No. 19-2203

In the

United States Court of Appeals

For the Fourth Circuit

JANE DOE,

Plaintiff-Appellant,

v.

FAIRFAX COUNTY SCHOOL BOARD,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA,
ALEXANDRIA DIVISION (1:18-cv-00614-LO-MSN)

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE IN SUPPORT OF PETITION FOR REHEARING EN BANC

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Supporting Appellee, Affirmance of the Decision of the U.S. District Court, and Appellee's Request for Rehearing En Banc

Pursuant to Federal Rule of Appellate Procedure 29(b), the National School Boards Association ("NSBA"), the Virginia School Boards Association ("VSBA"), the Maryland Association of Boards of Education ("MABE"), the North Carolina School Boards Association ("NCSBA"), and the South Carolina School Boards Association ("SCSBA"), by counsel, respectfully request leave to file a brief amici curiae in the support of the Petition for Rehearing En Banc (Doc. 59) filed by Appellee Fairfax County School Board. As required by FRAP 29(b), this motion is accompanied by the proposed brief amici curiae. The School Boards *Amici* conferred with counsel for the Appellant and the Appellee, and both parties consent to the filing of a brief amici curiae by the School Boards *Amici*.

I. Statement of Identity of Amici

The NSBA is a non-profit organization representing state associations of school boards, and the Board of Education of the U.S. Virgin Islands. Through its member state associations, NSBA represents over 90,000 school board members who govern nearly 14,000 local school districts serving approximately 51 million public school students. NSBA regularly represents its members' interests before Congress, and federal and state courts.

The VSBA is a voluntary, nonpartisan organization whose primary mission is the advancement of K-12 education in Virginia. Every public school board in the Commonwealth of Virginia is a member of VSBA. The VSBA promotes excellence

in public education through training, advocacy, and services. It also supports school boards by providing information and guidance related to compliance with state and federal laws, including Title IX.

The MABE is a private, not-for-profit organization that represents and has a membership consisting of all of Maryland's 24 local boards of education. MABE advocates for the concerns of Maryland boards of education before state and federal courts and agencies, the Maryland General Assembly, and the United States Congress.

The NCSBA is a non-profit organization formed to support local school boards across North Carolina. Although participation is voluntary, all of the 115 local boards of education in North Carolina are members, as is the school board for the Eastern Band of the Cherokee Nation. The NCSBA advocates for the concerns of local school boards in North Carolina, in federal courts, and in legislatures. There is no other entity that represents the interest of the North Carolina boards of education or that has the same understanding of matters affecting them. The NCSBA files amicus curiae briefs on behalf of North Carolina school boards in State and federal appellate cases.

Since 1950, the South Carolina School Boards Association ("SCSBA") has served as the unified voice of school boards governing South Carolina's K-12 public school districts. Membership consists of all 79 school boards across South Carolina,

but the SCSBA also provides resources to a number of non-traditional education entities such as the South Carolina School for the Deaf and Blind. SCSBA is a membership-driven, non-profit organization that provides a variety of board services, ranging from policy resources to training for members, and represents the statewide interests of public education through legal, political, community and media advocacy. As a legal advocate for public school districts, the SCSBA represents the interests of its members in supporting and enhancing elementary and secondary education in matters before the State and federal courts.

II. Interest in the Case and Reasons Why an Amicus Brief is Desirable and Why the Matters Asserted are Relevant to the Disposition of the Case

The School Boards *Amici* respectfully ask this Court to grant the Petition for Rehearing En Banc filed by Fairfax County School Board. *See* Doc. 59. The School Boards *Amici* previously filed a brief supporting Appellee Fairfax County School Board. *See* School Boards Br. Amici Curiae (Doc. 30).

Rehearing is necessary to correct the numerous errors in the panel's decision. *See* Opinion (Doc. 56). The Supreme Court of the United States established a demanding liability standard for claims of student-on-student sexual harassment against school districts. The panel's decision significantly relaxes this standard and creates a liability regime that will expose school districts throughout the Fourth Circuit to unfettered litigation regardless of the manner in which an educator or administrator attempts to implement the requirements of Title IX of the Education

Amendments of 1972, 20 U.S.C. §§ 1681-1688. Moreover, the panel's decision creates splits with six other circuits. This is a matter of exceptional importance, and en banc review is both merited and required.

An amicus brief from the School Boards *Amici* is desirable and the matters asserted by the School Boards Amici are relevant to the disposition of the case because the decision in this case will affect every public school student throughout the Fourth Circuit. The School Boards *Amici* here represent the interests of every public school board in Virginia, Maryland, North Carolina, and South Carolina. *Amici* recognize safe and supportive learning environments are crucial to the mission of every public school district. *Amici* and their members are committed to protecting students and to helping school districts develop and implement policies to address unlawful harassment and the overall school climate. *Amici* have taken a proactive approach to assist their members in meeting this important commitment through advocacy before federal and state governmental entities, policy development assistance, consultation, educational materials, and professional training for school officials. These school officials are in the best position to develop strategies to create safe learning environments for all students. The panel's decision significantly alters the liability standard for the members of the School Boards *Amici*, and will impact the educational environment of every K-12 public school student in the Fourth

Circuit. Therefore, the School Boards *Amici* respectfully ask the Court to grant leave to file the accompanying brief amici curiae.

Dated: July 7, 2021

Respectfully submitted,

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The Maryland Association of Boards of Education,
The North Carolina School Boards Association,
and
The South Carolina School Boards Association

CERTIFICATE OF COMPLIANCE

This brief complies with the requirements of Federal Rule of Appellate Procedure 29.

This brief complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5) because it has been prepared in a proportionally spaced 14-point Times New Roman font using Microsoft Word.

/s/ Robert W. Loftin
Robert W. Loftin

CERTIFICATE OF SERVICE

I hereby certify that on July 7, 2021, I electronically filed the foregoing Motion with the Clerk of this Court using the CM/ECF System, which will send notice of such filing to all counsel of record.

/s/ Robert W. Loftin
Robert W. Loftin

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BRIEF OF AMICI CURIAE NATIONAL SCHOOL BOARDS ASSOCIATION, VIRGINIA SCHOOL BOARDS ASSOCIATION, MARYLAND ASSOCIATION OF BOARDS OF EDUCATION, NORTH CAROLINA SCHOOL BOARDS ASSOCIATION, and SOUTH CAROLINA SCHOOL BOARDS ASSOCIATION

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Brief Supporting Appellee, Affirmance of the Decision of the U.S. District Court, and Appellee's Request for Rehearing En Banc

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

No. 19-2203 Caption: Jane Doe v. Fairfax County School Board

Pursuant to FRAP 26.1 and Local Rule 26.1,

National School Boards Ass'n, Virginia School Boards Ass'n, Maryland School Boards Ass'n,
(name of party/amicus)

North Carolina School Boards Ass'n, and South Carolina School Boards Ass'n

who is amicus, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Robert W. Loftin Date: 16 March 2020

Counsel for: Amicus Curiae in Support of Appellee

Print to PDF for Filing

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STATEMENT OF IDENTITY, INTEREST IN CASE, AND SOURCE OF AUTHORITY TO FILE

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The decision in this case will affect every public school K-12 student throughout the Fourth Circuit. The School Boards *Amici* here represent the interests of every public school board in Virginia, Maryland, North Carolina, and South Carolina. *Amici* recognize safe and supportive learning environments are crucial to the mission of every public school district. *Amici* and their members are committed to protecting students and to helping school districts develop and implement policies to address unlawful harassment and the overall school climate. *Amici* have taken a proactive approach to assist their members in meeting this important commitment through advocacy before federal and state governmental entities, policy development assistance, consultation, educational materials, and professional training for school officials. These school officials are in the best position to develop strategies to create safe learning environments for all students.

The School Boards *Amici* respectfully ask this Court to grant the Petition for Rehearing En Banc filed by Fairfax County School Board. *See* Doc. 59. The School Boards *Amici* previously filed a brief supporting Appellee Fairfax County School Board. *See* School Boards Br. Amici Curiae (Doc. 30). No attorney for any party authored this brief in whole or in part, and no person or entity other than the *Amici* and their members and counsel made any monetary contribution to this brief's preparation or submission.

SUMMARY OF THE ARGUMENT

Rehearing is necessary to correct the numerous errors in the panel's decision. *See* Opinion (Doc. 56). The Supreme Court of the United States established a demanding liability standard for claims of student-on-student sexual harassment against school districts. The panel's decision significantly relaxes this standard and creates a liability regime that will expose school districts throughout the Fourth Circuit to unfettered litigation regardless of the manner in which an educator or administrator attempts to implement the requirements of Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688. Moreover, the panel's decision creates splits with six other circuits. This is a matter of exceptional importance, and en banc review is both merited and required.

ARGUMENT

I. The Panel's Decision Fails to Apply the Correct Legal Standard When Reciting the Facts

As an initial matter, the panel failed to apply the correct legal standard when reciting the facts. *Compare* Opinion at 3-6 & 19-20 *with* Appellee's Br. at 42-45 *and* School Boards Br. Amici Curiae at 13-23. Because the school board was the prevailing party below, the panel was required to "view the trial evidence in the light most favorable to" the Fairfax County School Board. *Roe v. Howard*, 917 F.3d 229, 233 (4th Cir. 2019). In failing to follow the correct legal standard, the panel "improperly substitute[d]" its "finding for the jury's." Opinion at 34 (Niemeyer, J.,

dissenting).[1] This error by the panel merits en banc review to ensure the proper standard is applied in future Title IX cases in the Fourth Circuit.

II. The Panel's Decision Conflicts with Supreme Court Precedent and this Circuit's Precedent, and Creates New Liability Standards that Will Expose Public Schools to Unfettered and Unlimited Liability

Left uncorrected, the panel's decision in this case will expand the scope of Title IX liability for public school districts in the Fourth Circuit well beyond what Congress intended.

A. The Panel's New Actual Knowledge Standard Significantly Alters the Landscape for Public Schools and Requires En Banc Review

In *Davis v. Monroe County Board of Education*, the Supreme Court—by a 5-4 majority—confirmed that a school district may be liable for "student-on-student" harassment only where "the funding recipient acts with deliberate indifference to *known* acts of harassment in its programs or activities." 526 U.S. 629, 633 (1999) (emphasis added). In articulating the liability standard, the Supreme Court held that a school district may be liable only if it had "*actual knowledge*" of "harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit." *Id.* at 650, 633 (emphasis added).

[1] As discussed below and separately by Fairfax County School Board, as well as for the reasons stated in his dissent, the School Boards *Amici* agree with Judge Niemeyer that there is a separate, alternative basis to affirm the judgment below. The School Boards *Amici* respectfully request that rehearing en banc be granted and this issue be allowed to be briefed further.

Throughout its opinion, the Supreme Court was careful to specify that school officials must subjectively know about "*acts*" of harassment before liability may attach. *E.g.*, *id.* at 642 (confirming that a school district may be liable for damages only by "remaining deliberately indifferent to acts of teacher-student harassment of which it had actual knowledge") (citing *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998)); *see also id.* at 643 (paraphrasing the *Gebser* standard as "deliberate indifference to known acts of harassment"); *id.* at 647 (concluding that recipients are liable "where the recipient is deliberately indifferent to known acts of student-on-student sexual harassment").

In *Davis,* the Supreme Court also contrasted "actual knowledge" with "constructive knowledge," which would impose liability on school officials who "knew *or should have* known" about in-school harassment, *i.e.*, those who were merely negligent. *Id.* at 642. Thus, as a first element, *Davis* makes clear that school officials must have "actual knowledge" of "acts of student-on-student harassment" to be liable for damages.

In *Baynard v. Malone*, 268 F.3d 228 (4th Cir. 2001), this Court applied the Supreme Court's holdings in *Gebser* and *Davis* to determine the actual knowledge an educational institution must possess to incur monetary liability under Title IX. This Court held "Title IX liability may be imposed only upon a showing that the school district officials possessed *actual knowledge* of the discriminatory conduct in

question." *Id.* (emphasis added). This Court emphasized that *Davis* foreclosed institutional liability for "failure to react to teacher-student harassment of which [the school district] knew or should have known," and, instead, limited liability to cases involving sexual harassment about which school officials have "actual knowledge[.]" *Id.*

The panel decision below sidesteps, ignores, and alters this unambiguous and binding precedent. In the context of the K-12 schools served by the School Boards *Amici*, the panel decision creates an unworkable rule that will create chaos throughout public schools in the Fourth Circuit. In recognizing that the deliberate indifference element is a "high bar," the panel stated: "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." Opinion at 17. This new rule in the panel's decision is a significant expansion on the rule announced in *Davis*, *see* 526 U.S. at 650, and is particularly problematic given the use of the word "unsubstantiated" by the panel. Moreover, it creates perverse incentives for schools "to expel first and to ask questions later." *Foster v. Bd. of Regents*, 952 F.3d 765, 794 (6th Cir. 2020) (Sutton, J., dissenting), *reh'g en banc granted*, 958 F.3d 540, on *reh'g en banc*, 982 F.3d 960 (6th Cir. 2020) (Op. by Sutton, J.).

B. The Panel's Deliberate Indifference Ruling was Made Without the Benefit of Briefing by the Parties and Expands the Heightened Standard Created by the Supreme Court

Exacerbating these perverse incentives, the panel's decision also improperly expands the clear limitations set by the Supreme Court in *Davis* regarding deliberate indifference. *See* Opinion at 21-32. The Supreme Court was clear that a school's "deliberate indifference" must "'subject[ ]' its students to harassment" in order for a violation of Title IX to occur. *Davis*, 526 U.S. at 644. In recognizing schools may face Title IX liability based on student-on-student harassment, the Supreme Court rejected any type of negligence or agency analysis and stated that the scenarios that might subject a school to liability are "narrowly circumscribe[d]" and "cabin[ed]" and "limit[ed]." *Davis*, 526 U.S. at 644-645.

Until the panel's decision, this Court had recognized that deliberate indifference is a "very high standard—a showing of mere negligence will not meet it." *Baynard*, 268 F.3d at 236 (quoting *Grayson v. Peed*, 195 F.3d 692, 695 (4th Cir. 1999)); *S.B. v. Bd. of Educ. of Harford Cty.*, 819 F.3d 69, 76 (4th Cir. 2016) ("*Davis* sets the bar high for deliberate indifference."). The Supreme Court recognized the importance of setting this heightened standard to ensure that school administrators "continue to enjoy the flexibility they require." *Davis*, 526 U.S. at 648. "The point, again, is that a school may not be held liable under Title IX . . . for what its students do, but only for what is effectively 'an official decision by the school not to remedy'

student-on-student harassment." *S.B.*, 819 F.3d at 76-77 (quoting *Davis*, 526 U.S. at 642). Importantly, "school administrators are entitled to substantial deference" in developing a "response to student-on-student bullying or harassment." *S.B.*, 819 F.3d at 77.

Without the benefit of briefing by either party, the panel adopted the minority view among other federal circuits and held that a single, isolated incident of pre-notice, student-on-student harassment may suffice to trigger Title IX liability for schools. Opinion at 26-27. The panel did this without discussing the Sixth Circuit's recent analysis of the issue in *Kollaritsch v. Mich. State Univ. Bd. of Trs.*, 944 F.3d 613 (6th Cir. 2019), *cert. denied*, 141 S. Ct. 554 (2020). This significant expansion of Title IX liability by the panel justifies and necessitates en banc review.

C. The Panel's Decision Eliminates an Educator's Discretion

Finally, in granting en banc review, the School Boards *Amici* respectfully request the Fourth Circuit recognize that school officials need leeway to exercise discretion and judgment in school disciplinary matters. That judgment is informed by an understanding of student experiences and relationships, socio-economic realities, and community dynamics and history. In every case, however, officials' discretion to evaluate the available information is essential.

Such deference to an educator's discretion is particularly critical in the "student-on-student" harassment context, for several reasons. First, school officials

have more accurate and reliable information about their students and school dynamics than any court or any government body could ever have. School officials interact with students daily, so they generally know which students are isolated, which students have had previous scuffles, and which students just broke up. Myriad facts that officials have learned about their school, staff, and students, along with officials' own specialized training and expertise, help officials evaluate reports of student misbehavior.

Second, as the Supreme Court has recognized, children "regularly interact in a manner that would be unacceptable among adults." *Davis*, 526 U.S. at 651. Even at the best schools, students call their classmates names, shove each other in the halls, experiment with their emerging sexuality, and exchange flirtatious or vulgar messages. Federal courts should not second-guess school officials' consideration of these realities or replace an educator's professional experience and expertise with their own.

Third, prohibiting educators from exercising their professional judgment to evaluate the facts they receive puts schools in an impossible position. Schools have responsibilities to accused students just as they do to accusers, and an overarching duty to all students to maintain a safe environment. In recent years, accused students have increasingly sought judicial recourse because they feel a school reacted too hastily or punished too severely. Regardless which party ultimately prevails, the

school can rarely satisfy the students and parents on the other side. The panel's expansion of liability only further narrows the channel through which schools must attempt to navigate.

In short, Title IX neither requires nor permits this Court to substitute its views, or the views of a "reasonable person," for that of trained school officials. Absent en banc correction of the panel's decision, school officials will lose the ability to exercise their discretion and judgment when investigating and responding to Title IX complaints concerning student-to-student harassment.

III. The Panel's Decision Creates Splits with Six Other Circuits

The School Boards *Amici* agree with the points made by the Appellee regarding the two different circuit splits created by the panel's decision. *See, e.g.,* Fairfax County School Board Petition for Rehearing En Banc (Doc. 59) at 1, 5, 6, 9-12, 13-16. These splits are especially problematic for the School Boards *Amici* because they must work with school districts throughout the Fourth Circuit to implement the panel's decision. If such splits are going to remain, the entire Fourth Circuit should address the issues raised in this appeal as they affect every public school student in the Fourth Circuit. The scope of Title IX liability is a matter of exceptional importance and merits en banc review.

CONCLUSION

The School Boards *Amici* respectfully pray that this Court grant Appellee's request for rehearing en banc and affirm the judgment below. Left uncorrected, the panel's decision will subject all school districts within the Fourth Circuit to increased litigation, while simultaneously denying school officials due deference to respond to and investigate alleged incidents.

Dated: July 7, 2021

Respectfully submitted,

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