No. 97-843

In the Supreme Court of the United States

OCTOBER TERM, 1997

AURELIA DAVIS, AS NEXT FRIEND OF LASHONDA D., PETITIONER

v.

MONROE COUNTY BOARD OF EDUCATION, ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Title IX of the Education Amendments of 1972, 20 U.S.C. 1681, 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."

The question presented is:

Whether a school board can be liable under Title IX for responding with deliberate indifference to a student's repeated complaints about severe and pervasive sexual harassment by another student in the course of the school's education programs and activities.

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This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.

STATEMENT

1. a. Petitioner filed this action under Title IX of the Education Amendments of 1972, 20 U.S.C. 1681, seeking, *inter alia*, damages and injunctive relief on behalf of her daughter, LaShonda D., against respondent Monroe County Board of Education.[1] Peti-

[1] Petitioner's Title IX claims against two individual school officials, her race discrimination claim under 42 U.S.C. 1981, and her various claims under 42 U.S.C. 1983 (1994 & Supp. II 1996) were dismissed by the district court under Federal Rule

tioner alleges that respondent responded with deliberate indifference to repeated complaints from herself and her daughter, then a fifth-grade student in a school administered by respondent, about severe sexual harassment of LaShonda by a male classmate, G.F., over a period of more than five months. Petitioner alleges that respondent's deliberate indifference to the complaints of sexual harassment created an intimidating, hostile, offensive, and abusive school environment for LaShonda, in violation of respondent's obligations under Title IX of the Education Amendments of 1972, 20 U.S.C. 1681, as a recipient of federal financial assistance. Pet. App. 93a-101a.

Petitioner alleges that G.F. harassed LaShonda on at least eight separate occasions at school between December 17, 1992, and May 19, 1993, during school hours.[2] School officials were informed about each of those incidents by LaShonda, petitioner (her mother), or both. Pet. App. 95a-97a. G.F. repeatedly attempted to touch LaShonda's breasts and vaginal area. On one occasion, G.F. rubbed his body against LaShonda in a sexually suggestive manner. *Id.* at 96a. On another occasion, G.F. put a door stop in his pants and behaved in a sexually suggestive manner toward LaShonda. *Ibid.* G.F. also directed vulgar comments to LaShonda, indicating a desire to have sexual contact with her. *Id.* at 95a-96a. After an incident on May 19, LaShonda told her mother that she "didn't know how

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of Civil Procedure 12(b)(6), were rejected by the court of appeals, and are not before this Court. See Pet. App. 2a-3a & n.3; *id.* at 82a-90a.

[2] Because petitioner's complaint was dismissed for failure to state a claim, the allegations of the complaint must be taken as true. *Scheuer* v. *Rhodes*, 416 U.S. 232, 236 (1974).

much longer she could keep him off her." *Id.* at 97a. As a result of that incident, G.F. was charged with and pled guilty to sexual battery. *Ibid.*

After each incident, LaShonda reported G.F.'s behavior to one or more of her teachers; she complained to at least three different teachers at the school that G.F. was sexually harassing her in classes or activities under their supervision. Pet. App. 96a-97a. Petitioner, LaShonda's mother, also complained to at least two of her daughter's teachers, and was assured that the school principal had been notified about the sexual harassment. *Ibid.* At one point, LaShonda and other girls who had been sexually harassed by G.F. wanted to go as a group to speak to the principal about the harassment, but their teacher told them that, "If he wants you, he'll call you." *Id.* at 96a. On or about May 19, petitioner spoke directly to the principal to see what action would be taken, but the principal merely stated: "I guess I'll have to threaten him (G.F.) a little bit harder." *Id.* at 97a. During that conversation, the principal asked LaShonda "why she was the only one complaining." *Ibid.*

Petitioner alleges that school officials did not discipline G.F. at any time during the period in which he was harassing LaShonda, despite LaShonda's and petitioner's repeated complaints. Pet. App. 97a. G.F. was not suspended, kept away from LaShonda, or reprimanded in any other way. *Ibid.* Moreover, school officials refused even to take minimal measures to keep G.F. away from LaShonda during a substantial part of that time. For example, LaShonda's assigned classroom seat was next to G.F. and, although LaShonda asked several times to be moved to a different seat so that she could prevent contact with

G.F., she was not permitted to do so for over three months. *Ibid.*

At the time of respondent's failure to respond to the complaints by petitioner and her daughter, respondent had no policy regarding sexual harassment. Respondent had not given its employees any training or other guidance on how to respond to complaints from students about sexual harassment. Pet. App. 98a.

As a result of respondent's inaction in response to LaShonda and her mother's repeated complaints about the continuing sexual harassment, LaShonda's ability to attend school and to perform her studies and activities was impeded. Pet. App. 97a. Her ability to concentrate on her school work was affected by her constant efforts to fend off G.F.'s sexual harassment. *Ibid.* Her grades also dropped. *Ibid.* LaShonda's mental health was affected. In April 1993, LaShonda's father discovered a suicide note she had written. *Ibid.*

Petitioner alleges that respondent engaged in deliberate indifference and intentional discrimination against LaShonda that warrants money damages and injunctive relief. Petitioner specifically alleges that, respondent, in its "failure to have a policy concerning sexual harassment of students and in their failure to respond to the complaints of this student, was willfully and deliberately indifferent." Pet. App. 98a. She alleges that respondent's deliberate indifference "to the unwelcome sexual advances of a student upon LaShonda created an intimidating, hostile, offensive and abus[ive] school environment," in violation of Title IX. *Id.* at 100a. Respondent's "failure to take action resulted in extreme emotional damage to LaShonda." *Id.* at 100a-101a. Petitioner asserts that, "had [the school principal] intervened as was neces-

sary, the injury to LaShonda would have been mitigated and the situation would have been ended." *Id.* at 100a. In addition to damages, petitioner sought injunctive relief requiring respondent "to institute a policy providing guidance for employees in the event of sexual harassment of students by fellow students," and enjoining respondent "from discriminating against female students by failing to respond to complaints of sexual harassment." *Id.* at 102a.

b. The district court dismissed petitioner's complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief could be granted. Pet. App. 82a-90a. The court recognized that Title IX is enforceable through an implied cause of action, *id.* at 88a (citing *Franklin* v. *Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992)), but ruled that "sexually harassing behavior of a fellow fifth grader is not part of a school program or activity." Pet. App. 88a. In the court's view, petitioner had not alleged "that the Board or an employee of the Board had any role in the harassment," and therefore "any harm to LaShonda was not proximately caused by a federally-funded educational provider." *Id.* at 88a-89a. Therefore petitioner had no cause of action under Title IX. *Id.* at 89a.

2. a. A divided panel of the Eleventh Circuit initially reversed the district court's dismissal of the Title IX claim and remanded for further proceedings. Pet. App. 62a-81a. The panel noted that, fairly construed, petitioner's complaint alleged that harm to LaShonda was proximately caused by the school officials' "failure to take action to stop the offensive acts of those over whom the officials exercised control," *id.* at 75a, thereby discriminating against petitioner and denying her the benefits of the edu-

cation program on the basis of her sex, *id*. at 66a. The panel concluded that "Title IX encompasses a claim for damages due to a sexually hostile educational environment created by a fellow student or students when the supervising authorities knowingly fail to act to eliminate the harassment." *Id.* at 73a-74a (citing *Franklin*, 503 U.S. at 74-75). In such circumstances, "the harassed student has 'be[en] denied the benefits of, or be[en] subjected to discrimination under' th[e] educational program in violation of Title IX." *Id*. at 75a.

One panel member dissented, arguing that Title IX did not apply because neither respondent nor any of its employees was alleged to have committed an act of harassment against LaShonda. Pet. App. 80a.

b. The Eleventh Circuit granted rehearing en banc, vacated the panel's opinion, and affirmed the district court's judgment dismissing the complaint. Pet. App. 91a-92a; *id*. at 1a-45a. The en banc majority construed petitioner's complaint to allege that LaShonda had been subjected to hostile environment sexual harassment, that one teacher knew of at least four instances of harassment, that at least two other teachers and the principal each knew of at least two incidents of harassment, and that respondent took no action except to threaten G.F. with disciplinary action. *Id*. at 6a-7a & n.6. But it concluded that Title IX does not impose upon school officials any obligation "to take measures sufficient to prevent a *non-employee* from discriminating" on the basis of sex against a student. *Id*. at 22a. The en banc court characterized petitioner's claim as "seeking direct liability of the Board for the wrongdoing of a student." *Id*. at 10a.

Relying primarily on legislative history, the en banc court reasoned that Congress enacted Title IX under its Spending Clause power and that Title IX gave educational institutions that receive federal funds notice that "they must prevent their employees from themselves engaging in intentional gender discrimination," Pet. App. 21a, but not that they could be liable for failing to prevent one student from sexually harassing another, *id*. at 19a.[3]

Four members of the court dissented, Pet. App. 46a-61a, arguing that the plain language of Title IX makes it clear that "liability hinges upon whether the grant recipient maintained an educational environment that excluded any person from participating, denied them benefits, or subjected them to discrimination," because of sex. *Id*. at 47a. The dissent noted that this construction of the statute is supported by the interpretation of the Department of Education, Office for Civil Rights (OCR), an agency charged with enforcing Title IX, which states:

> a school's failure to respond to the existence of a hostile environment within its own programs or activities permits an atmosphere of sexual discrimination to permeate the education program and results in discrimination prohibited by Title IX. . . . Thus, Title IX does not make a school

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[3] The author of the opinion for the en banc court included two sections that were not joined by any other member of the court: a discussion of the due process rights of alleged harassers and possible suits by disciplined harassers (Pet. App. 22a-29a (Part III.B)), and a discussion of the possible number of lawsuits involving harassment by fellow students (*id*. at 30a-32a (Part III.C). See *id*. at 33a; *id*. at 36a & n.1 (opinion of Carnes, J., concurring specially).

> responsible for the actions of harassing students, but rather for its *own* discrimination in failing to remedy it once the school has notice.

Id. at 48a (quoting Sexual Harassment Guidance, 62 Fed. Reg. 12,034, 12,039-12,040 (1997)). The dissent disagreed with the majority's reliance on the absence of a discussion of student-on-student harassment in the legislative history of Title IX because a failure to mention it in congressional debate "does not mean that it was not encompassed within Congress's broad intent of preventing students from being 'subjected to discrimination' in federally funded education programs." *Id.* at 50a. The dissent pointed out that the majority's reasoning would call for rejection of the cause of action under Title IX recognized by the Court in *Franklin*, because it also was not mentioned during congressional debate. *Ibid.* The dissent also reasoned that sufficient notice was provided to fund recipients to satisfy the Spending Clause prerequisite for damages under Title IX, because the plain meaning of the statute "unequivocally imposes liability on grant recipients for maintaining an educational environment in which students are subjected to discrimination." *Id.* at 51a. Here, where petitioner alleges that at least three teachers and the school principal had actual knowledge of the harassment and took no meaningful action to end it, the dissent argued that the district court's dismissal of the Title IX claims against the Board should have been reversed. *Id.* at 61a.

DISCUSSION

The petition for a writ of certiorari should be granted. The court of appeals' ruling forecloses all claims under Title IX of the Education Amendments

of 1972, 20 U.S.C. 1681, whether for damages or for injunctive relief, for a school district's failure to respond to known sexual harassment of a student by another student. Such categorical exclusion of those claims is inconsistent with this Court's decision in *Gebser* v. *Lago Vista Independent School District*, 118 S. Ct. 1989 (1998), with the plain language of the statute, and with the decisions of other courts of appeals. In the alternative, it would be appropriate for the Court to grant the writ, vacate the judgment below, and remand the case for reconsideration in light of *Gebser*.

1. In *Gebser*, this Court addressed the circumstances under which an educational institution receiving federal funds may be held liable in damages in an implied right of action under Title IX when a teacher sexually harasses a student. The Court concluded that damages could be recovered in such a case only when "an official who at a minimum 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 responds with deliberate indifference. 118 S. Ct. at 1999. The Court reasoned that, because Title IX's express remedial scheme permitting termination of federal funds is predicated on notice and an opportunity for the recipient to rectify a violation, Congress also did not intend to subject recipients of federal financial assistance to damages liability when the recipient "was unaware of discrimination in its programs and is willing to institute prompt corrective measures." *Ibid.*

The *Gebser* Court's ruling about the educational institution's potential liability did not depend upon the harasser's status as an employee. In fact, the

Court expressly rejected arguments that liability should be based on agency principles of respondeat superior or constructive notice that result from the employer-employee relationship. 118 S. Ct. at 1995, 1997. Rather, the Court emphasized that the educational institution's liability rests on its own "official decision * * * not to remedy the violation," not on the independent actions of its harassing employees. *Id*. at 1999.

It follows from this analysis that when school officials know that severe or pervasive sexual harassment of a student is occurring under their education programs or activities, their failure to exercise their authority to address the harassment fosters a hostile educational environment, and constitutes a violation of Title IX, whether the student's harasser is a school employee or another student. In either case, the student is required to attend school in a discriminatorily hostile or abusive environment. When school officials knowingly fail to remedy a sexually hostile or abusive environment in an education program or activity, they "subject" harassed students to that environment in violation of Title IX. And *Gebser* makes clear that when a school district responds with deliberate indifference to known incidents of sexual harassment of a student, it discriminates against that student in violation of Title IX, and the Spending Clause prerequisite for damages under Title IX is met. *Id*. at 1998-1999.

Differences between students and teachers may of course be relevant to determining an institution's liability in damages for its failure to respond adequately to incidents of sexual harassment. The words or actions of a child may not have the same meaning and impact as the words or actions of an adult teacher.

Thus, the identity of the harasser and the social context in which the incident occurs may be relevant to determining whether the harassment is sufficiently severe, persistent, or pervasive to constitute actionable harassment. See *Oncale* v. *Sundowner Offshore Services, Inc.*, 118 S. Ct. 998, 1002-1003 (1998).[4] Similarly, because the means available to school systems for controlling the actions of employees differ from their means of controlling the actions of students, the harasser's status in relation to the school may be relevant in determining whether officials' response to harassment was deliberately indifferent. Differences between students and employees do not, however, justify the court of appeals' rule that, as a categorical matter, an educational institution has no obligation under Title IX to respond to complaints of sexual harassment because the harasser is another student.

Petitioner's allegations meet the *Gebser* standard. Petitioner alleges that her daughter was subjected to repeated incidents of sexual harassment by another student while at school, Pet. App. 95a-97a, that three teachers and the principal of the school had actual knowledge of the harassment, *id.* at 96a-98a, that the

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[4] As the initial panel below emphasized, "a hostile environment in an educational setting is not created by a simple childish behavior or by an offensive utterance, comment, or vulgarity. Rather, Title IX is violated 'when the [educational environment] is permeated with 'discriminatory intimidation, ridicule, and insult' that is 'sufficiently severe or pervasive to alter the conditions of the victim's [environment] and create an abusive environment.' " Pet. App. 76a-77a (citing *Harris* v. *Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993), quoting *Meritor Savings Bank, FSB* v. *Vinson*, 477 U.S. 57, 67 (1986)) (citation omitted).

harassment occurred while the students were "under the supervision of * * * teachers," *id.* at 96a, that the principal "was responsible for supervising discipline of the students in his school," *id.* at 98a, and that respondent responded with deliberate indifference to her complaints, *id.* at 100a. Thus, "official[s] of the recipient entity with authority to take corrective action to end the discrimination" had actual knowledge of the harassment and failed to act to stop it. *Gebser*, 118 S. Ct. at 1999.[5]

The court of appeals' contrary ruling failed to recognize that petitioner was making a claim against respondent for its own deliberate failure to remedy the hostile environment created by sexual harassment. The court erroneously interpreted petitioner's claim as "seeking direct liability of the Board for the wrongdoing of a student" and distinguished that from a case such as *Franklin* where, according to the court of appeals, the school was held liable directly for its employee's harassing actions. See Pet. App. 9a-10a. Thus, under the court of appeals' erroneous view, the fact that the harassing student is not an employee means that such liability does not apply. *Id.* at 22a. But *Gebser* teaches that, even in cases like *Franklin* where the harasser is an employee-agent of the

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[5] In *Floyd* v. *Waiters*, 133 F.3d 786, 789-793 (1998), petition for cert. pending, No. 97-8906, the Eleventh Circuit held that a school district could be held liable, under Title IX, for its employee's harassment of a student only where the superintendent or the school board itself has actual knowledge of the harassment. That rule is inconsistent with *Gebser*, which holds the institution responsible for knowledge of harassment by those school officials—like the teachers and principal here—with the authority to take corrective action to remedy the harassment on behalf of the educational institution.

educational institution, the institution's damages liability is based not on the actions of the employee-agent, but rather on the institution's own actions in deciding whether or how to respond to complaints about sexual harassment under its education programs and activities. That is precisely the theory of liability advanced by petitioner in this case. Under *Gebser*, these allegations state a claim for damages under Title IX.[6]

2. The circuits are divided on the questions whether and how Title IX applies to a school's response to students' complaints of sexual harassment by other students. The issue has been addressed inconsistently by four courts of appeals, and it is pending in four others.

The Seventh and Ninth Circuits have held that Title IX requires officials of recipient educational institutions to take steps to stop known sexual harassment of students by other students in their education programs and activities. In *Doe* v. *University of Illinois*, 138 F.3d 653, 661 (7th Cir. 1998), petition for cert. pending, No. 98-126, the plaintiff alleged that she had been subjected to a campaign of sexual harassment by a group of students at a high school administered by the University of Illinois, that she had complained to appropriate school officials, and that school officials had failed to take meaningful action to punish the harassers or to prevent further occurrences. The plaintiff brought an action alleging, *inter alia*, violations of Title IX, and seeking dam-

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[6] The requirements of notice and deliberate indifference announced in *Gebser* expressly apply only to damages liability. Petitioner may be able to establish a violation of Title IX, and hence entitlement to injunctive relief, without such a showing.

ages. The district court dismissed her Title IX claims. *Id.* at 655-656.[7]

The Seventh Circuit reversed, holding that "a Title IX fund recipient may be held liable for its failure to take prompt, appropriate action in response to student-on-student sexual harassment that takes place while the students are involved in school activities or otherwise under the supervision of school employees, provided the recipient's responsible officials actually knew that the harassment was taking place." *Doe*, 138 F.3d at 661; see also *id.* at 677-678 (Evans, J., concurring). The court ruled that such a failure to take appropriate steps in response to known sexual harassment is intentional discrimination on the basis of sex of the sort Title IX prohibits. *Id.* at 661. All three members of the panel recognized that the educational institution is liable, not for the actions of the harassing students, but for its own failure to respond to the harassment. *Id.* at 662; see *id.* at 668-669 (Coffey, J., concurring in part and dissenting in part); *id.* at 677 (Evans, J., concurring).[8]

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[7] The district court also rejected the University's contention that Doe's Title IX claim was barred by the Eleventh Amendment. The court of appeals affirmed that judgment, holding that "Congress enacted Title IX and extended it to the States, at least in part, as a valid exercise of its powers under Section 5 of the Fourteenth Amendment," and validly abrogated the States' Eleventh Amendment immunity. 138 F.2d at 660.

[8] In addition to the three separate opinions of the panel on the merits, Judge Easterbrook issued a statement respecting the denial of rehearing en banc, 138 F.3d at 678-679, and Chief Judge Posner (joined by Flaum & Manion, JJ.), issued a dissent from denial of rehearing en banc, *id.* at 679-680.

Judge Easterbrook noted that the panel's holding in *Doe* that "failure to protect pupils from private aggression is a

The Ninth Circuit agrees with the Seventh Circuit on this issue. In *Oona, R. S.* v. *McCaffrey*, 143 F.3d 473 (9th Cir. 1998), petition for cert. pending, No. 98-101, the plaintiff alleged that, while a sixth-grade student, she had been subjected to sexual harassment by a student teacher and by other students, and that school officials knew of the harassment but failed to take action to stop it. *Id.* at 474-475. She brought an action asserting, *inter alia*, claims against individual school officials pursuant to 42 U.S.C. 1983 (1994 & Supp. II 1996) for violation of her rights under Title IX and the Equal Protection Clause. *Ibid.*[9] On interlocutory appeal, the Ninth Circuit affirmed a district court order denying the individual defendants' motion to dismiss on qualified immunity grounds. The court held that a school official's obligation, under Title IX, to take steps to stop sexual harassment by other students (as well as by teachers) was clearly established at the time of the incidents alleged by the plaintiff. *Id.* at 476-478. It concluded: "We do not consider what steps school officials may reasonably be required to take to address harassment by fellow students. * * * We hold only that * * *

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species of discrimination" is based on "the original meaning of equal protection of the laws." 138 F.3d at 678. He emphasized that no active member of the Seventh Circuit expressed disagreement with that ruling; rather, they disagreed only regarding the level of knowledge and response required to be shown on the part of school officials in order to warrant imposition of liability. *Ibid.*

[9] The plaintiff also asserted a Title IX claim against the school district, but that claim was not before the court of appeals. 143 F.3d at 475. The court declined to address the question whether the individual defendants could be sued under Section 1983 for violations of Title IX. *Ibid.*

the duty to take reasonable steps * * * is clearly established." *Id.* at 477. One member of the court dissented, arguing that qualified immunity was warranted because the law was not clearly established at the time of the alleged incidents. *Id.* at 478-479.

By contrast, the Fifth Circuit has held that school districts may be liable for damages under Title IX in some cases of sexual harassment by fellow students, but only when school officials treat complaints of harassment by students of one sex differently from complaints by students of the other sex. *Rowinsky* v. *Bryan Indep. Sch. Dist.*, 80 F.3d 1006, 1016 (5th Cir. 1996), cert. denied, 117 S. Ct. 165 (1996).[10]

The Eleventh Circuit stands alone in holding that school officials have no responsibility at all, under Title IX, to respond to complaints by students about sexual harassment in the school's education program or activities if the harasser is a student.

Cases presenting the question of the applicability of Title IX to allegations of student sexual harassment by other students are now pending before the Second, Third, Fourth, and Tenth Circuits. See *Bruneau* v. *South Kortright Central Sch. Dist.*, No. 97-7495 (2d Cir. argued Dec. 12, 1997); *Linson* v. *University of Pennsylvania*, No. 96-2098 (3d Cir. submitted June 17, 1997; held pending this Court's decision in *Oncale* v. *Sundowner Offshore Services, Inc.*, No. 96-568); *Brzonkala* v. *Virginia Polytechnic Institute and State Univ.*, 132 F.3d 949 (4th Cir. 1997)

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[10] In *Doe*, the Seventh Circuit criticized *Rowinsky* for mischaracterizing the plaintiff's claim as an effort to hold the school liable for the acts of harassing students, when the plaintiff's claim actually was based on the schools' "own actions and inaction in the face of its knowledge that the harassment was occurring." 138 F.3d at 662.

(holding that an educational institution may be held liable under Title IX if it knew or should have known of sexually hostile environment caused by peer harassment and failed to remedy it), reh'g en banc granted, Nos. 96-1814 & 96-2316 (Feb. 5, 1998) (argued Mar. 3, 1998); *Murrel* v. *School Dist. No. 1*, No. 97-1055 (10th Cir. argued March 18, 1998).

These decisions show that the courts of appeals are in great disarray as to when, if ever, a school district may be liable under Title IX for responding with deliberate indifference to known sexual harassment of students by students or other non-employees. Ordinarily after the announcement of a new rule of law such as the one announced in *Gebser*, this Court remands related cases for reconsideration in light of the newly announced legal principles. For several reasons, however, we suggest that it would be more appropriate for the Court to grant review on the merits in this case. First, while *Gebser* points strongly in the direction of recognizing liability of a school district for failure to respond adequately to known sexual harassment of students by other students, it does not squarely address the issue, and thus does not directly respond to the Eleventh Circuit's observation that the Supreme Court has never squarely addressed Title IX liability in the context of student-on-student sexual harassment (Pet. App. 9a, 19a n.13). Second, the division among the courts of appeals on this issue involves four circuits, and is unlikely to be eliminated by a remand in this case and in others raising similar issues in petitions pending before this Court; the frequency with which the issue arises suggests that a definitive resolution by this Court is needed. Third, this Court's resolution of the issue is not likely to be aided by additional decisions

from the numerous courts of appeals in which the matter is pending. Litigation in the lower courts may well illuminate subsidiary issues, such as which school officials must receive notification of the harassment before liability accrues, and what constitutes an adequate response. But on the basic question presented by this case—whether such liability can ever exist—additional litigation can shed little additional light. In this respect, the case is in a similar posture to *Oncale* v. *Sundowner Services, Inc.*, 118 S. Ct. 998 (1998), in which this Court reviewed a holding by a court of appeals that same-sex sexual harassment is categorically not actionable under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*

For these reasons, the Court should grant certiorari to resolve the conflict, and to correct the error of the Eleventh Circuit in holding that federal fund recipients have no obligation under Title IX to address known sexual harassment of students by other students.

CONCLUSION

The petition for a writ of certiorari should be granted to review the court of appeals' ruling that educational institutions have no obligation under Title IX to take steps to address known instances of sexual harassment of students by other students. Alternatively, the petition should be granted, the judgment vacated, and the case remanded for reconsideration in light of *Gebser*.

Respectfully submitted.

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