional rights would be nothing but lip service paid by the framers if those rights are not enforceable. The finding that Article I, Section 2 is self-executing comports with the general scheme of rights established in the Rhode Island Constitution.

In sum, Article I, Section 2 is self-executing. It provides specific concrete and enforceable rights. It does not contain a legislative directive for further action. The legislative history is indicative of the framers' intention that the provision be self-executing. Self-execution harmonizes with the scheme of rights established in the Rhode Island Constitution.

2. **Because the Antidiscrimination Clause of Article I, Section 2 is self-executing, this Court should recognize a cause of action for damages.**

In *Bivens*, the United States Supreme Court held that a federal agent acting under the color of authority could be liable for money damages for violating the plaintiff's Fourth Amendment rights to be free from unreasonable searches and seizures. 403 U.S. 388, 389 (1971). The Court's decision in *Bivens* was "significant because Congress had provided no statutory remedy for such a violation, so the Court held that the Fourth Amendment itself supported the remedy." Shields, 568 A.2d at 930. Damages are the ordinary remedy for an invasion of personal interests in liberty. *Bivens*, 403 U.S. at 396. "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever [s]he receives an injury." *Marbury v. Madison*, 5 U.S. 137, 163 (1803).

The antidiscrimination provision of Article I, Section 2 provides essential constitutional protections against discrimination on the basis of race, gender, and handicap. If the Court does not recognize the provision as self-executing, Doe may be without a remedy. While there may be statutory avenues of relief available under RICRA, those rights are not clearly defined and at least the trial court has held that they do not apply to the case at bar. Additionally, a constitutional tort is more firmly established as legal right, as compared to a statutory tort, and offers maximum protection against the class-based harm sought to be prevented. R.A., pp. 152, 387. Indeed, the framers intended the protections in Article I, Section 2 to be more expansive than other similar statutory protections. *Id.* Doe is entitled to enforce her constitutional guarantee to be free from discrimination based on her gender.

This Court in *Bandoni* did not find the provision at issue self-executing and, in the interests of judicial restraint, declined to recognize a cause of action for violation of the Victims' Rights Amendment. *Bandoni*, 715 A.2d at 596. But the rights at issue in *Bandoni*—while important in their own right—are different than those here. Based on the legislative history of the Victims' Rights Amendment, the Court in *Bandoni* held that the Constitutional Convention and the general assembly both had opportunity to act to provide a remedy for a violation, but intentionally declined to do so. *Bandoni*, 715 A.2d at 595. Here, on the other hand, the framers expressly intended that the antidiscrimination protections for handicapped individuals, and those subjected to discrimination based on race and gender, be enforceable.[3] R.A., pp. 374, 387.

[3] Also at issue in *Bandoni* were additional complicating factors, including tort immunity for judges and prosecution officials, and defining the scope of liability for state officials who are responsible for complying with the victims' rights statute. *Bandoni*, 715 A.2d at 595. Those types of issues, which the Court in *Bandoni* said are in the purview of the legislature rather than the courts, are not present here.

This is case against a private entity that does significant business with the State of Rhode Island and its political subdivisions, including the City of Providence. R.A., p. 256, ¶50. The language of Article I, Section 2 provides that individuals shall be free from discrimination "by the state, its agents or any person or entity with the state." The legislative history of Article I, Section 2 indicates that the phrase "doing business with the state" provides protection from actions of private individuals and entities, in addition to state action. A review of the Citizens Rights Committee reports show that earlier drafts of the resolution prohibited discrimination "under any program or activity within the state." R.A., p. 384. This language was changed to prohibit discrimination "under any program or activity of the state, its agents, or any person or entity doing business with the state." Id. That language was carried forward through the Convention and eventually into Article I, Section 2. The drafters intended "that the phase 'the state, its agents, or any person or entity doing business with the state' refers to the State of Rhode Island and Providence Plantations, its municipalities or other political entities; and its instrumentalities; or any public or private agency, institution, or organization that does business with public agencies." R.A., p. 387. Brown University is a private institution that does significant business with the state of Rhode Island, as well as with the City of Providence. R.A., p. 256, ¶50.

Providing for a constitutional remedy for a violation of Article I, Section 2 would not be a unique exercise and is within the judiciary's scope of interpreting the law. *See e.g.*, *Bivens*, 403 U.S. at 397 (holding that the plaintiff could obtain a damages remedy for a violation of his Fourth Amendment rights); *Godfrey v. State*, 898 N.W.2d 844 (Iowa 2017) (holding that the due process and equal protection clauses of the state constitution were self-executing and provided a claim for damages in the face of an inadequate remedy); *Davis v. Passman*, 442 U.S. 228 (1979) (holding that the plaintiff had a cause of action for damages for gender discrimination under the

Fifth Amendment's Due Process Clause and its equal protection component). The Court in *Bandoni* expressed concern over the separation of powers and noted that principles of judicial restraint prevent it from creating a cause of action for damages in all but the most extreme circumstances. *Bandoni*, 715 A.2d at 595. The allegations contained within the Complaint in this case, if proven, represent an appropriate circumstance.

VI. CONCLUSION

For all of the reasons set forth above, Plaintiff-Appellant Jane Doe respectfully requests that this Court reverse the judgment of the Superior Court granting the Defendants' 12(b)(6) Motion to Dismiss, and allow Jane Doe to proceed on her claims under RICRA and the Antidiscrimination Clause of Article I, Section 2 of the Rhode Island Constitution.

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