No. 21-968

IN THE

Supreme Court of the United States

FAIRFAX COUNTY SCHOOL BOARD,

Petitioner,

v.

JANE DOE,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER

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SUPPLEMENTAL BRIEF

The government's brief adds nothing to what Respondent ("Jane") has already said. The United States simply rehashes Jane's arguments, including her strained attempt to both acknowledge a circuit split on an issue of profound importance (because it undeniably exists) and at the same time suggest this Court leave it be. There is no mention of any unique governmental interest that might militate against this Court's intervention. And unsurprisingly so. This case concerns only the implied *private* right to sue "fashion[ed]" by this Court under Title IX. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 285 (1998). The scope of the government's express enforcement authority is not at issue and will not be affected.

The government's opposition to certiorari, therefore, fails for the same reasons that Jane's does. Like Jane, the government's true basis for opposition appears to be its agreement with the decision below. But the government, like Jane, misreads this Court's decisions in *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999), and *Gebser*. And in any event, there is no real dispute that the issues here are "of great importance to school districts across our country." Pet.App.61a n.1 (Wilkinson, J., dissenting from denial of rehearing en banc). Nor is it genuinely contested that these issues—particularly the first—have engendered deep disagreement within and among the lower courts. Indeed, this petition is one of two before the Court that raise the first question presented, *see also Wamer v. Univ. of Toledo*, No. 22-123 (U.S.), and a third concerning similar issues is expected soon, *see infra* at 5. A wide range of *amici*, including nine States that filed in *Wamer*, support review here. Certiorari should be granted.

ARGUMENT

I. The Court should grant certiorari to clarify whether a funding recipient's conduct must cause actionable harassment to trigger Title IX's implied right of action.

A. The circuits are deeply split.

The government joins Jane in trying to downplay the confusion among the circuits on this question. But they stand alone with that view.

In addition to judges on *both* sides of the decision below, the School Board has pointed previously to widespread recognition of the circuit split among courts and scholars. Pet.17–21; Reply.3–6. And that is far from all. There are more cases. *See, e.g.*, *Posso v. Niagara Univ.*, 518 F. Supp. 3d 688, 703 (W.D.N.Y. 2021) (noting "the circuits . . . are split"); *Doe 1 v. Howard Univ.*, 396 F. Supp. 3d 126, 133 (D.D.C. 2019) ("[T]here is a split among circuits and district courts[.]"). And other commentators, too, acknowledge the "wide jurisdictional split" that must "be resolved by th[is] Court."[1]

Nevertheless, the government contends that the admitted "circuit conflict" does not "warrant[] this Court's review." U.S.Br.13. It is wrong. Like Jane, the

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[1] Hannah Brenner, *A Title IX Conundrum: Are Campus Visitors Protected from Sexual Assault*, 104 IOWA L. REV. 93, 119 (2018); *see also Civil Rights Law-Title IX-Sixth Circuit Requires Further Harassment in Deliberate Indifference Claims*, 133 HARV. L. REV. 2611, 2614–15 (2020) ("*Davis* incited a circuit split" between the First and Tenth Circuits and the Sixth, Eighth, and Ninth Circuits); Keeley B. Gogul, *The Title IX Pendulum: Taking Student Survivors Along for the Ride*, 90 U. CIN. L. REV. 994, 1008 (2022) ("The requirements for pleading a post-assault claim . . . are the subject of a circuit split.").

government premises this conclusion on a misreading of Eighth and Ninth Circuit cases and a misunderstanding of recent events in the Sixth Circuit.

To begin with, the government grossly mischaracterizes the Eighth Circuit's decision in *Shank v. Carleton College*, 993 F.3d 567 (8th Cir. 2021). The government admits that the opinion expressly states—just as the School Board says it does—that a Title IX plaintiff must "demonstrate a 'causal nexus' between the college's conduct and the student's experience of sexual harassment or assault." *Id.* at 573. But it then suggests that *Shank* left open the possibility of liability for "post-notice harms *other than* harassment." U.S.Br.15 (emphasis added). Not so. What the Eighth Circuit actually said was that "[e]ven assuming" and "accepting" there had been "sexual harassment for purposes of Title IX liability," the plaintiff offered no evidence showing that the school had caused such hypothetical abuse. 993 F.3d at 576. Contrary to the government's assertion, *Shank* consistently requires—in direct conflict with the Fourth Circuit—that a school itself have caused actionable harassment for there to be implied Title IX liability.

The government also fails in its effort to explain away the Eight Circuit's earlier decision in *K.T. v. Culver-Stockton College*, 865 F.3d 1054 (8th Cir. 2017). It points out that *K.T.* quotes the "make them . . . vulnerable" language from *Davis*. U.S.Br.15. But that proves nothing. The question is what the Eighth Circuit interpreted that language to mean. And though the government pointedly ignores *that* part of the opinion, it is decidedly in conflict with the Fourth Circuit. *K.T.*, 865 F.3d at 1058 (school's response must have "caused the assault"); *ibid.* (schools must "have more than after-the-fact notice of

a single instance in which the plaintiff experienced sexual assault").

The government's treatment of Ninth Circuit cases is similarly flawed. As with the *K.T.* decision, the government merely points out that the Ninth Circuit in *Reese v. Jefferson School District No. 14J*, 208 F.3d 736 (9th Cir. 2000), quotes the "make them . . . vulnerable" language from *Davis*. U.S.Br.15. But again, that proves nothing. The question is what the Ninth Circuit interpreted that language to mean. And again, *that* part of the opinion is plainly in conflict with the Fourth Circuit. *Reese*, 208 F.3d at 740 (no liability because "no evidence that any harassment occurred after the school district learned of the plaintiffs' allegations").

Karasek v. Regents of University of California, 956 F.3d 1093 (9th Cir. 2020), is no more helpful to the government than it was to Jane. That case was decided on grounds other than those at issue here, so it simply did not implicate the circuit split, which it in any event expressly acknowledges. *Id.* at 1106 n.2.

Finally, the government admits that the Sixth Circuit's opinion in *Kollaritsch v. Michigan State University Board of Trustees,* 944 F.3d 613 (6th Cir. 2019), *cert. denied*, 141 S. Ct. 554 (2020), conflicts with the Fourth Circuit, but claims the decision has been materially narrowed by two recent opinions. That is incorrect.

The first case—*Doe v. Metro. Gov't of Nashville & Davidson Cty.*, 35 F.4th 459 (6th Cir. 2022), *rehr'g en banc denied*, No. 20-6225, 2022 WL 3221938 (Aug. 5, 2022)—does not implicate the part of *Kollaritsch* that conflicts with the Fourth Circuit. *Kollaritsch*'s most prominent conclusion was its rejection of the argument adopted by the Fourth Circuit below—specifically,

"that the isolated phrase *make them vulnerable* means that post-actual-knowledge *further* harassment is not necessary." 944 F.3d at 622. But in addition to holding that there must be post-notice harassment, *Kollaritsch* also held that such "harassment must be inflicted against the same victim." *Id.* at 621–622 (cleaned up). It is this latter holding only—not at issue here—that the *Nashville* court recently limited to the university context: "[W]e decline to extend *Kollaritsch*'s same-victim requirement to a Title IX claim in a high school setting." *Nashville*, 35 F.4th at 468; *see also id.* at 473 (Guy, J., dissenting) (disagreeing that harassment by "third parties" could "satisfy the requirement of *further* post-actual-notice harassment").

The government and Jane both vastly overread *Nashville*. U.S.Br.14; Resp.Suppl.Br.1. As one court recently explained in rejecting an identical reading of the case, "Plaintiff's argument that [*Nashville*] limited [*Kollaritsch*] to claims brought against universities, as opposed to high schools[,] overstretches the holding of that decision." *Doe v. Plymouth-Canton Cmty. Sch.*, No. 19-10166, 2022 WL 1913074, at *9 (E.D. Mich. June 3, 2022). Thus, *Nashville*'s "clarifi[cation] that high school students can make out a claim of deliberate indifference to sex-based harassment where a plaintiff asserts that sex-based harassment happened to more than one student . . . is inapplicable in this case because [Jane] does not allege that [Jack] harassed other students." *Ibid.* What is more, even that "inapplicable" holding is expected to be challenged in a forthcoming petition for certiorari.

The government also seeks to marginalize *Kollaritsch* by pointing to a recent Sixth Circuit holding that the "post-notice harassment requirement" does not "appl[y] to teacher-student harassment claims." *Wamer v.*

Univ. of Toledo, 27 F.4th 461, 469 (6th Cir. 2022), *cert. pending*, No. 22-123 (U.S. docketed Aug. 9, 2022). But as the School Board has previously noted, Reply.4, *this* case does not involve teacher-student harassment. And if anything, *Wamer* supports certiorari here, as it squarely refutes Jane's and the government's attempts to mischaracterize the holdings of the Eighth and Ninth Circuits. 27 F.4th at 466–467 (noting that post-notice harassment has "divided our sister circuits," and contrasting the First, Tenth, and Eleventh Circuits with the Eighth and Ninth).

Wamer also supports certiorari here because it provides a glimpse into what the future holds if this Court declines to intervene. Within just a few months of the filing of the petition here, the Sixth Circuit turned a two-dimensional split into three-way chaos, creating nuances within this issue that no other court has ever suggested. And now a petition for certiorari has been filed in that case by the Ohio Attorney General, supported by nine *amici* States, urging this Court to grant review both here and in *Wamer*. Br. of *Amici Curiae* States of Utah [et al.] in Supp. of Pet'r at 14, *Univ. of Toledo v. Wamer*, No. 22-123 (filed Sept. 8, 2022). Contrary to the government's and Jane's suggestions, the developments in the Sixth Circuit do not show this issue is unworthy of review. Quite the opposite. They underscore that the confusion in the lower courts is only going to get worse, and that schools across the country will continue to cry out for a clear national rule from this Court. Because only this Court can authoritatively interpret *Davis*, it should intervene now and put an end to this long-simmering conflict.

B. The decision below is wrong.

The government also urges this Court to deny certiorari because the decision below is correct. But it is not, and the government's argument to the contrary is flawed in numerous respects.

For example, the government first points to Title IX's text, ostensibly as evidence of the statute's breadth. U.S.Br.7–8. But the analysis of a judicially implied private right of action does not "[s]tart with the text" as the government suggests. U.S.Br.7. "Because th[is] cause of action was inferred by the Court [itself], the usual recourse to statutory text . . . will not enlighten our analysis." *Franklin v. Gwinnett Cty. Pub. Sch.,* 503 U.S. 60, 71 (1992). The answer does not turn merely on "defin[ing] the scope of the behavior that [the text of] Title IX proscribes," *Davis*, 526 U.S. at 639, but rather on how this Court has exercised its "measure of latitude to shape a sensible remedial scheme" and "fashion the scope of [the] implied right," *Gebser*, 524 U.S. at 284.

So the government's attempt to use the statutory text to expand liability beyond "'subject[ing]' students to 'harassment,'" U.S.Br.11, is flatly incorrect. *Davis* is what defines the scope of liability for damages in a private suit for student-on-student harassment. And under *Davis*, that liability is limited to only those circumstances where a school's "deliberate indifference 'subject[s]' its students to harassment." 526 U.S. at 644.

When the government finally turns to *Davis*, it gets that wrong, too. The government reads *Davis*'s requirement that a school "'cause [students] to undergo' harassment or 'make them liable or vulnerable' to it," *id.* at 645 (cleaned up), as allowing two alternative paths to liability. U.S.Br.11. Fair enough. But under

both paths, there must be *actual* harassment, not just *possible* or *potential* harassment, as the government suggests. That is made indisputably clear in the very next paragraph of *Davis*, which explains that "[t]hese factors combine to limit a recipient's damages liability to circumstances wherein the recipient exercise substantial control over both the harasser and the context *in which the known harassment occurs*." 526 U.S. at 645. That sentence plainly contemplates liability only where there is *actual* harassment attributable to a funding recipient.

Finally, the government wrongly gives short shrift to the policy and administrative concerns raised by the Fourth Circuit's rule and identified by the School Board, its *amici*, and the dissenting judges below. Pet.28–33; Sch.Bd.Ass'ns.Br.13–24; Pet.App.71a; Pet.App.83a. Among other things, Judge Wilkinson warned that "every peer-on-peer incident" is now "open to a 'response suit' designed to probe its aftermath." Pet.App.65a (Wilkinson, J., dissenting from denial of rehearing en banc). He was right. Citing the decision below, courts are sending to trial private suits for money damages even where the government's resolution of an administrative complaint years earlier, on the same facts, established that the school "conducted a prompt, thorough, and impartial investigation." *Doe v. Putney*, No. 3:18-CV-00586, 2022 WL 3335774, at *6 (W.D.N.C. Aug. 12, 2022).

C. This case is an effective vehicle.

The government echoes Jane's claims of a "vehicle problem," but fares no better than she did.

Like Jane, the government notes that this issue was not debated "in the district court or in [the School Board's] briefs before the panel." U.S.Br.17. But it

fails, like Jane, to explain why that matters. After all, "the court below passed [up]on the issue presented," *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991), and the government does not deny that the issue was fully vetted by the parties and every sitting judge of the Fourth Circuit in the en banc process.

The government's next contention (again echoing Jane) is that the School Board made a "*potential* concession" at oral argument below. U.S.Br.17 (emphasis added). But as reflected in the government's careful phrasing, it's clear that the government recognizes the record is ambiguous at best, as the School Board has explained. Reply.17. And for that reason, like Jane, the government stops well short of arguing that there is anything close to estoppel or any other actual legal impediment to this Court's review.

In the end, the government's real complaint appears to be its speculation that Jane "could have shown that she suffered post-notice harassment," had she known it would be relevant. U.S.Br.17. But the government's contrived concern is easily laid to rest. Under direct questioning by the Fourth Circuit, Jane's counsel denied that "any harassment was caused by the school's indifference," and confirmed there was not "any evidence that the harassment continued after th[e] one incident." Oral Arg. at 1:05–33, https://www.ca4.uscourts.gov/OAarchive/mp3/19-2203-20210125.mp3; *see also* Reply.9 & n.5. Indeed, this *actual* concession by Jane's counsel is unsurprising, as it would have made little sense to have held back evidence of *any* harassment—pre- or post-notice—if Jane actually had it.

II. This Court should grant certiorari to clarify that a subjective standard applies to the "actual knowledge" requirement.

The government separately urges this Court to deny certiorari on the second question presented, but it is wrong on that front, too.

For starters, there is no lack of clarity or "retreat" on the question presented, contrary to the government's suggestion. U.S.Br.17, 22. It was because Jane misconstrued the issue, BIO.28, that the School Board's reply offered clarification. The question has always been whether the requirement of "actual knowledge" in a private action under *Davis* is met only when school officials actually understand the factual allegations to involve actionable harassment. Reply.10.

Next, the government is also incorrect about the circuit split on this question. U.S.Br.22. The government summarily dismisses *Doe v. St. Francis School District*, 694 F.3d 869 (7th Cir. 2012), and *Shrum ex rel. Kelly v. Kluck*, 249 F.3d 773 (8th Cir. 2001), because neither expressly mentioned a "subjective" standard. U.S.Br.22. But that is effectively what the decisions adopted, which is why the Fourth Circuit itself acknowledged a split below. Pet.App. 16a. In *Shrum*, the Eighth Circuit found no "actual knowledge" where school officials were aware of reports of "sexual misconduct" but found them "inconclusive." 249 F.3d at 780, 782. And in *St. Francis*, the Seventh Circuit similarly held that school officials lacked "actual knowledge" where they heard suspicions of a teacher-student relationship but did not understand those suspicions to describe "anything illegal." 694 F.3d at 872.

As for *Rosa H. v. San Elizario Independent School District*, 106 F.3d 648 (5th Cir. 1997), the government is correct that it "predates *Gebser*," U.S.Br.22, but that does not make the decision irrelevant or "incorrectly" decided, *ibid*. In fact, *Gebser* affirmed a Fifth Circuit decision that "rel[ied] in large part" on *Rosa H.* 524 U.S. at 280. And in doing so, this Court itself cited approvingly to *Rosa H. Ibid.*

The government's main objection to certiorari, once again, is that it agrees with the Fourth Circuit's decision below. U.S.Br.20–21. As usual, that is a weak basis for opposing certiorari where there is a clear circuit split, as here.

But the government is also wrong. As the School Board has explained, it is impossible to reconcile the Fourth Circuit's objective standard with this Court's rejection of "constructive notice," *Gebser*, 524 U.S. at 285, and "a negligence standard," *Davis*, 526 U.S. at 642. The government apparently disagrees that the Fourth Circuit imposed the very "should have known" standard expressly refused in *Gebser* and *Davis*. *See, e.g.*, *Davis*, 526 U.S. at 642. But that is exactly what the court of appeals did. It held that an official has "actual knowledge" so long as a hypothetical "reasonable official would construe [a complaint] as alleging misconduct prohibited by Title IX." Pet.App.19a. That is the textbook definition of "should have known."

Finally, the government suggests this case is a "poor vehicle" because it is "unlikely" the School Board "could prevail even if actual knowledge were assessed subjectively." U.S.Br.22. This makes no sense. A jury already *found for the School Board* on this very issue. Pet.App.89a.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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