No. 21-968

IN THE

Supreme Court of the United States

FAIRFAX COUNTY SCHOOL BOARD,

Petitioner,

v.

JANE DOE,

Respondent.

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

REPLY BRIEF

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REPLY BRIEF

The questions presented are "important legal issue[s] that . . . implicate educational institutions across the country." App.78a (Niemeyer, J., dissenting from denial of rehearing en banc). As the amici underscore, thousands of funding recipients have a direct stake in preserving the intentionally "high standard" for liability under Title IX's implied private right of action for money damages. *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629 (1999).

Respondent ("Jane") mainly quarrels with whether, and the degree to which, the courts of appeals are divided on the questions presented. But she is wrong, as explained further below. Among other things, all three judges authoring opinions below (including on both sides of the 9–6 denial of en banc rehearing) noted the deep circuit split on whether post-notice harassment is required for a school to be liable. These judges did not "misstate[] the law." BIO.16. Jane's denial of a circuit split on the second question presented is likewise unconvincing.

Jane's contrived claims of a vehicle problem (regarding the first question presented) are also incorrect. The merits of the issue were clearly passed upon, in both the majority and dissenting opinions, so there is no concern that this Court is being asked to consider anything in the first instance. In any event, Jane's assertion that the School Board previously somehow "endorsed" her position, BIO.11–12, does not withstand scrutiny.

These considerations, discussed in more detail below, well support a grant of certiorari. They are bolstered further still by the fact that the Fourth Circuit was wrong on the merits. Jane contends that

the decision is correct on both counts, BIO.18–27, 33–37, but it is not, for the reasons previously described, Pet.14–17, 22–26. In short, it "subject[s] school districts to liability for incidents they did not cause and could not prevent or foresee" and "is a startling expansion of a statute which gave no notice to unsuspecting funding recipients that any such cause of action lay in wait." Pet. App. 61a–62a (Wilkinson, J., dissenting from denial of rehearing en banc).

The questions here concern not what schools must do under Title IX's primary and express administrative regime, but rather the scope of the private right of action for money damages that this Court has read into Title IX. The decision below ignores the "very real limitations on a funding recipient's liability" under that implied cause of action, and betrays the *Davis* majority's commitment that school systems would *not* face money-damages liability for their students' misconduct, but only for their own deliberate indifference in response to "known" harassment. 526 U.S. at 652. Validating the practical concerns of *Davis*'s four dissenting justices, decisions like the Fourth Circuit's create serious challenges for school systems struggling to balance the rights of accusers and those of the accused while the specter of a huge jury verdict looms. Pet.29–32.

The Court should grant certiorari and reverse.

ARGUMENT

I. This Court should grant certiorari to resolve the deep division in the circuits over whether a funding recipient's conduct must cause actionable harassment to trigger Title IX's implied right of action.

A. The courts of appeals are sharply divided.

The School Board has not "engineer[ed]" a circuit split over whether the implied right of action requires actionable post-notice harassment. BIO.16. To the contrary, a judicial and scholarly consensus recognizes a deep and mature split.

All three judges authoring opinions below noted that the circuits disagree. Judge Wynn stated in his majority opinion that the "[c]ourts of appeals have actually divided on the issue." Pet. App. 29a n.12; *see also* Pet. App. 57a n.3 (Wynn, J., concurring in denial of rehearing en banc). So, too, did Judge Niemeyer in his panel dissent, *see* Pet. App. 43a, and Judge Wilkinson in his dissent from the denial of rehearing en banc, *see* Pet. App. 68a ("Seven circuits have addressed" the issue: the "First, Eleventh, and now the Fourth Circuit" on one side, and "the Sixth, Eighth, Ninth, and Tenth Circuits" on the other).

It also "has not been lost on other courts in recent decisions that the current circuit split is a significant one that is likely ripe for review." Lauren E. Groth, et al., *Giving* Davis *Its Due: Why the Tenth Circuit Has the Winning Approach in Title IX's Deliberate Indifference Controversy*, 98 DENV. L. REV. 307, 328 (2021). Just last month, the Sixth Circuit reiterated that the question has "divided our sister circuits." *Wamer v. Univ. of Toledo*, 27 F.4th 461, 466–467 (6th

Cir. 2022) (aligning the First, Tenth, and Eleventh Circuits against the Eighth and Ninth). A district court likewise noted recently that "the circuit and district courts are split." *Cavalier v. Cath. Univ. of Am.*, 513 F. Supp. 3d 30, 59–60 (D.D.C. 2021) (explaining "one line of authority" includes Sixth, Eighth, Ninth, and Tenth Circuit decisions, while the "competing line of authority" includes First and Tenth Circuit decisions).

Scholars agree too. *See, e.g.*, Pet.21 n.3; Parker Bednasek, *Turning A Blind Eye: The Causation Standard for Title IX Peer Sexual Misconduct Claims*, 70 U. KAN. L. REV. 329, 335–336 (2021) (noting that the First, Tenth, and Eleventh Circuits "have adopted the vulnerability standard," and the Sixth, Eighth, and Ninth Circuits "the further misconduct standard").

In the face of all this, Jane suggests that the Court's denial of certiorari in *Kollaritsch v. Michigan State University Board of Trustees,* 944 F.3d 613 (6th Cir. 2019), *cert. denied*, 141 S. Ct. 554 (2020), proves the absence of a meaningful circuit split. BIO.15. But, of course, a "variety of considerations . . . underlie denials of the writ." *Teague v. Lane*, 489 U.S. 288, 296 (1989) (internal quotation omitted). And the landscape differs now: the decision below deepens the circuit split and is a better candidate for certiorari because it was wrongly decided.

Jane also posits that judges and scholars have all misunderstood the Sixth, Eighth, and Ninth Circuits. But contrary to Jane's assertion, the Sixth Circuit's *Wamer* decision does not create doubt about its position on this issue. BIO.16. Citing "important policy reasons," the court merely "conclude[d] that the more stringent standard for peer-harassment deliberate-indifference claims introduced in *Kollaritsch* should

not apply in the context of *teacher*-student harassment claims." 27 F.4th at 469–471 (emphasis added).

Regarding the Eighth Circuit's decisions, Jane points (at BIO.17–18) to an unpublished district court decision that observed those opinions do not "explicitly side with [particular] [c]ircuits in holding that Title IX requires subsequent harassment." *Doe v. Bd. of Trs. of Neb. State Colls.*, No. 8:17CV265, 2021 WL 2383176, at *4 (D. Neb. June 10, 2021). But it is not important whether those decisions expressly acknowledged the split. Their holdings unquestionably conflict with the Fourth Circuit, as they found the schools' responses "cannot be characterized as deliberate indifference" because the schools did not "*cause[] the assault*." *K.T. v. Culver-Stockton Coll.,* 65 F.3d 1054, 1058 (8th Cir. 2017); *see also Shank v. Carleton Coll.*, 993 F.3d 567, 576 (8th Cir. 2021). Jane argues *Shank* is inapposite because the plaintiff there "asserted only . . . post-notice 'emotional trauma.'" BIO.17. But that is the point: a school must itself have caused actionable sexual harassment. "Linking the college's actions or inactions to emotional trauma the plaintiff experienced in the wake of sexual harassment or assault, even if proven, is not enough." 993 F.3d at 576.

As for the Ninth Circuit, Jane argues *Reese* is distinguishable because the students had graduated by the time harassment was reported. BIO.17. But that just explains why no "harassment occurred after the school district learned of the plaintiffs' allegations," which is why "the school district cannot be deemed to have 'subjected' the plaintiffs to the harassment." *Reese v. Jefferson Sch. Dist. No. 14J*, 208 F.3d 736, 740 (9th Cir. 2000). *Reese*'s legal principle is what matters, not its specific facts. *Karasek v. Regents of University of California* does not help Jane either,

BIO.17; it merely notes that *in that case*, the court had no reason to opine on "the circuit split," 956 F.3d 1093, 1106 n.2 (9th Cir. 2020).[1]

Finally, Jane relies heavily on a statement of interest filed in 2021 by the United States in another case. BIO.15–18. The government's characterization of the circuit split is wrong for the reasons already explained. The statement's only value is that it makes clear there is no reason to delay a grant of certiorari to determine the government's views.[2]

B. There is no vehicle problem.

Jane conjures up what she describes as a "fatal vehicle problem." BIO.11. In support, she primarily contends that the School Board "waived the argument" and "invited the holding to which it now objects." BIO.12. This argument fails.

For starters, it is noteworthy what Jane is *not* arguing. She does not contend that either the alleged waiver or invitation *legally bars* this Court from granting certiorari and considering the first question presented. And for good reason.

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[1] As the School Board has consistently acknowledged, Pet.20 n.2, there are Tenth Circuit decisions on both sides of the issue. *Compare Escue v. N. Okla. Coll.*, 450 F.3d 1146, 1155–56 (10th Cir. 2006), *with Farmer v. Kan. State Univ.*, 918 F.3d 1094, 1103–1104 (10th Cir. 2019). Jane's insinuation that the School Board has sought to hide this fact is belied by her admission that the School Board alerted the en banc Fourth Circuit to *Farmer* because the panel majority had "miss[ed]" it. BIO.16 & n.4.

[2] There also is no reason to delay this case for *Cummings v. Premier Rehab Keller, P.L.L.C.*, No. 20-219. Contrary to Jane's suggestion (BIO.26 n.7), the issue in *Cummings* is not raised here.

As to the alleged waiver, it is plainly no barrier to certiorari because "the court below passed [up]on the issue presented." *Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991). Even assuming a claim was "not raised by petitioner below," this Court "ordinarily feel[s] free to address it, [if] it was addressed by the court below. Our practice permit[s] review of an issue not pressed so long as it has been passed upon." *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (citation omitted).

The issue here was more than "passed upon"—it was robustly deliberated. It was discussed at oral argument; considered and rejected by the majority as a ground for affirmance; examined by Judge Niemeyer in dissent; briefed by the parties on the School Board's petition for rehearing en banc; and hotly disputed by members of the en banc court, spurring three lengthy opinions.

As to the alleged invitation, Jane relies entirely on counsel's ambiguous response to an imprecise question by Judge Wynn: whether it is correct that, following a known sexual assault, if "nothing happens again, then it doesn't matter what the school did, they off [sic] Title IX." Oral Arg. at 27:53–28:00, https://www.ca4.uscourts.gov/OAarchive/mp3/19-2203-20210125.mp3. Counsel responded, "I don't think that's correct." *Id.* at 28:01–03. Contrary to Jane's assertion, this statement hardly "endorse[s]" the Fourth Circuit's erroneous ruling—*i.e.*, that the implied private right of action does not require post-notice harassment for liability. BIO.12. Instead, as the surrounding colloquy shows, counsel merely acknowledged that Title IX's administrative regime independently requires that school officials respond appropriately to allegations of discrimination; they

cannot simply go "off Title IX."[3] Jane's assertion is further belied by counsel's statement in that same colloquy that "Judge Niemeyer was correct" about "liability." *Id.* at 27:31–34. *See, e.g.*, *id.* at 2:29–43 (JUDGE NIEMEYER: "We're looking fundamentally at school board liability, and the liability is based on . . . failure to respond such that the harassment is continued.").

These facts, too, come nowhere close to creating a *legal bar* to certiorari, which is why Jane never argues as much. She cites judicial estoppel cases, but carefully describes them only as presenting "similar circumstances" because they are, on review, plainly inapposite.[4]

What Jane actually contends is that the alleged waiver and invitation make this case "an unsuitable vehicle." But it is unclear why. As described above, the Fourth Circuit fully vetted the merits of this issue in *five* different opinions. It is not as if the panel majority—whose opinion would be under review—

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[3] *See* Oral Arg. at 27:15–21 (explaining a "school official with corrective action authority has to take appropriate steps in response, and that's going to depend on the circumstances"), 28:06–10 (noting "this is not a case where the school system did nothing.").

[4] In *City of Springfield v. Kibbe*, the Court dismissed as improvidently granted because, unlike here, "the petition did not explicitly present the . . . question, and it had not been addressed below." 480 U.S. 257, 260 (1987). As to *New Hampshire v. Maine*, 532 U.S. 742 (2001), *none* of the three factors identified there weighs in favor of judicial estoppel here. The School Board's current position is not "clearly inconsistent" with an earlier position; it did not "succeed[] in persuading a court to accept that . . . earlier position"; and it would not "derive an unfair advantage or impose an unfair detriment on [Jane] if not estopped." *Id.* at 750–751.

punted on grounds of waiver or estoppel. Accordingly, this is not a case where this Court's prudential admonition that it is "a court of final review and not first view" has any bearing. *See, e.g.*, *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 110 (2001).

Finally, Jane argues that the case is a "poor vehicle" because there is an "obvious alternative ground" for affirming the Fourth Circuit's decision. BIO.13. But Jane's suggested alternative ground for affirmance—that Jack's continued school attendance constituted harassment, BIO.13–14—is foreclosed by her concession that no harassment followed the incident.[5] In any event, the Court often grants certiorari where a respondent offers another ground for affirmance. *See, e.g.*, *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 259–260 (2009).

II. This Court should also grant certiorari to resolve the circuit split over whether an objective standard applies to the "actual knowledge" requirement.

In response to the second question presented, Jane likewise quarrels with whether a circuit split exists—even though, again, the Fourth Circuit itself acknowledged one. Pet. App. 16a (citing conflicting authority). She also argues that the issue is "unworthy of review" because it "is unlikely to reoccur" and "not

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[5] *See, e.g.*, Oral Arg. at 1:05–33 (JUDGE NIEMEYER: "Is there any evidence that the harassment continued after this one incident?" COUNSEL: "No, there is not, Your Honor." . . . JUDGE NIEMEYER: "My question is whether any harassment was caused by the school's indifference." COUNSEL: "No, Your Honor."). This concession also undermines Jane's unexplained assertion that she was denied the ability to "develop the record below." BIO.12.

even [her] case turns on this issue." BIO.32–33. She is wrong on all counts.

First, Jane misstates the School Board's position. The School Board does not contend that "actual knowledge" turns on whether officials "conclude[d] that the reported sexual harassment in fact occurred." BIO.28. Rather, the issue is whether officials subjectively understood there to have been "reported sexual harassment"—because that subjective understanding is what makes the harassment, in the words of *Davis*, "known," *see* 526 U.S. at 633–649. To be clear, this requirement has no connection to the truth of any allegations or whether officials believe those allegations. The question is whether officials actually understand the allegations, assuming they are true, as describing actionable harassment.

That issue—whether it is an official's actual *subjective* understanding of a report that matters, or instead the *objective* understanding of a hypothetical person—has divided the courts of appeals. In applying an objective standard, Pet. App. 8a, the Fourth Circuit split from the Fifth, Seventh, and Eighth Circuits.[6] Jane focuses on the wrong issue when she faults the School Board for not citing cases where schools "disbeliev[ed] the plaintiff's report." BIO.29.

Second, Jane wrongly dismisses the School Board's cases as "pre-assault" cases. BIO.30–31. She urges that, unlike in this "post-assault" case, pre-assault cases turn on the foreseeability of harassment. But it is not apparent why foreseeability should change

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[6] *See* Pet.26–28 (discussing *Doe v. St. Francis Sch. Dist.*, 694 F.3d 869, 871–872 (7th Cir. 2012); *Shrum ex rel. Kelly v. Kluck*, 249 F.3d 773, 782 (8th Cir. 2001); *Rosa H. v. San Elizario Indep. Sch. Dist.*, 106 F.3d 648, 658–659 (5th Cir. 1997)).

whether actual knowledge is an objective or subjective standard. Foreseeability may require *more* knowledge—*e.g.*, a "pre-assault" plaintiff may also need to allege that the funding recipient knew the alleged harasser posed a prior substantial risk of harassment—but it does not change the *nature* of the required knowledge.

Third, Jane's attempt to downplay the Fourth Circuit's decision, BIO.32–33, is unavailing. To begin with, the Fourth Circuit's objective approach introduces the very "should have known" standard that this Court has rejected. *Davis*, 526 U.S. at 640. Jane denies that, but she tellingly slips into negligence-type language elsewhere in her brief. *See, e.g.*, BIO.29 (arguing that there should be actual knowledge if a school official "failed to recognize that a report described sexual harassment"). Furthermore, Jane's discussion undermines her own hyperbolic claims that a subjective standard will "render[]" Title IX "meaningless." BIO.37. As Jane herself admits, an official's subjective understanding can be tested by juries, who may not "credit a school official's testimony that she did not know a report of sexual harassment was a report of sexual harassment." BIO.32–33. Likewise, as the School Board previously explained, "actual knowledge" can be shown through evidence of willful blindness. Pet.26.

Finally, Jane incorrectly asserts the Fourth Circuit was nevertheless right because *no* evidence supported the jury's verdict. BIO.33–34. Not so. Ample evidence, including school officials' own testimony, showed they did not understand reports of the incident to be describing harassment. Pet. App. 87a–88a. The jury was entitled to credit that evidence over Jane's conflicting evidence (repeated at BIO.3–5).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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