IN THE SUPREME COURT OF THE UNITED STATES

No. A-___

FAIRFAX COUNTY SCHOOL BOARD,
Applicant.

v.

JANE DOE,
Respondent.

APPLICATION TO THE HON. JOHN G. ROBERTS, JR. FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Pursuant to Rules 13.5 and 30.2 of this Court, Applicant Fairfax County School Board (the "School Board") hereby moves for an extension of time of 45 days, to and including Thursday, January 13, 2022, within which to file a petition for a writ of certiorari to review the judgment in this case. A panel of the United States Court of Appeals for the Fourth Circuit rendered a decision on June 16, 2021, App., *infra*, 1a–39a, and the court denied en banc rehearing on August 30, 2021, *id.* at 40a–74a. Unless extended, the deadline to file a petition is Monday, November 29, 2021. This Court has jurisdiction to review the decision under 28 U.S.C. § 1254(1).

In support of its request, the School Board states as follows:

1. This case raises important questions about the scope of liability under Title IX's implied right of action for school administrators responding to an isolated instance of student-on-student sexual harassment. It arises from a sexual

encounter between two Fairfax County Public Schools students, Jane Doe and Jack Smith, during a school band trip. School officials' investigation found that Doe and Smith had engaged in mutual sexual touching, for an extended period, on a bus filled with students and chaperones. App., *infra*, 5a. They accepted Doe's explanation that she participated in the sexual activity because she did not know how to say no, and concluded that Doe had participated willingly. Doe's mother later insisted that Smith's touching of Doe constituted an assault and that Smith should be disciplined. *Id.* The school disagreed, based on the evidence it had collected, but provided Doe with numerous accommodations. *Id.* at 6a. Smith had no further contact with Doe, except that he remained in her band class until he graduated just over two months later.

A year later, Doe sued the School Board under Title IX, alleging that Smith had sexually assaulted her during the band trip and that school officials had been deliberately indifferent. *Id.* After a two-week trial, involving more than two dozen witnesses, the jury returned a verdict for the School Board on special interrogatories. The jury concluded that Smith had subjected Doe to sexual harassment and that the single incident was so severe, pervasive, and objectively offensive that it denied her equal access to educational opportunities. *Id.* at 7a. The jury found, however, that school officials did *not* have "actual knowledge" of the harassment. *Id.* As a result, the jury did not reach the question whether the School Board acted with deliberate indifference. *Id.* Judgment was entered for the School Board, and Doe appealed.

2. In a published decision, a divided panel of this Court reversed and remanded the case for a new trial. The majority held that a "school may be held liable under Title IX based on a single, pre-notice incident of severe sexual harassment, where the school's deliberate indifference to that incident made the plaintiff more vulnerable to future harassment or otherwise had the combined systemic effect of denying equal access to a scholastic program or activity." *Id.* at 27a (cleaned up). The majority also concluded "that a school's receipt of a report that can *objectively* be taken to allege sexual harassment is sufficient to establish actual notice or knowledge under Title IX—regardless of whether school officials *subjectively* understood the report to allege sexual harassment or whether they believed the alleged harassment actually occurred." *Id.* at 7a–8a (emphases added). The majority rejected several alternative grounds for affirmance. *Id.* at 21a–32a.

Judge Niemeyer dissented. He would have affirmed on the ground that, because the incident "was a one-time act of sexual misconduct," which "the school learned of . . . only after the fact, with no opportunity to prevent it," the School Board could not be liable under Title IX because "no school conduct, or lack thereof, *caused* any sexual harassment." *Id.* at 38a (Niemeyer, J., dissenting). While acknowledging that "[c]ourts of appeals have actually divided on the issue of whether a single, isolated incident of pre-notice harassment may be sufficient to trigger Title IX liability," the majority rejected Judge Niemeyer's view and held that post-notice harassment was not necessary. *Id.* at 26a n.12.

The School Board petitioned for rehearing en banc, which the Court denied

by a 9–6 vote. App., *infra*, at 40a-74a. The Court's 35-page denial order included three opinions: Judge Wynn wrote to concur in the denial of rehearing en banc, and Judges Wilkinson and Niemeyer each filed a dissenting opinion. Judge Wilkinson expressed his hope that "each of the[] opinions will assist the Supreme Court when it ultimately resolves an issue of great importance to school districts across our country." *Id.* at 57a n.1 (Wilkinson, J., dissenting). A divided panel later denied the School Board's motion to stay the court's mandate pending the School Board's filing of a petition for a writ of certiorari. App., *infra*, at 75a-76a.

3. The School Board anticipates filing a petition for a writ of certiorari regarding two issues dividing the Fourth Circuit here and courts of appeal elsewhere: (1) whether the implied right of action under Title IX allows liability to be imposed on a funding recipient even if its acts or omissions cause no sexual harassment, and (2) whether the actual-knowledge element of a Title IX claim is governed by an objective or subjective standard. The resolution of both issues is important not only to the School Board—which governs one of our nation's largest school systems—but to more than 20,000 school districts and postsecondary institutions in the United States.

In *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629 (1999), this Court assured school systems that Title IX liability would generally not attach to "a single instance of one-on-one peer harassment" because it was unlikely to have "a systemic effect on educational programs or activities." *Id.* at 653. But the panel here "str[uck] out on a new course for school liability under Title IX, imposing what

sounds very much like strict liability, which th[is] Court has rejected." App., *infra*, at 74a (Niemeyer, J., dissenting). Its decision further entrenches the "deep[] split on whether Title IX and Supreme Court precedent can be read to impose liability in these circumstances." *Id.* at 64a (Wilkinson, J., dissenting).

4. The School Board's undersigned counsel of record, Elbert Lin, respectfully requests a 45-day extension of time, to and including January 13, 2022, within which to file a petition for a writ of certiorari. The undersigned did not represent the School Board below and requires additional time to become familiar with the record, research the legal questions presented, and prepare a petition that fully addresses the complex and far-reaching issues raised here. The undersigned recently has had significant briefing and oral argument obligations—including a petition for a writ of certiorari in *Loughry v. United States*, No. 21-581 (U.S.); an amicus brief in *Sackett v. EPA*, No. 21-454 (U.S.); oral argument in B.R. v. F.C.S.B., No. 21-1005 (4th Cir.); response briefs in *Corder v. Antero Resources Corp.*, No. 21-1715(L) (4th Cir.), and *Serna v. Northrop Grumman Systems Corp.*, No. 21-55238 (9th Cir.); and preliminary injunction briefing in *Oklahoma v. Department of the Interior*, No. 5:21-cv-00719-F (W.D. Okla.)—and has numerous upcoming deadlines in this Court, the Ninth Circuit, the West Virginia Supreme Court of Appeals, and the Western District of Oklahoma.

For the foregoing reasons, the School Board requests that a 45-day extension of time, to and including Thursday, January 13, 2022, be granted within which the School Board may file a petition for a writ of certiorari.

Respectfully submitted,

Elbert Lin
Counsel of Record
HUNTON ANDREWS KURTH LLP
951 E. Byrd Street, East Tower
Richmond, Virginia 23219
elin@HuntonAK.com
804-788-8200

November 12, 2021