No. 21-968

In the Supreme Court of the United States

FAIRFAX COUNTY SCHOOL BOARD, PETITIONER

v.

JANE DOE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

Title IX of the Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 363 (20 U.S.C. 1681 *et seq.*), provides 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). This case presents two questions about the scope of Title IX's private damages remedy:

1. Whether a student who proves that she was sexually assaulted by a classmate, that her school had actual knowledge of the assault, and that the school responded with deliberate indifference must also prove that she was subject to additional harassment in order to recover damages for injuries caused by the school's deliberately indifferent response.

2. Whether a school has actual knowledge of a sexual assault for purposes of Title IX if it receives reports that objectively allege that a student was a victim of a sexual assault.

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

1. Title IX of the Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 373 (20 U.S.C. 1681 *et seq.*), provides 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). Sexual harassment, including sexual assault, is one form of discrimination "on the basis of sex." *Jackson* v. *Birmingham Bd. of Educ.*, 544 U.S. 167, 174 (2005) (citation omitted).

In *Franklin* v. *Gwinnett County Public Schools*, 503 U.S. 60 (1992), this Court recognized that a federal funding recipient may face Title IX liability for sexual harassment that a student experiences at the hands of a teacher. *Id.* at 74-75. Several years later, in *Gebser* v. *Lago Vista Independent School District*, 524 U.S. 274 (1998), the Court set out a framework for establishing a school's liability for damages in such cases, holding that the plaintiff must show that the school had "actual knowledge" or "notice" of the harassment and responded with "deliberate indifference." *Id.* at 290. In *Davis* v. *Monroe County Board of Education*, 526 U.S. 629 (1999), the Court further held that a school may be liable for "student-on-student" harassment if it "acts with deliberate indifference to known acts of harassment in its program or activities" and the harassment "is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit." *Id.* at 633.

2. Respondent Jane Doe is a former high school student who attended a school administered by petitioner, the Fairfax County School Board. Pet. App. 3a. During her junior year, Doe was sexually assaulted by a classmate on a school band trip to a music festival in Indianapolis. *Id.* at 4a. On the overnight bus ride to the festival, Doe was seated next to Jack Smith, an older student who draped a blanket over their bodies and then "repeatedly touched her breasts and genitals and penetrated her vagina with his fingers despite her efforts to physically block him." *Ibid.* Smith also "repeatedly put [Doe's] hand on his penis even after she moved it away." *Ibid.* During the assault, Doe felt "frozen in fear" and was "so shocked and scared that [she] did not know

what to say or do." *Id.* at 4a-5a (quoting C.A. App. 1800, 2515).

When the school learned of the incident, Doe told school officials that she did not "think" the sexual activity on the bus was "consensual." Pet. App. at 5a (quoting C.A. App. 1207-1208). She also provided the school with a written account of the assault, explaining that:

> I moved my hand away but Smith 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.

Ibid. (brackets and citation omitted). During Smith's own meeting with school officials, he "initially denied that he touched Doe sexually against her will," although he later admitted that he had "'grab[bed]'" Doe and "touch[ed] her breasts." *Id.* at 5a (quoting C.A. App. 1332-1333).

When the assistant principal charged with investigating the assault first learned of the incident, she was aware that she was dealing with the "possibility" of "sexual assault." C.A. App. 1186-1187. She ultimately concluded, however, that there was insufficient evidence to establish that an assault had occurred. Pet. App. 6a. School officials therefore declined to discipline Smith, *ibid.*, and they stood by their decision even after Doe's mother reiterated that her daughter had been the victim of "a sexual assault." C.A. App. 1299.

Smith remained in Doe's band class until he graduated later that year. C.A. App. 1121-1122. Even though "band had long been an important part of [Doe's] life," she struggled to "fully participate in band activities,"

Pet. App. 35a, in part because she was "terrified of seeing or being near Smith," *id.* at 6a. Doe stopped attending band class for a time, sitting alone "in a small, windowless practice room" until the band director rearranged seats to keep Doe and Smith "as far apart as possible." *Id.* at 34a. And Doe "continued to find it difficult" to "fully participate in her band classes even after Smith had graduated." *Id.* at 7a.

3. Doe filed suit against petitioner under Title IX. Pet. App. 7a. After a trial, a jury found that Smith had "sexually harassed Doe" and that the harassment was "severe, pervasive, and offensive enough to deprive Doe of equal access to the educational opportunities or benefits provided by her school." *Ibid.*; see *id.* at 81a-82a. The jury also found, however, that petitioner did not have "actual knowledge of the alleged sexual harassment," and it therefore returned a verdict in petitioner's favor without deciding whether petitioner was deliberately indifferent. *Id.* at 7a, 82a. The district court denied Doe's motion for a new trial. *Id.* at 7a.

Doe appealed, arguing that the evidence did not support the jury's determination that petitioner lacked actual knowledge of the assault. Pet. App. 7a-8a. Petitioner sought to defend the jury verdict by arguing that "[a]ctual knowledge is subjectively measured," Pet. C.A. Br. 35 (emphasis omitted), and that the jury "could have properly concluded" that school officials believed that the sexual activity on the bus did not qualify as a sexual assault because it was consensual, *id.* at 43.

At oral argument, the court of appeals asked whether the judgment could be affirmed on the alternative ground that Doe had not proved that petitioner's deliberate indifference to her assault caused her to suffer additional harassment. See, *e.g.*, C.A. Oral Arg. at

1:05-1:35, 7:34-7:57, 10:37-11:38, 25:49-28:00. Petitioner had not raised that argument, and petitioner's counsel appeared to concede that it was not "correct" to say that Title IX requires post-notice harassment. *Id.* at 28:00-28:03; see Pet. App. 57a-58a (Wynn, J., concurring in the denial of rehearing en banc).[1]

4. The court of appeals reversed and remanded for a new trial in a divided opinion. Pet. App. 1a-43a.

a. The court of appeals first held that "a school's receipt of a report that can objectively be taken to allege sexual harassment is sufficient to establish actual notice or knowledge under Title IX." Pet. App. 8a. And the court concluded that a new trial was required because "no evidence in the record support[ed] the jury's verdict that [petitioner] lacked actual notice of the sexual assault allegations," which were repeatedly brought to the attention of school officials. *Id.* at 19a-23a.

The court of appeals also rejected several potential alternative grounds for affirming the judgment. Pet. App. 23a-36a. As relevant here, it disagreed with the dissent's view that the judgment should be affirmed because Doe had not shown that she experienced additional harassment after the school received notice of her assault. *Id.* at 29a-31a. The court held that, in the absence of post-notice harassment, a Title IX plaintiff may still establish a school's liability for its own inadequate response to a sexual assault if that response was "clearly unreasonable" and "made the plaintiff more vulnerable to future harassment or further contributed to the deprivation of the plaintiff's access to educational opportunities." *Id.* at 31a.

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

b. Judge Niemeyer dissented. Pet. App. 38a-43a. He "agree[d] with the majority that the school received notice of the incident," calling that conclusion "unremarkabl[e]" and emphasizing that it "could hardly have been in dispute" because "[t]he school was actually told of the incident." *Id.* at 39a. But Judge Niemeyer would have affirmed on the ground that petitioner's "knowledge" of the assault did not make it "liable under Title IX," *id.* at 39a-40a, because he interpreted this Court's decisions to hold that a school can be liable only for additional harassment that occurs "after it receives notice," *id.* at 42a.

c. The court of appeals denied rehearing en banc over the dissent of six judges. Pet. App. 44a-45a. Judge Wynn concurred in the denial of rehearing en banc. *Id.* at 46a-60a. Judges Wilkinson and Niemeyer issued dissenting opinions. *Id.* at 61a-78a.

DISCUSSION

Petitioner contends (Pet. 15-17) that a school cannot be liable under Title IX for its deliberate indifference to a student's sexual assault unless the student endures additional harassment after the school receives notice. The court of appeals correctly rejected that contention. This Court recently denied a petition for a writ of certiorari raising the same question. *Kollaritsch* v. *Michigan State Univ. Bd. of Trs.*, 141 S. Ct. 554 (2020) (No. 20-10). This case is an even weaker candidate for review because the Sixth Circuit has now retreated from its decision in *Kollaritsch* by limiting its requirement of post-notice harassment to cases involving colleges and universities. See *Doe* v. *Metropolitan Gov't of Nashville & Davidson Cnty.*, 35 F.4th 459, 468 (2022), reh'g denied, No. 20-6225, 2022 WL 3221938 (6th Cir. Aug. 5, 2022). Accordingly, no court of appeals requires post-notice

harassment where, as here, a case involves "students in high school." *Ibid.* And even if the question presented otherwise warranted review, this interlocutory case would be a poor vehicle in which to consider it because petitioner failed to properly raise the issue below.

Petitioner also challenges (Pet. 22-25) the court of appeals' holding that *Gebser*'s actual-knowledge requirement is satisfied when a school receives a report that objectively alleges sexual assault. That holding is correct, and no court of appeals has accepted petitioner's view that *Gebser* allows a school to evade liability for its deliberate indifference to allegations of sexual assault merely because its officials subjectively believed that the harasser's conduct did not occur or did not qualify as assault. The petition for a writ of certiorari should be denied.

I. THE FIRST QUESTION PRESENTED DOES NOT WARRANT REVIEW

A. The Court Of Appeals' Decision Is Correct

The court of appeals correctly held that Title IX liability "is not necessarily limited to cases" where a school's deliberate indifference to an alleged sexual assault "'cause[s]'" additional "post-notice" harassment. Pet. App. 29a (citation omitted). Both Title IX's text and this Court's precedent support that holding, and petitioner's contrary arguments are unavailing.

1. Start with the text. Title IX provides that a student may not "be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any" federally funded "education program or activity." 20 U.S.C. 1681(a). Sexual harassment—up to and including sexual assault—is one well-recognized form of discrimination on the basis of sex. See, *e.g.*, *Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80

(1998). Accordingly, when a student endures sexual harassment or assault by another student under a federally funded "education program or activity," she suffers "discrimination" "on the basis of sex" in violation of Title IX. 20 U.S.C. 1681(a); see *Jackson* v. *Birmingham Bd. of Educ.*, 544 U.S. 167, 174 (2005).

Although a school can be held liable in damages only for its own misconduct, its deliberate indifference to sexual harassment may violate Title IX even if the harassment does not recur. If, for example, the school's inadequate response causes the victim to withdraw from an educational program or activity because she reasonably fears that continued participation will lead to further harassment, the school's deliberate indifference has caused her to be "excluded from participation." 20 U.S.C. 1681(a). And even if the student continues to participate, a deliberately indifferent response that leaves her vulnerable to further harassment may diminish her ability to learn or otherwise "den[y]" her access to educational "benefits" to which she is entitled. *Ibid.*

2. This Court's precedents confirm that a school may be liable under Title IX for educational harms inflicted on a student by the school's deliberate indifference to sexual harassment even when those harms do not include additional harassment. For three decades, this Court has held that a school may be liable for "intentional discrimination" in violation of Title IX when a student is "sexually harass[ed]" while participating in a federally funded education program or activity. *Franklin* v. *Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 74-75 (1992). In a pair of cases, the Court set forth a detailed framework defining the circumstances under which a school may face Title IX liability for a student's sexual

harassment by a teacher, see *Gebser* v. *Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998), or another student, see *Davis* v. *Monroe Cnty. Bd. of Educ.*, 526 U.S. 629 (1999). And those cases establish that a sexual-assault victim need not wait for her school's inadequate response to cause additional harassment before bringing suit. To the contrary, *Davis* explicitly held that a school may face Title IX liability if its deliberate indifference *either* "'cause[s] [students] to undergo' harassment *or* 'makes them liable or vulnerable' to it." 526 U.S. at 645 (emphasis added; brackets and citation omitted).

The *Gebser* and *Davis* framework also focuses on requirements that may be satisfied even in the absence of post-notice harassment. *Davis* held that Title IX liability attaches when schools "are deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school." 526 U.S. at 650. Those requirements impose a "high standard," but that standard may be met when a school's response to sufficiently serious harassment is "clearly unreasonable," *id.* at 643, 648—not merely when the school's inadequate response actually causes further harassment.

Of course, the fact that Title IX liability is "not necessarily limited to cases" involving post-notice harassment, Pet. App. 29a, does not mean that such harassment is irrelevant. The inquiry into the adequacy of the school's response requires a fact-specific assessment of the situation the school faced and the actions it took. A school may use the absence of further harassment as evidence that its response to the initial abuse was sufficient, just as a student may use the reoccurrence of the

harassment as evidence the school's response was "clearly unreasonable." *Davis*, 526 U.S. at 648.

Furthermore, *Gebser* and *Davis* emphasize that a school may be held financially liable only for its "own misconduct," not the misconduct of the harasser. *Davis*, 526 U.S. at 640. A student who has not experienced post-notice harassment thus must show that the school's deliberate indifference "excluded" her "from participation in" federally funded "education program[s] or activit[ies]," "denied" her educational "benefit[s]," or otherwise "subjected" her to "discrimination" "on the basis of sex" in violation of Title IX. 20 U.S.C. 1681(a). In some cases, that showing may be difficult to make. Cf. *Davis*, 526 U.S. at 652-653 (suggesting that "a single instance of one-on-one peer harassment" is unlikely to "be serious enough to have the systemic effect of denying the victim equal access to an educational program or activity"). But where the pre-notice harassment was sufficiently severe, a school's deliberate indifference may satisfy the statutory standard. See, *e.g.*, *Farmer* v. *Kansas State Univ.*, 918 F.3d 1094, 1099-1100 (10th Cir. 2019) (college's deliberate indifference to student's rape caused student to "liv[e] in fear that she would run into her attacker, miss[] classes, struggle[] in school" and "withdr[a]w from [university] activities in which she had previously taken a leadership role").

3. Petitioner's contrary arguments are unpersuasive. Petitioner first attempts to recast *Davis*'s holding that schools subject students to discrimination on the basis of sex when they either "'cause [students] to undergo' harassment or 'make them liable or vulnerable' to it." 526 U.S. at 645 (citation omitted). Petitioner asserts that *Davis* was only identifying "two possible

ways" that a school's deliberate indifference might cause further harassment. Pet. 15 (brackets and citation omitted). But the Court's use of the disjunctive "or" makes clear that making a student "liable or vulnerable" to harassment is an alternative to "caus[ing]" it. *Davis*, 526 U.S. at 645.

Petitioner is similarly mistaken in asserting that the text of Title IX requires post-notice harassment because it would be incorrect to "say that [a] school had 'subjected' its students to harassment if the students never experienced any harassment as a result of the school's conduct." Pet. 16-17 (citation omitted). Title IX does not bar schools from "subject[ing]" students to "harassment," *ibid.*; it broadly prohibits subjecting students to "discrimination"—as well as "den[ying]" them "the benefits of" or "exclud[ing]" them "from participation in" an education program or activity—"on the basis of sex." 20 U.S.C. 1681(a). And this Court has recognized that a school's "deliberate indifference to sexual harassment of a student by another student * * * squarely constitutes 'discrimination' 'on the basis of sex.'" *Jackson*, 544 U.S. at 174 (citation omitted).

Petitioner also errs in suggesting (Pet. 17) that the "Spending Clause's requirement of clear notice" prevents a school from facing liability for deliberate indifference that does not result in additional harassment. This Court has already explained that the Spending Clause's "notice" requirement is satisfied "in cases of a recipient's deliberate indifference to one student's sexual harassment of another, because the deliberate indifference constitute[s] intentional discrimination on the basis of sex." *Jackson*, 544 U.S. at 182. That is equally true whether the school's deliberate indifference actually causes additional harassment or simply leaves the

student-victim vulnerable to it. Indeed, because the recurrence of harassment depends in part on the actions of third parties, the school's own conduct may be exactly the same in either case.

Petitioner thus errs in asserting that federal-funding recipients will be "blindside[d]" if they are held financially liable for harms inflicted by their deliberate indifference to reports of sexual harassment or assault. Pet. 17 (citation omitted). That assertion disregards both this Court's decisions and longstanding federal guidance underscoring that Title IX requires a school to respond appropriately to such reports. See *Davis*, 526 U.S. at 647-648 (citing 1994 and 1997 guidance (59 Fed. Reg. 11,448, 11,449-11,450 (Mar. 10, 1994); 62 Fed. Reg. 12,034, 12,039-12,040 (Mar. 13, 1997))). Regulations promulgated by the Department of Education in 2020 expressly reiterate this requirement, providing that "[a] recipient with actual knowledge of sexual harassment * * * must respond promptly in a manner that is not deliberately indifferent." 34 C.F.R. 106.44(a). And the Department of Education has recently proposed revised regulations that further describe a school's obligations. See 87 Fed. Reg. 41,390, 41,432-41,452 (July 12, 2022).

B. The Court of Appeals' Decision Does Not Implicate Any Circuit Conflict Warranting This Court's Review

Petitioner asserts (Pet. 15-21) that the courts of appeals are divided on whether *Davis* requires post-notice sexual harassment. Other than the Sixth Circuit, however, every court of appeals that has decided the question has rejected petitioner's view. And after the petition was filed, the Sixth Circuit confined its contrary decision to the postsecondary context and squarely held that post-notice harassment is *not* required for a high

school to be held liable for its deliberate indifference. This case thus does not implicate any circuit conflict warranting this Court's review.

1. In the decision below, the Fourth Circuit joined the First, Tenth, and Eleventh Circuits in recognizing that a school may be liable for the harms caused by its deliberate indifference to sexual harassment even absent additional post-notice harassment. The First Circuit rejected the contention that "Title IX liability only attaches after an institution receives actual notice of harassment and the institution subsequently 'causes' the victim to be subjected to additional harassment." *Fitzgerald* v. *Barnstable Sch. Comm.*, 504 F.3d 165, 172 (2007), rev'd and remanded on other grounds, 555 U.S. 246 (2009). The Tenth Circuit reached the same conclusion, emphasizing that *Davis* makes clear that "a Title IX plaintiff is not required to allege that she suffered actual additional incidents of sexual harassment." *Farmer*, 918 F.3d at 1104.[2] And the Eleventh Circuit held that a school's deliberate indifference to a student's rape was sufficient to establish liability even though the victim did not experience further abuse, explaining that the school "subject[ed] her to discrimination" by "fail[ing] to take any precautions that would prevent future attacks." *Williams* v. *Board of Regents of the Univ. Sys. of Ga.*, 477 F.3d 1282, 1297 (2007).

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[2] Petitioner suggests that an earlier Tenth Circuit decision "read *Davis* to require 'further sexual harassment.'" Pet. 19 (quoting *Escue* v. *Northern Okla. Coll.*, 450 F.3d 1146, 1155 (2006)) (emphasis omitted). But *Farmer* repudiated that reading of *Escue*, explaining that *Escue* did not "h[old] that a Title IX plaintiff was required to allege subsequent actual incidents of sexual harassment." *Farmer*, 918 F.3d at 1106.

2. Petitioner's original assertion of a circuit conflict (Pet. 18) rested primarily on the Sixth Circuit's decision in *Kollaritsch* v. *Michigan State University Board of Trustees*, 944 F.3d 613 (2019), cert. denied, 141 S. Ct. 554 (2020), which held that a university's deliberate indifference to sexual harassment does not give rise to Title IX liability unless it "result[s] in further actionable sexual harassment against the student-victim." *Id.* at 618. But the Sixth Circuit has since held that *Kollaritsch*'s requirement of post-notice harassment "does not apply to students in high school"—the context at issue here—because high schools exercise more control over their students than universities. *Doe*, 35 F.4th at 468. And the Sixth Circuit recently cemented that limitation by denying rehearing in *Doe* with only one judge dissenting. *Doe* v. *Metropolitan Gov't of Nashville & Davidson Cnty.*, No. 20-6225, 2022 WL 3221938 (Aug. 5, 2022). Because this case would have been decided the same way had it arisen in the Sixth Circuit, it does not implicate the shallow conflict *Kollaritsch* created in the university context.[3]

3. Petitioner briefly contends (Pet. 18-19) that the Eighth and Ninth Circuits have also held that post-notice harassment is required for liability under Title IX. In fact, neither circuit has squarely addressed the issue, and both have suggested that they will side with the majority view when they do.

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[3] It is in any event uncertain whether the Sixth Circuit will adhere to its outlier decision in *Kollaritsch* in the university context. Even before *Doe*, the court had begun to cabin *Kollaritsch*'s reach, holding that post-notice harassment is not required in cases involving allegations of sexual harassment by a teacher, even in the university setting. See *Wamer* v. *University of Toledo*, 27 F.4th 461, 470 (6th Cir. 2022), petition for cert. pending, No. 22-123 (filed Aug. 5, 2022).

Petitioner observes that in *Shank* v. *Carleton College*, 993 F.3d 567 (2021), the Eighth Circuit required a student to establish a "'causal nexus' between the college's conduct and the student's experience of sexual harassment." Pet. 18 (quoting *Shank*, 993 F.3d at 576) (emphasis omitted). But that language does not foreclose liability in cases where a college's deliberate indifference to pre-notice harassment causes a student to "experience" post-notice harms other than harassment. To the contrary, *Shank* recognized that the college's delay in moving the plaintiff to a new dorm after learning that she had been raped by a floormate would have given rise to Title IX liability if the plaintiff had "offered evidence to support the conclusion that the college's shortcoming in this regard deprived her of * * * educational opportunities." 993 F.3d at 576. And in the other Eighth Circuit decision on which petitioner relies (Pet. 19), the court recognized that a school may be liable when it either causes harassment *or* "make[s] [students] liable or vulnerable to it." *K.T.* v. *Culver-Stockton Coll.*, 865 F.3d 1054, 1057 (2017) (citation omitted).

Similarly, petitioner errs in invoking (Pet. 19) the Ninth Circuit's decision in *Reese* v. *Jefferson School District No. 14J*, 208 F.3d 736 (2000). *Reese* held that a school was not liable for its deliberate indifference to harassment the school discovered shortly before the victims graduated because the school's conduct did not "cause the plaintiffs to undergo harassment *or make them liable or vulnerable to it.*" *Id.* at 740 (emphasis added; citation omitted); see *Stanley* v. *Trustees of Cal. State Univ.*, 433 F.3d 1129, 1137 (9th Cir. 2006) (reiterating that vulnerability to further harassment suffices). And a panel of the Ninth Circuit recently declined to

"express [an] opinion on" whether post-notice harassment is required, *Karasek* v. *Regents of Univ. of Cal.*, 956 F.3d 1093, 1106 n.2 (2020)—an option that would not have been available if, as petitioner maintains, the court had already decided the question.

4. Petitioner also asserts that a writ of certiorari is warranted because the decision below exposes schools to "an endless stream of litigation" and "incentiv[izes]" school officials to "'expel first and * * * ask questions later.'" Pet. 29-30 (citation omitted). But petitioner acknowledges (Pet. 18) that multiple courts of appeals have recognized for more than a decade that Title IX liability does not necessarily require post-notice harassment. Petitioner offers no evidence that schools in those circuits have been placed in the "untenable situation" it describes. Pet. 3; see Pet. App. 60a n.4 (observing that "no such evils of over-litigation have occurred"). And *Davis* itself rejected a similar argument that permitting liability for student-on-student harassment would result in the "expulsion of every student accused of misconduct involving sexual overtones." 526 U.S. at 648 (citation omitted). *Davis* explained that school administrators would "continue to enjoy the" disciplinary "flexibility they require" because schools face liability only when their response to serious sexual harassment is "clearly unreasonable." *Ibid.* The same principle applies here and refutes petitioner's predictions about the consequences of adhering to a rule that has long prevailed in much of the Nation.

C. This Case Would Be A Poor Vehicle For Considering The Question Presented

Even if the question presented otherwise warranted this Court's review, this case would be a poor vehicle in

which to consider it. Petitioner failed to present its current argument in the district court or in its briefs before the panel. And when the panel raised the issue at oral argument, petitioner's counsel appeared to concede that it was not "correct" to say that a school's Title IX liability is limited to cases where its deliberate indifference causes additional harassment. C.A. Oral Arg. at 28:00-28:03; see pp. 4-5, *supra*.

Petitioner maintains (Reply Br. 7) that this statement should not be treated as a concession. But at minimum, the potential concession would complicate review because Doe would likely renew her claim that petitioner waived or forfeited its argument if the Court granted certiorari. And the belated stage at which the argument was raised means that this Court would lack the benefit of full development of the relevant issues. For example, Doe contends (Br. in Opp. 13-14) that she could have shown that she suffered post-notice harassment if petitioner had properly raised the issue at the district court, but no court has yet considered that contention. The Court should not grant review in a case with those complications—especially because the interlocutory posture means that petitioner will have an opportunity to seek review on a more developed record if it does not prevail on remand.

II. THE SECOND QUESTION PRESENTED DOES NOT WARRANT REVIEW

Petitioner also asks (Pet. 21-28) this Court to grant a writ of certiorari to decide whether *Gebser*'s "actual knowledge" requirement must be assessed subjectively or objectively. The precise contours of petitioner's argument are unclear. The petition asserted (at 24) that a school can be held liable only for what its officials

"subjectively believed to be true." The question presented thus asks whether a school can evade liability if its officials had a "subjective belief" that no "harassment actionable under Title IX occurred." Pet. i. Petitioner's reply brief, in contrast, maintains (at 10) that its proposed rule has "no connection" to "whether officials believe th[e] allegations" and instead requires only that "officials actually understand the allegations, assuming they are true, as describing actionable harassment." Neither argument warrants this Court's review: The court of appeals' decision is correct; no court of appeals has adopted petitioner's reading of *Gebser*; and this case would in any event be a poor vehicle for considering the issues petitioner seeks to raise.

A. This Court adopted the "actual knowledge" requirement in *Gebser*. The Court explained that Title IX's express enforcement mechanism "hinges its most severe sanction on notice," 524 U.S. at 290, by directing that a federal agency "may not institute enforcement proceedings until it 'has advised the appropriate person or persons of the failure to comply,'" *id.* at 288 (quoting 20 U.S.C. 1682). The Court reasoned that Title IX's "implied damages remedy should be fashioned along the same lines." *Id.* at 290. The Court thus held that a recipient may be liable for damages only if an official who has "authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of discrimination in the recipient's programs and fails adequately to respond." *Ibid.*

The Court's application of the actual-knowledge requirement makes clear that (like the statutory provision on which it was based) it requires only that an appropriate official had notice of the alleged violation—not that

the official subjectively believed the allegation or understood it to describe an actionable assault. In *Gebser* itself, the Court applied that requirement to the petitioner's allegation that the respondent school district was liable for her abuse at the hands of her teacher by assessing whether the "information" that the school principal had received "alert[ed]" the principal "to the possibility that [a teacher] was involved in a sexual relationship with a student," 524 U.S. at 291; the Court did not analyze the principal's subjective understanding. Similarly, in *Davis*, the Court recognized that the allegations in the plaintiff's complaint suggested that she could establish "actual knowledge," 526 U.S. at 654, even though the complaint does not appear to have included an account of how officials at the plaintiff's school subjectively understood the reports of harassment, *id.* at 633-635.

The court of appeals properly applied those precedents when it held that the "actual knowledge" requirement must be assessed through an "objective inquiry which asks whether an appropriate official in fact received" a "report or complaint alleging sexual harassment" that could reasonably be construed to "alleg[e] misconduct prohibited by Title IX." Pet. App. 18a-19a. And the court correctly found that requirement easily satisfied here. Among other things, Doe provided a written statement describing her assault, and her mother directly informed school officials that Doe was the victim of a sexual assault. *Id.* at 20a-21a. Thus, as Judge Niemeyer emphasized, the school's actual knowledge "could hardly have been in dispute" because "[t]he school was actually told of the incident." *Id.* at 39a.

B. Petitioner asserts (Pet. 23) that the court of appeals' "'objective'" standard contradicts *Gebser* by imposing liability in cases where a school "*should have known* that the student was a victim of sexual harassment." But *Gebser* merely held that Title IX liability in private damages actions cannot be "based on a theory of constructive notice," under which a school is liable when it "'should have known' about harassment but failed to uncover and eliminate it." 524 U.S. at 282 (citation omitted). The court of appeals appropriately recognized that liability attaches only when an appropriate official has "in fact received" an allegation of sexual assault. Pet. App. 18a. Nor is petitioner correct in asserting (Pet. 25) that the court of appeals erred by equating "actual knowledge" and "actual notice"; *Gebser* itself used the terms interchangeably, see 524 U.S. at 290-291; p. 18, *supra*; see also 34 C.F.R. 106.30(a) (explaining that "[a]ctual knowledge means notice of sexual harassment or allegations of sexual harassment") (emphasis omitted).

Petitioner also errs in suggesting (Pet. 24) that an "objective" actual-knowledge inquiry is incompatible with the deliberate-indifference requirement. The two requirements work in tandem: A plaintiff must first establish actual knowledge by presenting evidence that a school official received "information" that was objectively sufficient to "alert" the official of "the possibility that" a student was subjected to unlawful harassment. *Gebser*, 524 U.S. at 291. The plaintiff must then establish deliberate indifference by demonstrating that the school's response to the information was "clearly unreasonable." *Davis*, 526 U.S. at 649.

That standard imposes a high bar: "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." Pet. App. 18a. Still, even at the deliberate-indifference stage, any inquiry must focus on the information the school received, *not* the official's subjective impression of it. An official's plainly unreasonable belief that a report does not establish harassment cannot excuse the school's failure to respond. Were it otherwise, schools could evade liability by employing officials who are unfairly skeptical of sexual assault victims or by failing to train its officials to recognize conduct that qualifies as actionable harassment or assault.

Finally, petitioner errs in relying (Pet. 24-25) on precedents interpreting the Eighth Amendment. *Davis* and *Gebser* recognized that Title IX's liability standard borrows from a different set of precedents—those governing "municipal liability" under 42 U.S.C. 1983. *Davis*, 526 U.S. at 642-643; see *Gebser*, 524 U.S. at 291 (citing *Board of the Cnty. Comm'rs of Bryan Cnty.* v. *Brown*, 520 U.S. 397 (1997), and *City of Canton* v. *Harris*, 489 U.S. 378 (1989)). And this Court has specifically distinguished that standard from the subjective standard that governs under the Eighth Amendment, observing that it is "hard to describe" the "understanding of deliberate indifference" in its municipal-liability precedents as "anything but objective." *Farmer* v. *Brennan*, 511 U.S. 825, 841 (1994).[4]

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[4] Petitioner also errs in invoking (Pet. 24-25) *Intel Corp. Investment Policy Committee* v. *Sulyma*, 140 S. Ct. 768 (2020), a case involving a provision of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1113. The Court held that in order for a plaintiff to have "actual knowledge" of a fiduciary "breach or violation"

C. Contrary to petitioner's suggestion (Pet. 26-28), there is no disagreement in the circuits regarding the appropriate standard for assessing actual knowledge under Title IX. Petitioner asserts (Pet. 26) that the decision below conflicts with decisions by the Fifth, Seventh, and Eighth Circuits. But the Fifth Circuit decision petitioner cites predates *Gebser* and incorrectly applied a standard borrowed from the Eighth Amendment context. See *Rosa H.* v. *San Elizario Indep. Sch. Dist.*, 106 F.3d 648, 658-659 (1997). And neither of the other cited decisions adopts—or even discusses—a subjective standard. See *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).

D. In any event, this case would be a poor vehicle in which to consider the meaning of *Gebser*'s "actual knowledge" requirement even if that question otherwise warranted this Court's review. First, petitioner has now retreated from the question framed in the petition. See Reply Br. 10; pp. 17-18, *supra*. Second, it is unlikely that petitioner could prevail even if actual knowledge were assessed subjectively. Indeed, the court of appeals specifically concluded that the record—including school officials' own testimony—confirmed that officials were "both objectively and subjectively aware that there was an allegation of a sexual assault." Pet. App. 22a n.8.

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within the meaning of Section 1113, *ibid.*, "the plaintiff must in fact have become aware of [the relevant] information," *Sulyma*, 140 S. Ct. at 777. But the Court did not suggest, as petitioner would have it, that the plaintiff must have *subjectively believed* that information or recognized that it established a violation of the statute.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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