No. 21-968

In The
Supreme Court of the United States

FAIRFAX COUNTY SCHOOL BOARD,
Petitioner,

v.

JANE DOE,
Respondent.

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

BRIEF OF AMICI CURIAE VIRGINIA SCHOOL BOARDS ASSOCIATION, NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, AND SOUTH CAROLINA SCHOOL BOARDS ASSOCIATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether a school may be liable for damages in a judicially implied private action under Title IX based on sexual harassment that the school's own conduct did not cause.

2. Whether the "actual knowledge" requirement for imposing monetary liability under Title IX is satisfied where school officials lacked a subjective belief that any harassment occurred.

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INTEREST OF *AMICI CURIAE*[*]

The Virginia School Boards Association (VSBA) is a voluntary, nonpartisan organization whose primary mission is the advancement of K-12 education in Virginia. Every public school board in the Commonwealth of Virginia is a member of VSBA. The VSBA promotes excellence in public education through training, advocacy, and services. It also supports school boards by providing information and guidance related to compliance with state and federal laws, including Title IX.

The North Carolina School Boards Association (NCSBA) is a nonprofit organization formed to support local school boards across North Carolina. Although participation is voluntary, all of the 115 local boards of education in North Carolina are members, as is the school board for the Eastern Band of the Cherokee Nation. The NCSBA advocates for the concerns of local school boards in North Carolina, in federal courts, and in legislatures. There is no other entity that represents the interest of the North Carolina boards of education or that has the same understanding of matters affecting them.

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[*] Pursuant to Rule 37.6, *amici curiae* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties were timely notified pursuant to Rule 37.2(a) of *amici curiae*'s intent to file this brief, and all parties have provided written consent to its filing.

Since 1950, the South Carolina School Boards Association (SCSBA) has served as the unified voice of school boards governing South Carolina's K-12 public school districts. Membership consists of all 79 school boards across South Carolina, but the SCSBA also provides resources to a number of non-traditional education entities such as the South Carolina School for the Deaf and Blind. The SCSBA is a membership-driven, non-profit organization that provides a variety of board services, ranging from policy resources to training for members, and represents the statewide interests of public education through legal, political, community and media advocacy. As a legal advocate for public school districts, the SCSBA represents the interests of its members in supporting and enhancing elementary and secondary education in matters before the state and federal courts.

INTRODUCTION AND SUMMARY OF ARGUMENT

Sexual harassment and assault are, without question, among schools' most serious concerns. Such behavior is reprehensible in its own right and can profoundly interfere with schools' educational mission. Title IX plays an important role in preventing such conduct in our schools and reinforces our schools' roles in preventing and responding to such destructive events. The court of appeals' interpretation of the judicially implied private right of action under Title IX, however, threatens to undermine those efforts and saddle public schools with crippling liability and litigation. The decision is wrong, and it warrants this Court's review.

I. This Court's cases make clear that a school may be liable for damages under Title IX only for its *own* misconduct, not for the conduct of its students or other independent actors. See *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629 (1999); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998). Accordingly, while sexual harassment by a student may, in some circumstances, amount to discrimination under Title IX, a school may be liable for damages only where the school's deliberate indifference to known acts of harassment effectively caused it. The court of appeals' decision is inconsistent with those principles.

A. Most fundamentally, the court of appeals erred in holding that a school may be liable for harassment, about which the school had no advance warning, based on a determination that the school's response left the victim vulnerable to future harassment—even if no further harassment ever occurred. That holding is irreconcilable with this Court's recognition that schools can only be held liable under Title IX for their own misconduct, not discrimination by independent actors. The Fourth Circuit reasoned that even a single incident of sexual harassment can deprive the victim of the benefits of educational opportunities and a school's insufficient response can contribute to that deprivation. But it is the harassment itself that is the "gender-oriented conduct" prohibited by Title IX. *Davis*, 526 U.S. at 651. Accordingly, where harassment is not attributable to a school's conduct—as where it occurred without advance warning—Title IX liability cannot follow.

B. The court of appeals further erred by holding that a school may be liable for harassment about

which school officials lacked any subjective awareness. This Court has twice held that a school can be liable under Title IX only for harassment about which the school had actual knowledge. *See Gebser*, 524 U.S. at 289-90; *Davis*, 526 U.S. at 642. The court of appeals worried that, if such actual knowledge were required, schools could evade Title IX liability by simply avoiding obtaining such knowledge. But "actual knowledge" includes circumstances in which an individual lacks substantial doubt about the existence of a fact, even if she avoids reaching the ultimate conclusion. And in other contexts, this Court has further accepted that evidence of "willful blindness" may also support a finding of "actual knowledge." Those means of proving "actual knowledge" protect against bad-faith conduct by schools, without imposing a constructive-knowledge standard.

II. The court of appeals' decision threatens to profoundly interfere with the educational mission of *amici curiae*'s member school boards. Permitting monetary liability to be imposed on schools for unforeseeable sexual harassment unattributable to the school itself risks hindering effective responses to such allegations, is incompatible with the practical realities faced by our schools, and is fundamentally inconsistent with the policies of Title IX itself.

A. The Fourth Circuit's approach, which essentially requires school districts to *guarantee* an environment free from unforeseeable peer harassment, will encourage administrators to take stringent disciplinary action against students accused of misconduct—even if administrators reasonably believe that no such misconduct has occurred or rightly conclude

that no further harassment will occur. While it may be tempting to favor such a better-safe-than-sorry approach, the profound consequences for students wrongly accused of misconduct counsel hesitation. And placing a judicial thumb on the scale in favor of such consequences will inevitably increase litigation from accused students. The result will be to place such schools between a rock and a hard place—in which they must choose between subjecting themselves to potential liability to the alleged victim or to the accused.

B. The Fourth Circuit's decision also evinces a lack of appreciation for the practical challenges schools face when investigating potential sexual misconduct, particularly in cases involving young children. Unlike federal litigants and courts, administrators analyzing these incidents first-hand cannot subpoena text messages or other potentially important documents; they cannot issue search warrants; they cannot compel witness testimony. And, the information schools do obtain, particularly from student witnesses, is often conflicting, rapidly mutating, and heavily influenced by pressure from peers and parents. The possibility of liability based on the potential for future harassment that has not occurred and the "objective" actual knowledge standard invites factfinders to ignore the nuances that school administrators presented with student misconduct allegations must decipher, and to overlook the limitations on the administrators' investigative powers.

C. Finally, the Fourth Circuit's decision is inconsistent with the policies and design of Title IX. Title IX was designed to address systemic, intentional

discrimination primarily through a system of prevention. Unlike Title VII, which "aims centrally to compensate victims of discrimination," Title IX "focuses more on 'protecting' individuals from discriminatory practices carried out by recipients of federal funds" and on preventing recipients from using those funds in a discriminatory manner. *Gebser*, 524 U.S. at 287, 292 (citations and quotation marks omitted). Since sexual harassment was first recognized as a form of gender discrimination prohibited by Title IX, the Department of Education and most federal courts have properly maintained the same preventive focus. The court of appeals' decision does not. Imposing liability on schools for an unforeseen incident of student-on-student harassment may provide some compensation to victims of such harassment, but it is a misguided approach to preventing intentional discrimination by schools.

ARGUMENT

The court of appeals erred in holding that a federal funding recipient may be liable for money damages under Title IX based on student-on-student harassment that the school's own conduct did not cause and about which the school had no actual knowledge. The court's published decision will undermine the efforts of public schools in responsibly and effectively responding to allegations of sexual harassment, it ignores the practical realities facing school officials and administrators who handle that delicate task, and it is inconsistent with the policies and design of Title IX.

I. The Court Of Appeals' Decision Is Wrong

Title IX provides that "no person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). As this Court has recognized, Title IX was enacted pursuant to Congress's authority under the Spending Clause. The legislation functions much like a contract. In exchange for federal funds, "States agree to comply with federally imposed conditions." *Davis*, 526 U.S. at 640 (quoting *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)).

While Congress has expressly authorized only an administrative enforcement scheme for Title IX, this Court has also recognized an implied private right of action for money damages under Title IX. *See Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60 (1992); *Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979). But to avoid imposing liability to which States have not agreed and to avoid frustrating the purposes of Title IX, the Court has narrowly interpreted that judicially implied right. *See Gebser*, 524 U.S. at 284-86.

Among other limitations, this Court has emphasized that a school "may be liable in damages under Title IX only for its own misconduct." *Davis*, 526 U.S. at 640-41. Accordingly, while sexual harassment of a student may, in some circumstances, "rise to the level of discrimination actionable" under Title IX, the Court has made clear that, where the harassment is from another student, schools may be liable under Title IX

only if the school itself has been "deliberately indifferen[t] to known acts of harassment" and "only where th[at] deliberate indifference effectively 'cause[d]' the discrimination." *Id.* at 642-43, 650 (second alteration in original). The Fourth Circuit's decision is inconsistent with those limitations.

A. Title IX Liability Cannot Be Based On Sexual Harassment That Is Not Attributable To The School's Own Misconduct

Most fundamentally, the court of appeals erred in holding that a school may be liable for money damages under Title IX based on an incident of sexual harassment about which the school had no advance warning and which the school's own conduct did not cause. Pet. App. 31a; *see id.* at 28a-31a. This Court made clear in *Davis* that, in order to be liable under Title IX, a school "*itself* must 'exclud[e] [persons] from participation in, . . . den[y] [persons] the benefits of, or . . . subjec[t] [persons] to discrimination under' its 'program[s] or activit[ies]'." *Davis*, 526 U.S. at 640-41 (quoting 20 U.S.C. § 1681(a)) (alterations in original) (emphasis added). Where liability is premised on sexual harassment by a third party, schools can therefore "be liable in damages only where their own deliberate indifference effectively 'cause[d]' th[at] discrimination." *Id.* at 642-43 (first alteration in original) (citing *Gebser*, 524 U.S. at 291). As the Court recognized, this "high standard" is necessary to eliminate the "risk that [a school] would be liable in damages not for its own official decision[s] but instead for its employees' [or students'] independent actions." *Id.* (quoting *Gebser*, 524 U.S. at 290-91).

Consistent with this Court's prior decisions, most courts of appeals to have considered the issue have correctly determined that Title IX liability cannot rest on harassment of which a school had no advance notice or warning. *See, e.g.*, *Kollaritsch v. Mich. State Univ. Bd. of Trs.*, 944 F.3d 613, 622 (6th Cir. 2019) (finding "post-actual-knowledge *further* harassment" necessary for Title IX liability and rejecting the argument that "vulnerability alone is its own causal connection") (emphasis in original); *K.T. v. Culver-Stockton Coll.*, 865 F.3d 1054, 1058 (8th Cir. 2017) (finding no liability without "more than after-the-fact notice of a single instance in which the plaintiff experienced sexual assault"); *Escue v. N. Okla. Coll.*, 450 F.3d 1146, 1155 (10th Cir. 2006) (holding that Title IX claim failed where the plaintiff did "not allege that further sexual harassment occurred as a result of [the school's] deliberate indifference"); *Reese v. Jefferson Sch. Dist. No. 14J*, 208 F.3d 736, 740 (9th Cir. 2000) (finding no liability without "evidence that any harassment occurred *after* the school district" received notice of prior harassment) (emphasis added).

To support its contrary conclusion, the Fourth Circuit relied on a single sentence from this Court's decision in *Davis* explaining that a school may not be held liable under Title IX unless its "deliberate indifference . . . at a minimum, 'cause[s] [students] to undergo' harassment or 'make[s] them liable or vulnerable' to it." *Davis*, 526 U.S. at 645 (second alteration in original) (quoting Random House Dictionary of the English Language 1415 (1996)); see Pet. App. 29a. The court interpreted that sentence as articulating two distinct "theor[ies] of liability," Pet. App. 29a: one

for when a school's callous response to known harassment causes further harassment and a second for when a school's response insufficiently guards against *the possibility* of future harassment, even if no further harassment ever occurs.

That single sentence from *Davis*, however, cannot support liability in a case like this one. Even if this Court intended to articulate two such theories of liability, it is ultimately the harassment itself that may amount to "discrimination" that Title IX prohibits—not the possibility of future harassment. *Davis*, 526 U.S. at 650. Where the only incidents of such discrimination occur without the school receiving any advance knowledge or warning, it is impossible to say that the school's own misconduct *either* caused the discrimination *or* made the victim vulnerable to it.

The Fourth Circuit emphasized that "[e]ven a single incident of sexual harassment . . . can inflict serious lasting harms on the victim" and "deprive the victim of the ability to fully participate in or to benefit from . . . educational opportunities." Pet. App. 30a. That is undoubtedly true. But the court erred in holding that a school may be held liable for those effects where the harassment cannot fairly be attributed to the school's own misconduct. The court reasoned that a school's insufficient response to unforeseen harassment may "further contribute[] to the deprivation of the plaintiff's access to educational opportunities." *Id.* at 31a. But, again, even if the court of appeals' premise is correct, its conclusion does not follow. The judicially implied right of action under Title IX does not create liability any time a student is deprived of the benefits of educational opportunities for any reason,

but only where the funding recipient denies a student such opportunities "on the basis of sex." 20 U.S.C. § 1681(a). It is the harassment itself that is the prohibited "gender-oriented conduct." *Davis*, 526 U.S. at 651. Where harassment is not attributable to a school's own misconduct, Title IX liability cannot follow.

This Court recognized in *Davis* that, "[a]lthough, in theory, a single instance of sufficiently severe one-on-one peer harassment could be said" to deny the victim equal access to educational opportunities, there is no indication in Title IX that Congress intended schools to be liable for such conduct "in light of the inevitability of student misconduct and the amount of litigation that would be invited by entertaining claims of official indifference to a single instance of one-on-one peer harassment." 526 U.S. at 652-53. The Fourth Circuit's decision is irreconcilable with that recognition.

B. Title IX Liability May Only Attach Where A School Has "Actual Knowledge" Of Harassment

The court of appeals compounded its error by further holding that a school may be liable for harassment about which school officials lacked any subjective awareness. In the Fourth Circuit's view, it is sufficient to satisfy the actual knowledge requirement for Title IX liability that a school official "receive[d] a report that can objectively be construed as alleging sexual harassment," regardless of whether that official or any other subjectively understood that the alleged harassment had taken place. Pet. App. 13a; *see id.* at 18a-19a (asking "whether a reasonable official would

construe [a report] as alleging misconduct prohibited by Title IX"). Such an objective, "should have known" standard sounding in negligence is inconsistent with this Court's precedent.

In *Gebser*, the Court rejected the argument that a school could be liable under Title IX for teacher-on-student harassment based on agency principles or constructive notice. 524 U.S. at 285. In doing so, it "declined the invitation to impose liability under what amounted to a negligence standard—holding the district liable for its failure to react to teacher-student harassment of which it knew or *should have known*." *Davis*, 526 U.S. at 642 (citing *Gebser*, 524 U.S. at 283). Instead, "to avoid diverting education funding from beneficial uses where a recipient was unaware of discrimination in its programs," this Court held that "a damages remedy will not lie under Title IX" unless the institution had "actual knowledge" of the alleged misconduct. *Gebser*, 524 U.S. at 289-90.

In *Davis*, this Court extended the actual knowledge requirement to instances of student-on-student harassment, confirming that an educational institution may be liable for such harassment only where "the funding recipient acts with deliberate indifference to *known* acts of harassment in its programs or activities." 526 U.S. at 633 (emphasis added). Throughout its opinion, the Court articulated the standard for liability to attach as one of "actual knowledge" of "harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit." *Id.* at 650, 633. Although the issue of whether

conduct meets the bar of legally actionable harassment has an objective component, the Court made clear that the actual knowledge standard is a subjective one. *Id.* at 642. The Court again distinguished actual knowledge from constructive knowledge and rejected the latter, which would impose liability on school officials who "knew *or should have* known" about in-school harassment, *i.e.*, those who were merely negligent. *Id.*

In this case, the court of appeals worried that, if such actual knowledge were required, "schools involved in Title IX lawsuits could avoid liability simply by arguing that they did not know that the report described sexual harassment." Pet. App. 17a. But those concerns are unfounded. As the court of appeals itself recognized, "actual knowledge" includes circumstances in which an individual "has no substantial doubt about the existence of a fact," even if she avoids reaching the ultimate conclusion. *Id.* at 13a (citation omitted). And in other contexts, this Court has further accepted that evidence of "willful blindness" may "support[] a finding of 'actual knowledge.'" *Intel Corp. Investment Policy Comm. v. Sulyma*, 140 S. Ct. 768, 779 (2020). Both avenues to proving "actual knowledge" protect against bad-faith conduct by schools, without imposing a constructive-knowledge standard that is inconsistent with this Court's cases.

II. The Court Of Appeals' Decision Warrants This Court's Review

If left uncorrected, the court of appeals' decision threatens to profoundly interfere with the educational

mission of public schools. *Amici curiae* do not minimize the gravity of sexual harassment in public schools. We take seriously the need to address allegations of such abuse. But the court of appeals' decision permitting monetary liability to be imposed on schools for sexual harassment unattributable to the school itself risks hindering effective responses to such allegations, is incompatible with the practical realities faced by schools, and is fundamentally inconsistent with the policies of Title IX itself.

A. The Fourth Circuit's Decision Will Incentivize Unwarranted Discipline And Wasteful Litigation

At bottom, the Fourth Circuit's holdings on both questions presented appear to rest on a reluctance to defer to school administrators' determinations about the appropriate response to allegations of sexual harassment. But courts across the country have long recognized that they are not educational experts, and judges have properly expressed reluctance to encroach on administrators' decisions in areas such as regulation of student speech,[2] student discipline,[3] student

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[2] *See, e.g.*, *B.H. ex rel. Hawk v. Easton Area Sch. Dist.*, 725 F.3d 293, 317 (3d Cir. 2013).

[3] *See, e.g.*, *Wise v. Pea Ridge Sch. Dist.*, 855 F.2d 560, 566 (8th Cir. 1988) (discussing the "Supreme Court's decisions which defer to school administrators in matters such as discipline and maintaining order in the schools"); *Doninger v. Niehoff*, 514 F. Supp. 2d 199, 215 (D. Conn. 2007) ("The Court defers to [school administrators'] experience and judgment [regarding student discipline], and has no wish *(cont'd)*

dismissal,[4] and harassment.[5] As one appellate court colorfully put it, judges "make poor vice principals." *Estate of Lance v. Lewisville Indep. Sch. Dist.*, 743 F.3d 982, 996 (5th Cir. 2014). By subjecting schools to liability based on the possibility of future harassment and second-guessing administrators' credibility evaluations, the Fourth Circuit has rejected these sound principles.

The consequences of the Fourth Circuit's approach, which essentially requires school districts to

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to insert itself into the intricacies of the school administrators' decision-making process.").

[4] *See, e.g.*, *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 230 (1985) ("Judicial review of academic decisions, including those with respect to the admission or dismissal of students, is rarely appropriate[.]") (Powell, J., concurring); *Bain v. Howard Univ.*, 968 F. Supp. 2d 294, 297 (D.D.C. 2013) (observing that student dismissal "is a determination that usually calls for judicial deference") (internal citation and quotations omitted).

[5] *See, e.g.*, *Stiles ex rel. D.S. v. Grainger Cnty., Tenn.*, 819 F.3d 834, 848 (6th Cir. 2016) (observing that "courts should avoid second-guessing school administrators' disciplinary decisions") (citing *Davis*, 526 U.S. at 648); *T.C. v. Metro. Gov't of Nashville*, 378 F. Supp. 3d 651, 676 (M.D. Tenn. 2019) (adding that the court "cannot assume that the only acceptable path is the strictest or most aggressive one, employing the harshest possible discipline against perpetrators, the most invasive surveillance of students' activities and communications, and the most rigorous and time-intensive administrative attention to the problem from school personnel").

guarantee an environment free from even unforeseeable peer harassment, will ultimately harm both school systems and the students they are bound to protect. It will encourage administrators to take stringent disciplinary action against students accused of misconduct, even if administrators reasonably believe—as Assistant Principal Hogan did in this case—that no such misconduct has occurred or rightly conclude that no further harassment will occur. The risk that a judge or a jury (armed with the fact-finding powers of the judicial process and faced with a sympathetic potential victim) will second-guess administrators' decision-making and credibility judgments weighs in favor of punishing even dubious possible infractions.

While it may be tempting to favor such a better-safe-than-sorry approach, the consequences for students accused of misconduct counsel hesitation. "A finding of responsibility for a sexual offense can have a 'lasting impact' on a student's personal life, in addition to his 'educational and employment opportunities,' especially when the disciplinary action involves a long-term suspension." *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 400 (6th Cir. 2017) (citation omitted). Indeed, as States (including Virginia) begin to pass legislation requiring institutions of higher education "to note on a student's transcript whether the student was suspended or expelled for sexual misconduct, he may face severe restrictions, similar to being put on a sex offender list, that curtail his ability to gain a higher education degree." Emma Ellman-Golan, Note, *Saving Title IX: Designing More Equitable and Efficient Investigation Procedures*, 116 Mich. L. Rev. 155, 175 (2017) (citations omitted); *see, e.g.*, Va. Code Ann. §

23.1-900. Such requirements could readily be expanded to K-12 schools. And any notation of suspension or expulsion on a student's transcript is likely to raise questions that could lead to similar consequences. In short, "the effect of a finding of responsibility for sexual misconduct on 'a person's good name, reputation, honor, or integrity' is profound." *Doe v. Miami Univ.*, 882 F.3d 579, 600 (6th Cir. 2018) (quoting *Goss v. Lopez*, 419 U.S. 565, 574 (1975)).

Placing a judicial thumb on the scale in favor of such consequences will also inevitably increase litigation from accused students, further straining schools' limited resources. Higher education institutions are already confronting this trend. In the eleven years since the Department of Education issued its now-rescinded 2011 Dear Colleague letter, outlining schools' responsibilities to investigate and address sexual harassment and sexual violence, reverse discrimination cases by accused students against colleges and universities have skyrocketed. *See* Samantha Harris & KC Johnson, *Campus Courts in Court: The Rise in Judicial Involvement in Campus Sexual Misconduct Adjudications*, 22 N.Y.U. J. Legis. & Pub. Pol'y 49, 66 (2019) (noting that federal reverse discrimination filings "jumped to twenty-five lawsuits in 2014; forty-five in 2015; forty-seven in 2016; and seventy-eight in 2017"). Plaintiffs in such cases have alleged that the Dear Colleague letter pressured universities to adopt procedures "designed to convict male students of sexual assault, whether they were guilty or not." *Doe v. Marymount Univ.*, 297 F. Supp. 3d 573, 587 (E.D. Va. 2018); *see Doe v. Purdue Univ.*, 928 F.3d 652, 668-69 (7th Cir. 2019); *Doe v. Baum*, 903 F.3d 575, 586 (6th Cir. 2018). The Fourth Circuit's approach to Title IX liability

would impose comparable pressure on elementary and secondary schools. The result will be to place such schools between a rock and a hard place—in which they must choose between subjecting themselves to potential liability to the alleged victim or to the accused.

B. The Fourth Circuit's Nondeferential Approach Ignores The Practical Challenges Of School Investigations

The Fourth Circuit's decision also evinces a lack of appreciation for the practical challenges schools face when investigating potential sexual misconduct, particularly in cases involving young children. In this case, the Fourth Circuit had the benefit of a thousand-plus-page record, including transcripts of a two-week jury trial. With such a wealth of information, it may be tempting to second-guess the credibility and safety determinations that school administrators evaluating peer harassment allegations must make. But administrators analyzing these incidents first-hand have only a fraction of the investigative tools afforded federal litigants. Schools cannot subpoena text messages or other potentially important documents. They cannot issue search warrants. They cannot compel witness testimony. And, the information schools do obtain, particularly from student witnesses, is often conflicting, rapidly mutating, and heavily influenced by pressure from peers and parents.

Numerous studies have confirmed this phenomenon. *See, e.g.*, Debra Ann Poole, Jason J. Dickinson, & Sonja P. Brubacher, *Sources of Unreliable Testimony from Children*, 19 Roger Williams U. L. Rev. 382

(2014) (collecting studies). Children's statements can be unreliable, and children are highly susceptible to cues (whether intentional or not) provided by adult questioners. *E.g.*, Stephen J. Ceci & Richard D. Friedman, *The Suggestibility of Children: Scientific Research and Legal Implications*, 86 Cornell L. Rev. 33, 34 (2000). Studies show that some children are more accurate than others, and a particular child may provide accurate or inaccurate information depending on the situation. Poole, 19 Roger Williams U. L. Rev. at 392-95. For these reasons, teachers and school administrators, who interact with their students on a daily basis, are better suited than judges or juries to gauge credibility and evaluate students' reports.

This case exemplifies how an "objective" knowledge and future vulnerability standard tempts factfinders to ignore these realities. When Assistant Principal Jennifer Hogan first interviewed her, Doe said that she "felt stuck in [the] situation," but "never said she pulled away." CA.JA 1196:21-25, 1201:1-20.[6] In fact, Doe said she and Smith were "both touching" for about 20 minutes. CA.JA 1258:25-1259:9. Doe was very upset that Smith had a girlfriend, and mentioned the girlfriend several times. CA.JA 1198:13-16. Throughout the interview, Doe seemed calm, and did not indicate that Smith had forced her. CA.JA 1196:13-18. At that juncture, Hogan believed Doe's account, and concluded that Doe had willingly participated in the encounter.

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[6] References to CA.JA-___ are to pages in the Joint Appendix, *Doe v. Fairfax Cnty. Sch. Bd.*, No. 19-2203 (4th Cir. Feb. 7, 2020), ECF No. 19.

Hogan then interviewed Smith, who said Doe had initiated the encounter, she put her head on his shoulder, she "touched [him] first," and she "never gave [him] any indication" that she did not want to participate. CA.JA 1267:9-20, 1219:24-1220:1, 1269:20-1270:6, 1272:19-22. Hogan then interviewed Doe again. During that second interview, Doe indicated for the first time that she "[didn't] think it was consensual." CA.JA 1210:11-17, 1280:2-4. Doe later testified that she believed the encounter was nonconsensual if she did not "explicitly say yes[.]" CA.JA 1772:16-1773:1. Hogan also interviewed two other students Smith had identified as being on the bus, neither of whom had seen or heard anything. CA.JA 1215:19-22, 1182:20-1184:2, 1287:4-14. Based on these first-hand conversations, Hogan concluded that Doe had fully participated in the encounter with Smith and that no sexual assault had occurred. CA.JA 1221:4-13, 1286:3-14. And, in fact, no future harassment occurred.

Other fact patterns demonstrate even more starkly the pitfalls of allowing courts to second-guess school administrators' subjective knowledge about student-on-student interactions. It is not unusual for a student to report an incident that sounds like nonsexual bullying—for example, a shove in the bathroom—that evolves and changes incrementally over time. Particularly once a student's parents become involved, the alleged incident may soon bear little resemblance to the initial report.

An administrator's subjective evaluation of these circumstances, based on first-hand conversations with students and their parents, may look very

different than the fixed and lawyer-polished version of events that reaches a judge or a jury. The possibility of liability based on the potential for future harassment that has not occurred and the "objective" actual knowledge standard invites factfinders to ignore the nuances that school administrators presented with student misconduct allegations must decipher, and to overlook the limitations on the administrators' investigative powers.

C. The Fourth Circuit's Approach Is Inconsistent With Title IX's Preventive Approach

Finally, the Fourth Circuit's decision is inconsistent with the policies and design of Title IX. Title IX was enacted in 1972 to address systemic, intentional discrimination primarily through a system of prevention. The Fourth Circuit's approach to Title IX liability loses sight of the statute's preventive focus approach. Imposing liability on schools for an unforeseeable incident of student-on-student harassment may provide some compensation for victims of such harassment, but it is a misguided approach to preventing intentional discrimination by schools.

Neither Title IX's text nor its legislative history suggests that Congress intended the statute to serve as a vehicle for compensating students for unforeseeable peer harassment. Unlike Title VII, which "aims centrally to compensate victims of discrimination," Title IX "focuses more on 'protecting' individuals from discriminatory practices carried out by recipients of federal funds" and on preventing recipients from using those funds in a discriminatory manner. *Gebser*, 524

U.S. at 287, 292 (citations and quotation marks omitted); *see also Cannon*, 441 U.S. at 704 ("First, Congress wanted to avoid the use of federal resources to support discriminatory practices; second, it wanted to provide individual citizens effective protection against those practices.").

Prevention as a congressional policy choice permeates related federal statutes that address child sex abuse and exploitation. *See, e.g.*, U.S. Department of Justice, The National Strategy for Child Exploitation Prevention and Interdiction: A Report to Congress at 1 (August 2010) ("[T]he goal of this National strategy is to prevent child sexual exploitation from occurring in the first place."); *see also* 42 U.S.C. § 5101 *et seq.* (aimed at supporting states in the prevention of child abuse). Although prevention efforts are costly, they are less costly than the effects associated with investigating and responding to harassment and abuse.

The same preventive approach has been applied under Title IX to sexual harassment, since it was first recognized as a form of gender discrimination prohibited by the statute. The first official policy guidance on sexual harassment for primary and secondary schools was issued in 1997. *See* U.S. Department of Education, Office for Civil Rights, Sexual Harassment Guidance, 62 Fed. Reg. 12034, 12039 (1997). Since

then, numerous detailed advisories and guidance documents have followed.[7] All of these guidance documents emphasize the theme of prevention through policy, training, and reporting requirements. And the United States Department of Education's emphasis on preemptive policies and training is a similarly prominent feature of Title IX's newest implementing regulations. *See* 34 C.F.R. § 106.1 *et seq.*[8]

In keeping with this prevention-focused approach, school districts have devoted, and continue to

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[7] *See* U.S. Department of Education, Office for Civil Rights, Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties (2001), *available at* http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf; U.S. Department of Education, April 4, 2011, Dear Colleague Letter, *available at* http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf; U.S. Department of Education, *Questions and Answers on Title IX and Sexual Violence*, April 29, 2014, *available at* http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf; U.S. Department of Education, April 24, 2015, Dear Colleague Letter, *available at* http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201504-title-ix-coordinators.pdf.; U.S. Department of Education, Oct. 26, 2010, Dear Colleague Letter, *available at* http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.html.

[8] The same is true of many State and local laws. In Virginia, for example, school employees must undergo rigorous criminal background checks, and all teachers seeking licensure or licensure renewals must complete training relating to the recognition and prevention of child abuse. *See* Va. Code Ann. §§ 22.1-296.2, 22.1-296.3.

devote, substantial resources toward preventing sexual abuse and harassment. Where a school district intentionally violates Title IX's standards, imposing liability serves to reinforce those standards and encourage effective prevention. Effectively requiring school districts to *guarantee* an environment free from unforeseeable peer harassment—regardless of the school's responsibility for or actual knowledge of that harassment—does not. As this Court has recognized, nothing in Title IX indicates that Congress contemplated such "unlimited recovery in damages against a funding recipient where the recipient is unaware of [the] discrimination." *Gebser*, 524 U.S. at 285. The Fourth Circuit erred in adopting that approach.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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