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

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

Title IX of the Education Amendments of 1972 provides, in relevant part, 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). "[A] private damages action may lie against [a] school board in cases of student-on-student harassment . . . where the funding recipient acts with deliberate indifference to known . . . harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit." *Davis ex rel. LaShonda D.* v. *Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 633 (1999). Harassment is "known" if the school receives "actual notice" of it. *Id.* at 647. The questions presented are:

1. If a school is deliberately indifferent to reported sexual harassment of a student, and that deliberate indifference "exclude[s the student] from participation in" or "denie[s her] the benefits of" the school's programming, 20 U.S.C. § 1681(a), is the school liable under Title IX, or must the student also experience additional sexual harassment after reporting?

2. If a school receives reports that, as an objective matter, describe sexual harassment of a student by a classmate, does the school have actual notice for purposes of Title IX, or does the school only have notice if it believes the reports are true?

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INTRODUCTION

In the decision below, the Fourth Circuit reaffirmed that a school may be liable under Title IX if it is deliberately indifferent to reported sexual harassment and the student-victim experiences an educational deprivation. This Court held exactly that in *Davis ex rel. LaShonda D.* v. *Monroe County Board of Education*, 526 U.S. 629 (1999). Fairfax County School Board's contention that this unexceptional conclusion requires review is meritless. Neither of the questions in the Board's petition warrants certiorari.

With regard to the first question, the petition is an unsuitable vehicle because the Board waived the issue by endorsing the exact opposite position below: The Board *conceded* before the Fourth Circuit that Title IX imposes liability for educational injuries caused by a school's deliberate indifference to reported sexual harassment even if the student does not experience additional harassment post-notice.

Even aside from this fatal vehicle problem, review of the first question presented is unwarranted because this case, if granted, would not require the Court to resolve the issue. There is also no circuit split worthy of review. Contrary to the Board's representations, only one circuit has come out the other way—and this Court denied review in that case last Term in *Kollaritsch* v. *Michigan State University Board of Trustees*, 141 S. Ct. 554 (2020).

Moreover, the Board's merits argument rests on the false premise that the Fourth Circuit's holding

renders the Board liable for the sexual harassment itself. The court of appeals said no such thing; it held only that the Board could be held liable if its *own* deliberate indifference toward the harassment deprived the victim of educational benefits. Pet. 30a-31a.

The Board's second question fares no better. Ignoring established precedent from this Court, and consensus among the courts of appeals, the Board asks the Court to review the Fourth Circuit's holding that a school has actual notice of sexual harassment when, as in *Davis*, it receives reports describing that harassment. According to the Board, a school receives the notice necessary to trigger its obligation to investigate only once it concludes that sexual harassment has in fact occurred. But no court has adopted the Board's position, which the Fourth Circuit rightly called "nonsensical" and "illogical." *Id.* 17a.

Throughout its petition, the Board fearmongers that the Fourth Circuit's opinion will open the floodgates for Title IX litigation. But numerous other circuits already apply Title IX in accordance with the Fourth Circuit's decision below, and "no such evils of over-litigation have occurred," *id.* 60a n.4, because this Court has already established "a high bar" for liability, *id.* 18a.

STATEMENT OF THE CASE

I. Factual Background

A jury has already found that Jane Doe was sexually assaulted by a classmate, Jack Smith, on a high school band trip in 2017, *id.* 4a, 33a, 82a—a finding the Board did not challenge on appeal, *infra* note 3. The assault was a "serious" one. Pet. App. 33a. Jack "repeatedly touched [Jane's] breasts and genitals and penetrated her vagina with his fingers despite her efforts to physically block him, and . . . he also repeatedly put her hand on his penis." *Id.* 4a.

Shortly after, Jane told friends about the assault, and they in turn told school administrators. Joint App. 383-86, 419-24.[1] The day Jane returned to school, she met with Assistant Principal Jennifer Hogan and a school security officer. *Id.* 1193-11, 1670, 2517-18. During that meeting, Jane provided a written statement about the assault. It read:

> I moved my hand away but [Jack] moved my hand back onto his genitals. I was so shocked and scared that I did not know what to say or do. He then started to move his hands towards me and I tried to block him but he still put his hands up my shirt and down my pants.

Id. 2515. When asked, Jane also said she did not "think it was consensual." *Id.* 2518. Hogan understood that Jane meant she "didn't want to be a participant" and

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[1] This brief refers to the appendix the parties jointly filed before the Court of Appeals as "Joint App."

there was "a lack of consent" to the sexual act. *Id.* 1207-08.

The security officer discouraged Jane from taking legal action, telling her that "there was really nothing [she] could do, that the most that [she] could charge Jack Smith . . . with was battery. . . . He told [her] the school wasn't liable for anything." *Id.* 1745. Hogan understood that, if Jane were to nonetheless report to the police, she would be reporting "sexual harassment." *Id.* 1213.

The administrators also interviewed Jack "to establish facts that perhaps could lead to a criminal offense or sexual harassment pursuant to the student handbook." *Id.* 2030. Jack initially denied Jane's allegation, but then changed his story, admitting that he had "grabbed" Jane and touched her breasts. *Id.* 1332-33.

Nonetheless, when Hogan and her supervising principal discussed "whether this was or wasn't a sexual assault," they concluded they lacked evidence to establish Jack had sexually assaulted Jane. *Id.* 1291.

Soon after, in a different meeting, Jane's mother told Hogan that Jane had been "sexual[ly] assault[ed]" on the band trip. *Id.* 1298-99, 1613. School officials, including Hogan, also received other reports from students and parents that Jane had been a victim of a "non-consenting sexual act" and "sexual harassment." *Id.* 2523, 2526.

In the aftermath of the assault, without the support and accommodations she needed to participate fully in school, Jane's grades dropped. *Id.* 2524-43. Her absences grew. *Ibid.* She avoided parts of the school where she feared she might see Jack. *Id.* 1754. Jane and Jack shared a band class—her assigned seat was right behind his—but Assistant Principal Hogan provided only two options: to avoid Jack, Jane could spend the class sitting alone in a small, windowless practice room, listening to the band practicing without her, or she could drop the class altogether. *Id.* 1614-15, 1753-55. Jane chose the former. *Id.* 1755. She also skipped performing in a concert to avoid Jack. *Id.* 1839-40.

II. Proceedings Below

A. The Trial

Jane sued the Board, alleging it had been deliberately indifferent to her report of sexual harassment in violation of Title IX. *Id.* 34-55. She did not allege the Board was liable for the assault itself, but only for its response. *See ibid.*

After a trial, a jury found that Jack had sexually harassed Jane, and that the harassment had been so severe, pervasive, and objectively offensive as to deprive her of educational opportunities. Pet. App. 81a-82a. The jury also found, however, that the school lacked actual knowledge of the harassment, *id.* 82a—a concept that the district court had failed to explain adequately, despite the jurors' multiple questions during

deliberations, *see, e.g.*, *id.* 23a n.9; Joint App. 2454, 2469, 3294-95, 3300. Accordingly, the jury entered a verdict for the defense without reaching whether the school had been deliberately indifferent to Jane's report of sexual harassment such that it could be held liable under Title IX. Joint App. 3325.

Jane moved for a new trial, arguing that the jury's verdict on actual knowledge was against the clear weight of the evidence. *Id.* 3331. The district court denied that motion. Pet. App. 85a.

B. The Appeal

Jane appealed to the Fourth Circuit. Joint App. 3406. At oral argument, Judge Niemeyer raised an alternative ground for affirmance that the Board had not pressed and the parties had not briefed: Did the fact that Jack had not engaged in additional harassment after Jane's report shield the Board from liability for its deliberate indifference? Oral Arg. 1:05-1:50.[2] Jane's counsel said no. *E.g.*, *id.* 1:51-2:20, 4:18-4:50. Judge Wynn then followed up with the Board's counsel, asking whether, under *Davis*, a school can only be liable if there is post-notice harassment. Oral Arg. 26:40-28:00. The Board responded, "I don't think that's correct." *Id.* 28:00-28:03; *see also* Pet. App. 57a-58a (Wynn, J., concurring in denial of rehearing en banc) (noting the "Board itself recognized at oral argument that a

[2] A recording of the argument is available at https://www.ca4.uscourts.gov/OAarchive/mp3/19-2203-20210125.mp3.

plaintiff need not be harassed *again after* an initial report in order to pursue a Title IX claim").

On June 16, 2021, the Fourth Circuit vacated the verdict and remanded for a new trial because "no evidence in the record supports the jury's finding that the School Board lacked actual notice or knowledge of the alleged harassment." Pet. App. 36a. The Fourth Circuit wrote that "when a school official with authority to address complaints of sexual harassment and to institute corrective measures receives a report that can objectively be construed as alleging sexual harassment, that receipt establishes actual notice of such harassment for Title IX purposes." *Id.* 13a.

That rule, the Fourth Circuit explained, was required by Supreme Court precedent. *Davis* "reversed the dismissal of the plaintiff's complaint, finding that she 'may be able to show both actual knowledge and deliberate indifference' based on the school board's failure to adequately respond to repeated 'complaints' and 'allegations' of misconduct." *Id.* 15a (citing *Davis*, 526 U.S. at 648, 653-54). In doing so, this Court "indicated that complaints, allegations, or reports of gender-motivated harassment (including sexual harassment) are sufficient to show actual notice for Title IX purposes." *Ibid.*

The Fourth Circuit noted *Davis*'s rule was consistent with this Court's earlier opinion about employee-on-student harassment, *Gebser* v. *Lago Vista Independent School District*, 524 U.S. 274 (1998). There, this Court explained "that to be liable under Title IX,

an appropriate person must be '*advised* of' the alleged misconduct." Pet. App. 14a (emphasis added) (quoting *Gebser*, 524 U.S. at 290). The Fourth Circuit also found it significant that *Gebser* used the terms "actual knowledge" and "actual notice" interchangeably. *Ibid.* Because "'knowledge' has several meanings, one of which denotes 'notice,'" the Fourth Circuit reasoned, this Court must have used both terms to connote the meaning of "the more specific term, 'notice.'" *Ibid.* And "'notice' . . . describes the objective 'condition of being warned or notified' of, or having 'received information about,' a fact or circumstance." *Ibid.* (quoting *Notice*, Merriam-Webster, https://www.merriam-webster.com/dictionary/notice). A complaint of sexual harassment, then, would suffice. *Ibid.*

The Fourth Circuit also noted that "[a]ny other rule would lead to absurd results" and that the Board's insistence that "actual notice means a school official's . . . conclusion that the alleged sexual harassment actually occurred" was "nonsensical." *Id.* 17a. "Under Title IX, a school's actual notice of the alleged sexual harassment is what triggers its duty to investigate. It would be illogical to require a school to investigate a complaint alleging sexual harassment only if it has *already* determined that such harassment did in fact occur." *Ibid.* (citation omitted).

Applying its actual notice standard to the record, the Fourth Circuit concluded that the Board had received numerous reports sufficient to establish knowledge. *Id.* 20a-23a. Among these were Jane's written statement describing the assault, Jane's statement to an

assistant principal "that she did not think the sexual contact with [Jack] was consensual," Jane's mother's report of "a sexual assault," and reports from other community members, including an email titled "Need to Report Peer Pressure and Sexual Harassment." *Id.* 20a-21a. "If these facts do not show that the School Board had actual notice," the Fourth Circuit wrote, "we don't know what would." *Id.* 22a.

Finally, the Fourth Circuit rejected the Board's proposed alternative grounds for affirmance: that no reasonable jury could find that the Board acted with deliberate indifference or that Jane was deprived of any educational opportunities. *Id.* 23a-36a.[3] In its analysis, the Fourth Circuit adopted the position that both Jane and the Board had endorsed at oral argument: a school may be liable where its deliberate indifference to known sexual harassment causes an educational deprivation, regardless of whether the plaintiff experiences post-notice further harassment. *Id.* 29a-31a.

Judge Niemeyer agreed that "whether the school received notice of the incident . . . could hardly have been in dispute." *Id.* 39a (Niemeyer, J., dissenting). He dissented, however, because he would have affirmed the verdict on the alternative ground that Jack had not

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[3] Despite the Board and its *amici*'s efforts to trivialize Jane's assault now, the Board did not ask the Fourth Circuit to affirm by reversing the jury's findings that Jack had sexually harassed Jane and that the harassment had been severe, pervasive, and objectively offensive. *See id*. 81a-82a (verdict); App. Ct. Doc. 27, at 52-57 (Mar. 9, 2020) (Board's brief on appeal).

subjected Jane to further harassment after she reported, even though the Board had disclaimed that position. *Id.* 39a-40a.

The Board then petitioned for rehearing en banc. *See* App. Ct. Doc. 59 (June 30, 2021). For the first time, the Board argued that it could not be liable under Title IX because Jack had not sexually harassed Jane again after her reports. *Id.* 13-16. In doing so, the Board reversed its previous position that such further harassment is not required. *See* Pet. App. 52a, 57a-58a. The Fourth Circuit denied the petition for rehearing en banc, *id.* 45a, and the Board's motion to stay the mandate, *id.* 80a. A new trial is scheduled to begin August 9, 2022. D. Ct. Doc. 390 (Mar. 25, 2022).

REASONS FOR DENYING THE PETITION

I. THE FOURTH CIRCUIT'S HOLDING THAT *DAVIS* DOES NOT REQUIRE POST-NOTICE HARASSMENT IS UNWORTHY OF THE COURT'S REVIEW.

There is no reason for this Court to review the Fourth Circuit's conclusion that not every plaintiff must experience post-notice sexual harassment to establish a Title IX claim. As an initial matter, the petition suffers from a fatal vehicle defect: the Board not only forfeited the issue by failing to raise it before the Fourth Circuit panel, but invited the holding by conceding during oral argument that post-notice harassment is unnecessary to hold a school liable for the

impact of its own deliberate indifference on a student's educational access. Moreover, the Board would not be entitled to judgment as a matter of law even if this Court adopted the rule it endorses. The Fourth Circuit's holding is also consistent with the views of the Department of Justice, the Department of Education, and all but one of the courts of appeals to have considered this question. And the Court declined to take up this very question just last Term.

A. This Case Is an Unsuitable Vehicle for Review.

1. The Board's first question presented suffers from a fatal vehicle problem: until recently, even the Board agreed with the Fourth Circuit's legal rule. Over the three previous years of litigation—first at the district court, and then in briefing before the Fourth Circuit panel—the Board made no mention of the argument it advances now. *See, e.g.*, App. Ct. Doc. 27 (Mar. 9, 2020) (Board's brief on appeal); D. Ct. Doc. 306 (Aug. 5, 2019) (Board's brief in support of its motion for judgment as a matter of law); D. Ct. Doc. 148 (May 3, 2019) (Board's brief in support of its motion for summary judgment). And when the issue was raised for the first time during oral argument before the Fourth Circuit, the Board agreed with Jane that Title IX liability does not require post-notice harassment. Oral Arg. 26:40-28:03. It was not until the Board lost before the Fourth Circuit panel that the Board reversed its position. *See* App. Ct. Doc. 59, at 13-16 (June 30, 2021).

In short, the Board asks this Court to grant certiorari to repudiate a legal rule the Board endorsed in this very case. To say the Board has waived the argument in its petition is an understatement; it invited the holding to which it now objects. As a result, this case is an unsuitable vehicle for addressing the question presented. Indeed, similar circumstances have led this Court to dismiss a writ as improvidently granted. In *City of Springfield* v. *Kibbe*, 480 U.S. 257 (1987), this Court dismissed a writ due to "considerable prudential objection to reversing a judgment because of instructions that petitioner accepted, and indeed itself requested," and did not raise with the court of appeals. *Id.* at 259. That the appeals court had passed on the issue unprompted did not excuse the petitioner's flip-flopping. *Ibid.*

Bedrock principles of judicial estoppel foreclose the Board from advancing a position contrary to the one it successfully advanced before the court below. *See New Hampshire* v. *Maine*, 532 U.S. 742, 749-50 (2001). The Board would "derive an unfair advantage" if allowed to "assert an inconsistent position" so late in the litigation. *Id.* at 751. And, because the parties were previously in agreement on this question, they have never briefed the issue in full, and Jane was unable to develop the record below in anticipation of the Board's new legal position. *See infra* pp. 13-14 (explaining how Jane could establish a Title IX claim even if further harassment were required). Denial of the Board's petition, then, is necessary "to protect the integrity of the judicial process." *New Hampshire*, 532 U.S. at

749 (quoting *Edwards* v. *Aetna Life Ins. Co.*, 690 F.2d 595, 598 (6th Cir. 1982)).

2. Even if this Court were inclined to overlook that critical problem, this case would be a poor vehicle because there is an obvious alternative ground for affirming the Fourth Circuit's order remanding the case for a new trial. Resolution of the question presented, then, would be unnecessary and inconsistent with principles of judicial modesty. *See* Stephen M. Shapiro et al., *Supreme Court Practice* § 6-148 (11th ed. 2019) (explaining Court is disinclined to grant certiorari in cases where the question presented need not be reached and "the case would be decided in favor of the respondent no matter how the conflict were resolved").

Courts routinely hold that a harasser's continued presence in the victim's workplace may create an objectively hostile environment. *E.g.*, *Lapka* v. *Chertoff*, 517 F.3d 974, 984 (7th Cir. 2008); *Ferris* v. *Delta Air Lines, Inc.*, 277 F.3d 128, 137 (2d Cir. 2001); *Ellison* v. *Brady*, 924 F.2d 872, 883 (9th Cir. 1991). "So too, if not more so, in a school." *McGinnis* v. *Muncie Comm. Sch. Corp.*, No. 1:11-cv-1125, 2013 WL 2456067, at *12 (S.D. Ind. June 5, 2013).

For that reason, some courts have recognized that, where a student is forced to see or spend time at school with the person who sexually assaulted her, the presence of the harasser not only makes the victim vulnerable to further abuse but may itself constitute hostile environment harassment. *E.g.*, *Kinsman* v. *Fla. State Univ. Bd. of Trs.*, No. 4:15CV235, 2015 WL 11110848,

at *4 (N.D. Fla. Aug. 12, 2015); *Doe ex rel. Doe* v. *Coventry Bd. of Educ.*, 630 F. Supp. 2d 226, 233 (D. Conn. 2009); *see also Stinson ex rel. K.R.* v. *Maye*, 824 F. App'x 849, 858 (11th Cir. 2020) ("Indeed, what gang-rape victim would not have a problem with continuing to sit in class with the three boys who gang raped her with impunity?"); U.S. Statement of Interest at 11-14, *T.F.* v. *Kansas State University*, No. 2:16-cv-02256 (D. Kan. July 1, 2016), https://www.justice.gov/crt/case-document/file/906097/download [hereinafter "U.S. Statement of Interest (Kansas)"] (explaining how presence of the harasser may cause a hostile environment, and collecting cases).

Here, Jane had to share a class with Jack after the assault and feared contact with him at school. *See supra* p. 5. Accordingly, this case would not require the Court to resolve the question presented because, after a new trial, a jury could find for Jane whether or not *Davis* demands post-notice harassment. If the Court wants to take up this issue, it should do so in a case where the victim did not experience a post-report hostile environment attributable to the harasser's continued presence. *See, e.g.*, *Williams* v. *Bd. of Regents of Univ. Sys. of Ga.*, 477 F.3d 1282, 1296-97 (11th Cir. 2007) (victim did not return to school after rape due to school inaction); *Takla* v. *Regents of the Univ. of Cal.*, No. 215CV04418, 2015 WL 6755190, at *2 (C.D. Cal. Nov. 2, 2015) (similar).

B. Only One Federal Appellate Court Has Taken a Position Different than the Fourth Circuit's, and the Court Denied Certiorari in that Case Last Term.

Even putting those vehicle issues aside, the Board asks this Court to address a lopsided split that the Court recently declined to resolve. The only federal appellate court to have taken the Board's position is the Sixth Circuit in *Kollaritsch* v. *Michigan State University Board of Trustees*, 944 F.3d 613, 623-24 (6th Cir. 2019); *see also* U.S. Statement of Interest at 12 n.5, *Thomas* v. *Bd. of Regents of the Univ. of Neb.*, No. 4:20-cv-03081 (D. Neb. June 11, 2021), https://www.justice.gov/crt/case-document/file/1405241/download [hereinafter "U.S. Statement of Interest (Nebraska)"] (noting the "Sixth Circuit stands alone"). And the Court denied certiorari in that case just last Term. *Kollaritsch*, 141 S. Ct. 554.

Since then, only two things happened. First, in this case, the Fourth Circuit adopted the position embraced by the First, Tenth, and Eleventh Circuits. *See Farmer* v. *Kan. State Univ.*, 918 F.3d 1094, 1103, 1106 (10th Cir. 2019); *Fitzgerald* v. *Barnstable Sch. Comm.*, 504 F.3d 165, 171 (1st Cir. 2007), *rev'd and remanded on other grounds*, 555 U.S. 246 (2009); *Williams*, 477 F.3d at 1296. Then, this March, a different panel of the Sixth Circuit refused to apply *Kollaritsch* in a teacher-on-student harassment case, instead explicitly adopting the logic of the Tenth and Eleventh Circuits. *Wamer* v. *Univ. of Toledo*, 27 F.4th 461, 463 (6th Cir.

2022). The Sixth Circuit, then, may resolve the split itself in a future decision.

Attempting to engineer a broader disagreement, the Board misstates the law in the circuits. For instance, the Board says that the Tenth Circuit has adopted its favored rule. Pet. 17-19. However, in an opinion the Board relegates to a footnote, the Tenth Circuit explicitly held that "a Title IX plaintiff is not required to allege that she suffered additional incidents of sexual harassment." *Farmer*, 918 F.3d at 1104. In doing so, the court addressed and distinguished its past cases, including one the Board now cites for its position. *Ibid.* "Neither [previous] case," *Farmer* explained, "held that a Title IX plaintiff was required to allege subsequent actual incidents of sexual harassment had occurred following the school's inadequate response to the victim's complaint." *Id.* at 1106 (discussing *Escue* v. *N. Okla. Coll.*, 450 F.3d 1146 (10th Cir. 2006)). The Board knows this: in its petition for rehearing en banc, the Board acknowledged that the Tenth Circuit had taken the same position as the Fourth. *See* App. Ct. Doc. 59, at 16 (June 30, 2021) (noting "[t]he [Fourth Circuit] majority could have found further support in a Tenth Circuit decision," *Farmer*).[4]

[4] The Fourth Circuit misstated the split, including by missing both *Farmer* and *Kollaritsch*, Pet. App. 29a-30a, 29a n.12. That error is perhaps unsurprising given that the parties had never briefed the matter. In his concurrence to the denial of rehearing en banc, Judge Wynn acknowledged that the Fourth Circuit had now aligned itself with the Tenth. Pet. App. 57a n.3.

The Board is also wrong that the Ninth Circuit has adopted a view on the question here. In 2020, the Ninth Circuit declined to "express [an] opinion on the circuit split." *Karasek* v. *Regents of Univ. of Cal.*, 956 F.3d 1093, 1106 n.2 (9th Cir. 2020). The earlier Ninth Circuit opinion the Board cites concerned harassment about which a high school learned after the end of the victim-plaintiffs' senior year. *Reese* v. *Jefferson Sch. Dist. No. 14J*, 208 F.3d 736, 738 (9th Cir. 2000). Because the students were done with school by the time of their report, they neither experienced further harassment nor were they vulnerable to it. *Id.* at 740. As a result, the court did not need to resolve the question at issue here. *See Farmer*, 918 F.3d at 1008 (distinguishing *Reese*).

The Board misreads the Eighth Circuit, too. That court has not adopted a position on the question presented. As the Department of Justice explained in a recent Statement of Interest urging the majority view, the cases the Board cites do not confront the question posed here because, in both, the plaintiffs' claims failed regardless of whether further harassment was required. U.S. Statement of Interest (Nebraska) at 9-12. One victim was not vulnerable to further harassment because she did not attend the defendant-college at which she was sexually assaulted. *K.T.* v. *Culver-Stockton Coll.*, 865 F.3d 1054, 1056 (8th Cir. 2017); *see also Farmer*, 918 F.3d at 1008 (distinguishing *K.T.*). Another asserted only that her school caused her post-notice "emotional trauma." *Shank* v. *Carleton Coll.*, 993 F.3d 567, 567, 575 (8th Cir. 2021); *see also Doe* v.

Bd. of Trs. of Neb. State Colls., No. 8:17CV265, 2021 WL 2383176, at *4 (D. Neb. June 10, 2021) (explaining "*Shank* does not address" the further harassment question).

Accordingly, there is no division of authority worthy of the Court's review at this time. To the extent that a more concrete circuit split develops in the future, the Court will have opportunities to resolve it then, and in cases without the grievous vehicle problems here.

C. The Fourth Circuit's Decision Is Correct.

There is a reason for the near unanimity among the courts of appeals: the Fourth Circuit's holding is correct. A plaintiff may state a claim under Title IX if her school's deliberate indifference to sexual harassment deprives her of educational opportunities even if she does not experience post-notice harassment. The alternative rule allows schools "one free rape"—a minority position at war with Title IX's text and purpose, and this Court's precedent. Indeed, the Department of Justice has called the Board's view "absurd." U.S. Statement of Interest (Nebraska) at 12 n.5.

1. Title IX forbids sex discrimination in education. 20 U.S.C. § 1681(a). As with any statute, courts' analysis begins with the text. *Bostock* v. *Clayton County*, 140 S. Ct. 1731, 1738 (2020). This Court has repeatedly instructed that Title IX must be "accord[ed] . . . a sweep as broad as its language." *N. Haven Bd. of Educ.* v. *Bell*, 456 U.S. 512, 521 (1982) (citation

omitted); *see also Jackson* v. *Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005) ("[B]y using such a broad term [as 'discrimination'], Congress gave the statute a broad reach.").

The statute's plain text identifies three categories of violations that may give rise to a claim: "No person in the United States shall, on the basis of sex, [1] be excluded from participation in, [2] be denied the benefits of, or [3] be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). "The statute makes clear that, whatever else it prohibits, students must not be denied access to educational benefits and opportunities on the basis of gender." *Davis*, 526 U.S. at 650.

In *Davis*, this Court considered whether a school could be liable under Title IX where its failure to address peer sexual harassment causes such exclusion, denial of benefits, or other discrimination. *Id.* at 643, 650. The Court held that it can, but emphasized that "a recipient of federal funds may be liable in damages under Title IX *only for its own misconduct*." *Id.* at 640 (emphasis added). A plaintiff, then, states a claim against a school for the defendant's "*own* decision to remain idle in the face of known student-on-student harassment," rather than based on the harasser's underlying misconduct. *Id.* at 641.

Accordingly, *Davis* explained, a school can be liable for its own deliberate indifference that "cause[s] students to undergo harassment or make[s] them

liable or vulnerable to it." *Id.* at 645 (citation and alterations omitted). In using the disjunctive, "*Davis* . . . clearly indicates that Plaintiffs can state a viable Title IX claim by alleging alternatively *either* that [the defendant]'s deliberate indifference to their reports of rape caused Plaintiffs 'to undergo' [additional] harassment *or* 'made them liable or vulnerable' to it." *Farmer*, 918 F.3d at 1103 (cleaned up) (quoting *Davis*, 526 U.S. at 645). Vulnerability requires only a potential for harm, not actual harm. *See, e.g.*, *Vulnerable*, Webster's Third New International Dictionary 2566-67 (1993) (defining "vulnerable" to mean "*capable* of being wounded" or "*open* to attack or damage" (emphases added)). A school may be liable, then, when its deliberate indifference "make[s]" the plaintiff "vulnerable" to abuse, regardless of whether further harassment actually occurs. *See Farmer*, 918 F.3d at 1003-04.

That makes sense because continuing harassment is not necessary for a school's deliberate indifference to "exclude[ ]" victims, "den[y]" them the recipient's "benefits," or otherwise "subject[them] to discrimination." 20 U.S.C. § 1681(a); *see also Hall* v. *Millersville Univ.*, 22 F.4th 397, 409 n.4 (3d Cir. 2022) (Nygaard, J.) ("The question is . . . whether [the university's] deliberate indifference to her harassment resulted in her being excluded from participation in, denied the benefits of, or subjected to discrimination under [its] education program."). That is especially clear in cases like this one, where a victim left unprotected by her school's deliberate indifference must sacrifice her own educational opportunities to avoid further harassment. *See, e.g.*,

Wamer, 27 F.4th at 471 (noting terrible choice posed to student-victims absent appropriate school response); *Hernandez* v. *Baylor Univ.*, 274 F. Supp. 3d 602, 613 (W.D. Tex. 2017) (same).

For example, in *Williams*, a student-victim reasonably decided not to return to the University of Georgia after she was gang raped because the school "failed to take any precautions that would prevent future attacks." 477 F.3d at 1297. Because she dropped out, she protected herself from further harassment, but the school's inaction nonetheless "excluded [her] from" and "denied [her] the benefits of" the University. 20 U.S.C. § 1681(a). In *Farmer*, the plaintiffs alleged that, because of their school's inaction after their rapes, they reasonably feared seeing their assailants on campus. *Farmer*, 918 F.3d at 1104-05. That fear then "forced them to take very specific actions that deprived them of educational opportunities," such as missing classes, withdrawing from school activities, and staying home rather than enjoying campus facilities. *Id.* at 1099-1101, 1105.

Similarly, because the Board failed to separate Jane from Jack after the assault, she was forced to limit her own education to avoid seeing him and risking additional abuse. *See* Pet. App. 6a-7a, 34a-35a. For example, she "refrain[ed] from fully participating in band activities[,] . . . instead attending class by sitting in a small practice room by herself," because she was "so uncomfortable being around" Jack. *Id.* at 6a-7a. A reasonable jury could therefore find that the Board's deliberate indifference "excluded [Jane] from

participation in" school, "denied [her its] benefits," or "subjected [her] to discrimination." 20 U.S.C. § 1681(a). The Board would then be liable for "its own misconduct," *Davis*, 526 U.S. at 640, not, as its petition wrongly contends, Jack's assault.

Even the Sixth Circuit has acknowledged that, in some circumstances, a school may be liable where a student must sacrifice her educational opportunities to avoid her harasser. When that court recently declined to apply *Kollaritsch* to employee-on-student harassment cases, it explained that, even absent further harassment, a school's deliberate indifference may imperil a victim's education "because the student is put in the position of choosing to [forgo] an educational opportunity in order to avoid contact with the harasser, or to continue attempting to receive the educational experience tainted with the fear of further harassment or abuse." *Wamer*, 27 F.4th at 471. As this case and others demonstrate, the same may be true when a student is harassed by a classmate.[5]

2. According to the Board, even though "a recipient's deliberate indifference to sexual harassment of a

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[5] *Wamer*'s text-based grounds for embracing *Farmer* and *Williams* are equally applicable to peer harassment cases. *Kollaritsch*'s reasoning does not turn on the identity of the harasser, and *Davis* imported its liability standard directly from *Gebser*, which concerned teacher-on-student harassment and rejected *respondeat superior* liability. *Davis*, 526 U.S. at 642-43. And even if *Wamer* is right that "it can more easily be presumed" that harassment by a teacher will disrupt a student's education, 27 F.4th at 471, that would not mean peer harassment could never, under any circumstances, have a comparable effect.

student . . . constitutes 'discrimination' 'on the basis of sex,' " *Jackson*, 544 U.S. at 174 (quoting *Davis*, 526 U.S. at 643), and even though the Board's deliberate indifference injured Jane in ways expressly forbidden by Title IX's text, she cannot make out a claim because she was not sexually assaulted post-notice. Pet. 15-17. The Board, it appears, would rewrite Title IX as a sexual assault tort under which the only cognizable violation is further sexual harassment. But "only the words on the page constitute the law adopted by Congress and approved by the President." *Bostock*, 140 S. Ct. at 1738.

The Board's rule would also turn *Davis* on its head. *Davis*'s premise is that a funding recipient is liable "only for its own misconduct." *Davis*, 526 U.S. at 641; *see also Gebser*, 524 U.S. at 290-91 (holding liability is premised on "an official decision by the recipient not to remedy the violation" rather than "its [harassing] employees' independent actions"). Yet the Board's proposed rule premises a school's liability on the later misconduct of a separate actor: the harasser. *See Farmer*, 918 F.3d at 1104.

In trying to rewrite this Court's precedent, the Board—like the Sixth Circuit opinion on which it relies—also misapprehends *Davis*'s scope. Without explanation, the Board contends that, when *Davis* referred to "[1] 'caus[ing students] to undergo' harassment or [2] 'mak[ing] them liable or vulnerable' to it," the Court actually meant to draw a distinction between a school's "[1] *commission* (directly causing further harassment)" and "[2] *omission* (creating vulnerability that [actually] leads to further harassment)." Pet. 15-16 (quoting

Kollaritsch, 944 F.3d at 623). In his concurrence to *Kollaritsch*¸ Judge Thapar gave examples to illustrate this supposed distinction: he wrote that a school "causes" sexual harassment "directly" if it "sen[ds] disparaging emails to just its female students," and "makes its students 'vulnerable' to harassment" if it "fail[s] to take any effort to prevent or end ongoing harassment by another student." *Kollaritsch*, 944 F.3d at 628 (Thapar, J., concurring).

But, by its own terms, *Davis* does not encompass "commission" cases; it applies only "[i]f a funding recipient *does not engage in harassment directly*." 526 U.S. at 644 (emphasis added); *see also Simpson* v. *Univ. of Colo. Boulder*, 500 F.3d 1170, 1174-78 (10th Cir. 2007) (Hartz, J., joined by McKay & Gorsuch, JJ.) (explaining why *Gebser* and *Davis* do not apply where a university directly causes sexual harassment through its policies and practices). If a school "commits" sexual harassment, as in Judge Thapar's hypothetical about disparaging emails, its liability stems directly from its own harassing acts. The Board's interpretation of *Davis* therefore renders the "cause to undergo" prong superfluous, because every true *Davis* claim would fall under the "vulnerability" prong. This reading is not only untethered from the language and logic of *Davis*, but incompatible with it.

Besides, there is nothing about the words "cause to undergo" or "make vulnerable to" that suggests a commission/omission distinction. "Cause" and "make" are synonyms and both phrases could refer either to actions or inactions. *See, e.g.*, *Make*, Black's Law

Dictionary (11th ed. 2019) ("1. To cause (something) to exist"); Restatement (First) of Torts § 9 (Am. Law Inst. 1934) (explaining when "a particular act *or omission* may [b]e the legal cause of an invasion of another's interest" (emphasis added)).[6]

3. That Title IX is a Spending Clause statute does not change the answer here. The Spending Clause does not require that every potential violation be "specifically identified and proscribed in advance," *Bennett* v. *Ky. Dep't of Educ.*, 470 U.S. 656, 666 (1985), in a manner akin to qualified immunity. And "the text of Title IX gives recipients notice that intentional discrimination will result in liability." *Hall*, 22 F.4th at 404. "It is for this reason that the Supreme Court has, throughout its Title IX jurisprudence, rejected arguments that *Pennhurst* bars a particular plaintiff's cause of action after finding that a funding recipient's conduct constituted an intentional violation of Title IX." *Ibid.*; *see also Jackson*, 544 U.S. at 182-83 (similar). For example, although Title IX does not mention either retaliation

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[6] Among other problems with the Board's argument is that *Kollaritsch* does violence to the tort principles that it purports to employ. *Recent Case*, Kollaritsch v. Michigan State University Board of Trustees*, 944 F.3d 613 (6th Cir. 2019)*, 133 Harv. L. Rev. 2611, 2615-17 (2020).

The Board also occasionally conflates the first question presented with a different issue: whether a single sexual assault is sufficiently serious to trigger a school's obligations. *E.g.*, Pet. at 2, 8. The Board has not challenged the jury's verdict that Jane's assault was "severe, pervasive, and objectively offensive." *See supra* note 3. The Board's rule would preclude liability absent post-notice harassment even if the victim was repeatedly raped before reporting.

or deliberate indifference to sexual harassment, 20 U.S.C. § 1681, this Court has held that the Spending Clause posed no obstacle to liability for such forms of intentional sex discrimination. *See, e.g.*, *Jackson*, 544 U.S. at 182; *Davis*, 526 U.S. at 649-50.

Here, the Board already knows Title IX prohibits "intentional sex discrimination in the form of a recipient's deliberate indifference to . . . sexual harassment of a student." *Jackson*, 544 U.S. at 173; *see also* Office for Civil Rights, U.S. Dep't of Educ., *Dear Colleague Letter: Harassment and Bullying* 2-3, 6-7 (Oct. 26, 2010), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf (interpreting Title IX to require schools to remedy effects of past harassment). And it is particularly hard to credit the Board's insistence that it could not have known Title IX proscribes deliberate indifference absent further harassment when, until recently, the Board agreed it did. *See supra* pp. 6-7.[7]

4. Because it makes sense as a matter of law and policy, the federal government has consistently endorsed the Fourth Circuit's view of *Davis*. The Department of Justice has repeatedly urged courts to adopt the majority view. U.S. Statement of Interest (Nebraska) at 8-12; U.S. Statement of Interest (Kansas) at 23-24. And the Department of Education's Title IX regulations concerning sexual harassment, which adopt *Gebser* and *Davis*'s "deliberate indifference" standard,

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[7] If this case did turn on interpretation of the Spending Clause, the correct course would be to hold for *Cummings* v. *Premier Rehab Keller, P.L.L.C.*, No. 20-219.

do not require further harassment to establish noncompliance. *See* 34 C.F.R. § 106.44.

Plus, contrary to the Board's handwringing, the Board's preferred rule is not necessary to cabin schools' liability appropriately. This Court has already done so by adopting a "high bar" for damages, Pet. App. 18a: a school may be liable only if it has actual knowledge and if its response is deliberately indifferent, among other conditions, *Davis*, 526 U.S. at 643-52. Accordingly, even though courts have adjudicated *Davis* claims absent a "further harassment" requirement for decades now, plaintiffs find it exceedingly difficult to succeed. *See, e.g.*, Emily Suski, *Subverting Title IX*, 105 Minn. L. Rev. 2259, 2266-78 (2021). Predictably, then, "in the circuits that align with the [Fourth Circuit's] view, no such evils of over-litigation have occurred." Pet. App. 60a n.4.

Nor is a "further harassment" requirement necessary to protect the speech and procedural rights of accused harassers. The Board's rule would not change what constitutes sexual harassment or what schools must do to avoid being deliberately indifferent—which, per *Davis*, does not require any "particular disciplinary action." 526 U.S. at 648. Instead, the rule would condition liability on additional, independent acts of a third party.

This Court has already made clear that cannot be right. Accordingly, it should not grant certiorari on this first question presented.

II. THE FOURTH CIRCUIT'S HOLDING THAT A REPORT OF SEXUAL HARASSMENT CONSTITUTES ACTUAL NOTICE IS UNWORTHY OF THIS COURT'S REVIEW.

The Board also asks this Court to take up a second question related to Title IX's "actual notice" requirement. Unlike the first question presented, this issue was the subject of disagreement before the Fourth Circuit and district court. But there is no split of authority whatsoever on this question. Every circuit agrees that when a school receives a report that, as an objective matter, alleges sexual harassment, it has actual notice of that harassment for purposes of Title IX.

Nonetheless, the Board argues that a school does not have actual notice unless it concludes that the reported sexual harassment in fact occurred. The Board occasionally conflates that view with a second, analytically distinct position that the district court appeared to adopt but every member of the Fourth Circuit panel rejected: that a school has actual knowledge when it receives a sexual harassment report, but only if officials recognize that the conduct alleged constitutes sexual harassment. Regardless, there is no circuit split on either issue because the Board's positions are "absurd," "nonsensical," and flatly inconsistent with *Davis*. Pet. App. 17a (citation omitted).

A. No Circuit Has Adopted the Board's Novel "Actual Notice" Theory.

1. In *Davis*, students' "allegations," "complaints," and "reports of [a classmate's] misconduct" were sufficient to establish actual notice. 526 U.S. at 648-49, 653-54. Unsurprisingly, then, there is no disagreement among the circuits that a school has actual notice when an appropriate school official receives a report describing the sexual harassment at issue in the case. *See, e.g.*, Pet. App. 13a; *I.F.* v. *Lewisville Indep. Sch. Dist.*, 915 F.3d 360, 372 (5th Cir. 2019); *Doe* v. *Galster*, 768 F.3d 611, 614 (7th Cir. 2014); *Papelino* v. *Albany Coll. of Pharmacy of Union Univ.*, 633 F.3d 81, 89 (2d Cir. 2011); *Vance* v. *Spencer Cnty. Pub. Sch. Dist.*, 231 F.3d 253, 259 (6th Cir. 2000); *Murrell* v. *Sch. Dist. No. 1*, 186 F.3d 1238, 1247 (10th Cir. 1999). In no circuit does a school lack actual knowledge because it disbelieves the plaintiff's report. Nor has the Board cited a single case in which a court even entertained the possibility that a school would lack actual notice if it failed to recognize that a report described sexual harassment.

2. The Board once again misstates the law among the courts of appeals. For instance, it represents that the Seventh Circuit has adopted its favored rule. Pet. 27. But that court has expressly held that "[t]o have actual knowledge of an incident, school officials must have witnessed it *or received a report of it*," *Galster*, 768 F.3d at 614 (emphasis added); *see also Gabrielle M.* v. *Park Forest-Chi. Heights Sch. Dist.* 163, 315 F.3d 817, 823 (7th Cir. 2003) ("Courts . . . have focused on reports . . . of inappropriate behavior to

determine when school officials had actual notice."). Likewise, the Fifth and Eighth Circuits have aligned themselves with the Fourth. *See I.F.*, 915 F.3d at 372; *K.T.*, 865 F.3d at 1058.

The Board argues otherwise only by relying on earlier cases involving "pre-assault" liability—an entirely different kind of Title IX claim than the "post-assault" claim Jane advances, and one in which the actual notice analysis necessarily differs. *See* U.S. Statement of Interest (Nebraska) at 4, 7-8 (describing differences between pre- and post-assault claims). "Pre-assault" plaintiffs contend that their schools should have anticipated and prevented the harassment they suffered *before* it was reported. *Ibid.* In the cases the Board cites, such plaintiffs argued their schools had actual notice of a substantial risk of future sexual abuse based on earlier complaints about the abusive teachers' other misconduct—some non-sexual, some toward other students. That, the courts said, was not enough for actual knowledge. *See Doe* v. *St. Francis Sch. Dist.*, 694 F.3d 869, 872 (7th Cir. 2012); *Shrum ex rel. Kelly* v. *Kluck*, 249 F.3d 773, 775-77, 782 (8th Cir. 2001); *see also Farmer* v. *Brennan*, 511 U.S. 825, 839 (1994) (holding that prison warden lacked sufficient knowledge for *Bivens* liability where he did not foresee risk of violence); *Rosa H.* v. *San Elizario Indep. Sch. Dist.*, 106 F.3d 648, 659 (5th Cir. 1997) (adopting similar rule, pre-*Gebser*, for Title IX and remanding to district court for application).

Jane, in contrast, challenges the Board's failure to respond properly to the assault after it occurred and

after she (and others) reported the specific incident to officials. Pet. App. 7a. She does not argue that the Board should have foreseen the assault based on earlier complaints indicating Jack posed a threat to her. Accordingly, the Board's cases are inapposite. *See id.* 12a.[8]

3. The Board also makes much of a supposed tension between the Fourth Circuit's holding and *Intel Corp. Investment Policy Committee* v. *Sulyma*, 140 S. Ct. 768 (2020). *Sulyma* considered when a plaintiff has actual knowledge of an ERISA violation, triggering the statute of limitations. *Id.* at 775. Even if the notice standards for ERISA and Title IX were identical, that opinion provides only further support for the Fourth Circuit's rule. *Sulyma* held that an ERISA plaintiff does not "necessarily ha[ve] 'actual knowledge' of the information contained in disclosures that he receives but does not read or cannot recall reading." *Id.* at 773. Nowhere did *Sulyma* suggest that the plaintiff did not have actual knowledge until he understood that the disclosed information demonstrated a fiduciary breach had in fact occurred. *See id.* at 773, 779.

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[8] The Fourth Circuit noted that *Shrum* might suggest actual notice requires "conclusive evidence" of harassment. Pet. App. 16a. Even if *Shrum*'s dicta on actual notice were correct, the case would be easily distinguishable: *Shrum* is a "pre-assault" case, inapposite for the reasons explained. 249 F.3d at 775-77, 782. And the Eighth Circuit has since clarified that, even for "pre-assault" cases, "reports of sexual harassment" are sufficient for actual knowledge. *K.T.*, 865 F.3d at 1058.

If Board officials denied reading or hearing all the reports lodged by Jane and others, *Sulyma* might be relevant. There is no dispute, though, that Assistant Principal Hogan read Jane's statement describing sexual harassment. Joint App. 1202. There is no dispute that Hogan heard Jane's mother say that Jane had been "sexual[ly] assault[ed]." *Id.* 1298-99, 1613. And there is no dispute that multiple assistant principals received an email from a student reporting the same conduct as "sexual harassment." *Id.* 2523-24. If officials somehow failed to "understand explicit reports of a 'sexual assault' or 'sexual harassment' as, well, reports of sexual harassment," Pet. App. 22a, that does not negate their knowledge of what they read and heard.

B. The Fourth Circuit's Actual Notice Holding Has Minimal Practical Import, Even to This Case.

As noted above, the Fourth Circuit rejected the district court's incorrect view of actual notice, which was distinct from the Board's: The district court appeared to believe a school official has actual knowledge when she receives a report, but only if she understands it is a report of sexual harassment. Pet. App. 87a-88a. To the extent the Board presses that view, the issue is unworthy of review, arising only because of the unusual procedural posture of this case.

In an ordinary case, a reasonable jury is unlikely to credit a school official's testimony that she did not know a report of sexual harassment was a report of

sexual harassment. *See* Pet. App. 22a. Jane's appeal regarding actual notice, however, was subject to a uniquely stringent standard of review. At the close of trial, Jane did not move for judgment as a matter of law on actual notice. *Id.* 20a. As a result, under Fourth Circuit law, the appeals court could order a new trial only if *no* evidence supported the special verdict. *Ibid.* And the district court wrongly believed that Assistant Principal Hogan had testified that she had not understood the reports of Jane's assault to be reports of sexual harassment. *Id.* 87a. If true, that might have been *some* evidence, however implausible, that Hogan had not understood the nature of the complaints. That, then, raised the novel question: Did it matter whether Hogan subjectively understood the reports to describe sexual harassment given that, as an objective matter, they did?

This issue is unlikely to reoccur unless another plaintiff finds herself in the same unusual posture. Indeed, not even Jane's case turns on this issue. As the Fourth Circuit observed, Hogan testified she *did* understand that she had received reports alleging sexual assault. *Id.* 22a n.8.

C. The Fourth Circuit's Decision Is Correct.

1. The Fourth Circuit was correct that a school has actual notice when an appropriate school authority receives a report of the sexual harassment at issue. Pet. App. 10a-19a. And it was correct that all the record evidence demonstrated that the Board had actual

notice in this case. *Id.* 20a-23a. On this, even the dissent agreed: Judge Niemeyer wrote that "whether the school received notice of the incident . . . could hardly have been in dispute." Pet. App. 39a (Niemeyer, J., dissenting). That result is required by this Court's precedent. As explained above, in *Davis*, students' "reports," "complaints," and "allegations" about a classmate's sexual harassment—which the school did not investigate, and so could not have substantiated—were sufficient to establish actual notice. 526 U.S. at 649, 653-54. The Board's rule simply cannot be squared with that outcome.

The Board's criticisms of the Fourth Circuit's reasoning are equally foreclosed by this Court's precedent. In its petition, for instance, the Board takes issue with the Fourth Circuit's observation that *Gebser* and *Davis* use the terms "actual knowledge" and "actual notice" interchangeably. Pet. 25. But those opinions indisputably do. *See, e.g.*, *Gebser*, 524 U.S. at 277, 285, 288, 291-92 (referencing "actual notice" requirement); *Davis*, 526 U.S. at 647 (same).

The Board's attempt to cast the Fourth Circuit's rule as a constructive-knowledge standard fares no better. No one suggests the Board had notice based on what school administrators "should have known." The Fourth Circuit simply held that the information the Board did know is enough. Pet. App. 20a-22a. The distinction between the Board's position and the unanimous legal rule, then, goes to *what* a school must actually (not constructively) know: Must it know of an *allegation* that a student has been sexually harassed,

or must it know that a student has *in fact* been harassed? *Davis* says the former is correct. 526 U.S. at 649.

The Board is also wrong that the Fourth Circuit's holding undermines *Gebser* and *Davis*'s intent requirement. Actual knowledge, of course, is only one element of a Title IX claim. Pet. App. 18a. To be liable, a school must also "intentionally act[] . . . by remaining deliberately indifferent" to the reported harassment. *Davis*, 526 U.S. at 642. In *Davis* the school's "official decision" to "ma[k]e no effort whatsoever either to investigate or put an end to the harassment" satisfied that requirement. *Id.* at 652, 654. That the school could not know the veracity of complaints it refused to investigate did not render its failures unintentional.[9]

2. The Board's proposed rule is "absurd" and "nonsensical." Pet. App. 17a (citation omitted). A standard that turned on whether school officials correctly categorized a report would "create 'perverse incentives' for schools to refrain from training their staff to better identify instances of sexual harassment . . . in order to avoid ever acquiring actual notice." *Ibid.* (citation omitted). Such a rule would be "especially concerning as applied to children, who cannot be expected to articulate

[9] To the extent the Board presses the district court's view that officials must understand that the reports they receive allege sexual harassment, a defendant may engage in intentional discrimination without understanding the legal ramifications of her actions. *See*, *e.g.*, *Kolstad* v. *Am. Dental Ass'n*, 527 U.S. 526, 536-37 (1999) (explaining circumstances in which a defendant might engage in "intentional discrimination" without realizing their conduct constitutes unlawful discrimination).

the sexual abuse and harassment they suffer in the same words as adults." *Ibid.*

"To the extent that the School Board suggests that actual notice means a school official's . . . conclusion that the alleged sexual harassment actually occurred, such a standard would be even more nonsensical," the Fourth Circuit wrote. *Ibid.* "Under Title IX, a school's actual notice of the alleged sexual harassment is what triggers its duty to investigate. It would be illogical to require a school to investigate a complaint alleging sexual harassment only if it has already determined that such harassment did in fact occur." *Ibid.* (citation omitted).

For that reason, it is little surprise that the Board's interpretation of Title IX is inconsistent with the Department of Education's. The Department's regulations define "[a]ctual knowledge" as "notice of sexual harassment or *allegations* of sexual harassment." 34 C.F.R. § 106.30(a) (emphasis added). In doing so, the Department, by its own account, "defin[ed] 'actual knowledge[]' . . . consistent with *Gebser* and *Davis*." Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026, 30,033-34 (May 19, 2020) (codified at 34 C.F.R. pt. 106).[10]

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[10] The Department acknowledged that it adjusted one part of the *Gebser-Davis* definition of "actual knowledge" for purposes of administrative enforcement: It expanded which employees may be considered "appropriate persons" whose knowledge may be

The Board and its *amici* fearmonger that, if a report of sexual harassment establishes actual notice, schools will be under pressure to violate the rights of the accused. Not so. As the Fourth Circuit noted, "a school's actual notice of the alleged sexual harassment . . . triggers its duty to investigate," Pet. App. 17a, not a duty to punish. "If a school becomes aware of an unsubstantiated allegation of sexual harassment, duly investigates it, and reasonably dismisses it for lack of evidence, the school would not be liable since it did not act with deliberate indifference." *Id.* 18a.

Plus, the Board's rule is not necessary to cabin liability appropriately. As explained above, this Court has already established high standards that make it exceedingly difficult for a plaintiff to prevail in a Title IX damages action against a school for mishandling sexual harassment. *See supra* p. 27. If the Board were right about actual notice, the threat of liability would go from slim to nonexistent: In every case, a school could avoid liability by simply refusing to investigate, ensuring it would never gain actual knowledge. Title IX's prohibition on sex discrimination would be rendered meaningless. Pet. App. 17a.

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imputed to the school. *Id.* at 30,033-34. That difference is irrelevant here.

CONCLUSION

The Court should deny the petition for a writ for certiorari.

Respectfully submitted,

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