No. 15-50558

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ADRIAN SALAZAR,

Plaintiff-Appellee,
v.

SOUTH SAN ANTONIO INDEPENDENT SCHOOL DISTRICT,

Defendant-Appellant

On Appeal from the United States District Court
for the Western District of Texas – San Antonio Division

BRIEF OF AMICI CURIAE NATIONAL SCHOOL BOARDS ASSOCIATION AND THE TEXAS ASSOCIATION OF SCHOOL BOARDS LEGAL ASSISTANCE FUND IN SUPPORT OF DEFENDANT-APPELLANT

Francisco M. Negrón Jr.
NATIONAL SCHOOL BOARDS ASSOCIATION
1680 Duke St.
Alexandria, Virginia 22314
(703) 838-6722
fnegron@nsba.org

Lisa A. Brown
Janet Little Horton
THOMPSON & HORTON LLP
3200 Southwest Freeway
Phoenix Tower, Suite 2000
Houston, Texas 77027
(713) 554-6741
lbrown@thompsonhorton.com
jhorton@thompsonhorton.com

Counsel for *Amici Curiae*

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that, in addition to those persons listed in the briefs previously filed by the parties to this appeal, the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. National School Boards Association, Alexandria, Virginia – *Amicus Curiae,* Alexandria, Virginia

2. Texas Association of School Boards Legal Assistance Fund (including the Texas Association of School Boards, Texas Association of School Administrators, and the Texas Council of School Attorneys) – *Amicus Curiae,* Austin, Texas

3. Thompson & Horton LLP, Phoenix Tower, Suite 2000, 3200 Southwest Freeway, Houston, Texas 77027 – Attorneys for Amici Curiae National School Boards Association and Texas Association of School Boards Legal Assistance Fund

/s/ Lisa A. Brown

Attorney for Amici Curiae National
School Boards Association and
Texas Association of School Boards Legal
Assistance Fund

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STATEMENT OF INTEREST OF AMICI CURIAE AND AUTHORITY TO FILE BRIEF[1]

The National School Boards Association ("NSBA") is a non-profit organization of state associations of school boards throughout the United States and the Board of Education of the U.S. Virgin Islands. Through its state associations, NSBA represents more than 90,000 of the nation's school board members who, in turn, govern approximately 13,600 local school districts that serve nearly 50 million public school students, which is approximately 90 percent of the elementary and secondary students in the nation. The Texas Association of School Boards (TASB) is a Texas non-profit corporation whose voluntary membership consists of the 1,036 school boards in the State of Texas. TASB's mission is to promote educational excellence for Texas school children through advocacy, leadership, and high quality services to school districts. TASB established the Legal Assistance Fund (LAF) under a Trust Agreement nearly three decades ago. The purpose of the LAF is to assist parties whose positions are aligned with the interests of Texas school districts by advocating through litigation for issues or causes that generally affect or will affect the public schools of Texas. Nearly 800 Texas school districts are members of the LAF. The LAF's board of trustees is governed by nine members representing TASB, the Texas Association

[1] All parties have consented to the filing of this brief. Additionally, no attorney for any party has authored this brief in whole or in part, and no person or entity other than Amici and their counsel have made any monetary contribution to the preparation or submission of this brief.

of School Administrators, and the Texas Council of School Attorneys. NSBA's and TASB's amicus briefs have been cited by the United States Supreme Court and this Court in numerous cases involving education and students. *See, e.g.*, *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999); *Morgan v. Swanson*, 755 F.3d 757 (5th Cir. 2014); *Doe v. Covington County Sch. Dist.*, 675 F.3d 849 (5th Cir. 2012).

Amici have submitted this brief because of the substantial impact that this Court's eventual ruling will have on the operation of schools that are subject to Title IX of the Education Amendments of 1972, 20 U.S.C. §1681. Although the Supreme Court has held that "knowledge of the wrongdoer himself is not pertinent to the analysis" of a claim for damages under Title IX, *see Gebser v Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 291 (1998), the district court upheld a $4.5 million judgment against the school district in this case based solely on the knowledge of the wrongdoer. Under the district court's ruling, no matter how vigilant a school is in providing anti-harassment training and complying with the mandates of Title IX, it will always be liable if the perpetrator is a school supervisor acting surreptitiously and alone. This ruling is contrary to *Gebser*, will create serious financial consequences for schools, and ultimately will undermine Title IX's commendable policy objectives by diverting funds away from educational programs to litigation. A strict liability standard also will discourage the formation

of mentoring relationships between educators and students which are associated with academic achievement and which are a protective factor against abuse. By addressing the real-world impact that a strict liability standard will have on the public schools, Amici believe that this brief will aid the Court in evaluating the issues presented by this appeal.

ARGUMENT

I. Liability for damages based solely on the knowledge of the wrongdoer has never been part of the Title IX contract between the federal government and public schools.

Congress enacted Title IX pursuant to its authority under the Spending Clause. *See Gebser v. Lago Vista Indep. Sch. Dist*., 524 U.S. 274, 287 (1998). The legitimacy of the spending power is the recipient's voluntary and knowing acceptance of the conditions attached to the money. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). Congress must communicate these conditions clearly and unambiguously. *Canutillo Indep. Sch. Dist. v. Leija*, 101 F.3d 393, 399 (5th Cir. 1996). Since the passage of Title IX more than 40 years ago, neither Congress, the U.S. Department of Education, nor any court has ever communicated to the nation's school districts or institutions of higher education that, as a condition of receiving federal funds, they may be held liable for unlimited damages based upon the sexually abusive acts of a school employee that were known only to the employee. In this case, by upholding a $4.5 million

judgment based solely on the knowledge of the perpetrator, the district court has, in effect, retroactively amended the Title IX contract with an untenable condition that will be financially devastating for schools and that ultimately will undermine Title IX's commendable policy objectives.

According to the U.S. Department of Education, in 2011, the average school district received just 10.16 percent of its revenue from federal sources.[2] A large portion of these federal dollars – approximately $12.6 billion in 2013 – is spent on special education for students with disabilities.[3] Other noteworthy federal education grant programs include the National School Lunch Program, the National School Breakfast Program, English language acquisition programs, and migrant education programs.[4]

When a school district accepts federal aid, it "weighs the benefits and burdens before accepting the funds." *Guardians Ass'n v. Civil Serv. Comm'n of N.Y.*, 463 U.S. 582, 596 (1983). If one of the burdens of accepting these funds is to agree to strict liability and the risk of multi-million dollar judgments for the private

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[2] *See* National Center for Education Statistics, DIGEST OF EDUCATION STATISTICS, *Revenues for Public Elementary and Secondary Schools, by source of funds: Selected years, 1919-1920 through 2011-2012*, Table 235.10, *available at* https://www.nces.edu.gov/programs/digest/d14/tables/dt14_235.10asp (last visited 9/25/15).

[3] U.S. Department of Education, *Special Education, Fiscal Year Budget 2014 Budget Request*, at J-11 (2014), *available at* https://www2.ed.gov/about/overview/budget/budget14/justifications/j-specialed.pdf (last visited 9/20/15).

[4] *See* Texas Legislative Budget Board, "Top 100 Federal Funding Sources in the Texas State Budget" at 57-59, 71 (Feb. 2013), *available at* https://www.lbb.state.tx.us/Federal_Funds/Other_Publications/583_Top%20100%20Fed%20Funds%20in%20Texas.pdf (last visited 9/16/15).

criminal acts of school supervisors, many school districts will conclude that the burden significantly outweighs the benefits. Surely Congress did not intend to discourage schools from participating in these programs. *Cf. id.* at 603, n. 24 (the "salutary deterrent effect of a compensatory remedy" may be "outweighed by the possibility that such a remedy would dissuade potential recipients from participating in important federal programs"); *see also Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 656 (1999) (Kennedy, J., dissenting) ("Without doubt, the scope of potential damages liability is one of the most significant factors a school would consider in deciding whether to receive federal funds").

Yet this is the likely consequence of the standard imposed by the district court. Under the court's ruling, no matter how vigilant a school is in providing anti-harassment training and complying with the mandates of Title IX, it will always be liable if the perpetrator is a school supervisor acting surreptitiously and alone. A single adverse judgment easily could exceed a district's annual federal funding or cause a financial crisis that impacts critical school services.[5]

Of the more than 1,000 school districts in the State of Texas, more than 75 percent of them enroll fewer than 1,600 students and receive a proportionately

[5] *See, e.g., Gebser*, 524 U.S. at 290 (noting that the defendant school district had received less than $120,000.00 in federal aid); *Canutillo*, 101 F.3d at 400 (even if school districts are vigilant in attempting to guard against abuse, strict liability creates an unreasonable risk of "potential financial ruin" for districts).

smaller share of federal dollars.[6] For example, Lago Vista ISD, the school district in *Gebser*, received just $617,112.00 in federal aid in 2012.[7] A $4.5 million judgment not only would exceed Lago Vista ISD's annual federal funding, it would wipe out most of the district's budget for teacher salaries.[8] Although South San Antonio ISD, with 10,000 students, receives more federal dollars than Lago Vista ISD, 89.7 percent of its students are economically disadvantaged, and a substantial portion its federal dollars are used to provide important services to students in need.[9]

The financial implications for schools are even greater in situations in which the perpetrator harms more than one student and each student asserts a separate claim. *See, e.g.*, *Canutillo Indep. Sch. Dist. v. Nat'l Union Fire Ins. Co.*, 99 F.3d 695 (5th Cir. 1996) (teacher allegedly molested five second-grade girls). Nor are the risks eliminated by the potential availability of insurance. Since the 1980s, when insurers received a large number of clergy-related sex abuse claims, insurance has become more expensive with higher premiums, higher deductibles, and intensive underwriting, and exclusions from coverage remain broad. *See generally* P. Swisher, "Liability Insurance Coverage for Clergy Sexual Abuse

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[6] Texas Education Agency, SNAPSHOT 2014 SCHOOL DISTRICT PROFILES, http://ritter.tea.state.tx.us/perfreport/snapshot/2014/distsize.html [hereinafter TEA SNAPSHOT] (last visited 9/23/15).

[7] *Id.*, TEA SNAPSHOT, http://ritter.tea.state.tx.us/perfreport/snapshot/2014/index.html.

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[9] *Id.*, TEA SNAPSHOT, http://ritter.tea.state.tx.us/cgi/sas/broker.

Claims," 17 CONN. INS. L.J. 355, 357-58, 397-97 (2011); *see e.g.*, *Canutillo*, 99 F.3d at 708 (holding that insurer had no duty to defend school district against Title IX claims; coverage was required only when school officials were acting "in the performance of duties" and "no person commits assault and battery in the performance of his duties"); *TIG Ins. Co. v. San Antonio YMCA*, 172 S.W.3d 652, 661 (Tex. App. – San Antonio 2005, no pet.) (holding that counselor's abuse of six children was considered a single "sexual abuse occurrence," thus limiting coverage available under the policy). If liability were to turn on the acts of the wrongdoer, as opposed to a school's lack of care in responding to a wrongdoer, then insurance, already a scarce resource, would become "even harder to obtain." *John R. v. Oakland Unified Sch. Dist.*, 48 Cal.3d 438, 451, 769 P.2d 948, 956 (1989) (applying California law); *Bratton v. Calkins*, 870 P.2d 981, 987 (Wash. App. 1994, review den.) (accord).

The legislative record indicates that "Congress did not view Title IX as the kind of legislation that could generate expansive liability." *Rosa H. v. San Elizario Indep. Sch. Dist.*, 106 F.3d 648, 668 n. 4 (5th Cir. 1997); *see also Cannon v. University of Chicago*, 441 U.S. 677, 709-710 (1979) (observing that Congress had considered and rejected the academic community's argument that a private right of action would lead to costly or burdensome litigation against schools). In *Cannon*, the Supreme Court concluded that a cut-off of federal funds by the Department of

Education would be a "far more severe" sanction than an individual lawsuit. *See id*. at 709 n. 47 and n. 44 (stating that the risk of the "occasional" lawsuit would be "dwarfed" by a cut-off of federal funds). This case demonstrates that, if liability is allowed based solely on the knowledge of the wrongdoer, then there is a very real risk of judgments that will be as severe, if not more severe, than the loss of federal funds.

No school should be placed in the position of having to weigh the benefits of participating in important federal programs against the burden of an unforeseeable multi-million dollar judgment, particularly when no prior regulation, court ruling, or departmental guidance gave notice of this potential source of liability. Although the federal government can "add strings to the Title IX funds as it disburses them," it cannot modify past agreements. *Rosa H.* at 658 (declining to retroactively apply new federal guidelines). Prior to the ruling in the court below, the nation's school districts reasonably relied on *Gebser's* unambiguous declaration that the "knowledge of the wrongdoer himself is not pertinent to the analysis" in a suit for damages under Title IX. *Gebser*, 524 U.S. at 291, citing the RESTATEMENT (SECOND) OF AGENCY § 280. The district court's ruling reflects a departure from precedent that will, as discussed below, have grave consequences for schools and their communities.

II. Under *Gebser*, liability for damages does not attach unless the school district receives a *meaningful opportunity* to end the discrimination and refuses to intervene; this opportunity does not exist when the perpetrator is the only person who knows about the discrimination.

In *Gebser*, the Supreme Court agreed that vicarious liability and constructive knowledge are not a part of the Title IX contract. The Court rejected these proposed liability standards because the recipient – the school board – will not have known about the noncompliance with the contractual condition. *Gebser*, 524 U.S. at 288. Instead, the Court held that liability is not permitted unless an "appropriate person" – an individual with authority to take corrective action – receives actual notice of the harassment but responds with deliberate indifference. *Id.* at 290-91. The knowledge of the perpetrator is never sufficient to trigger liability. *Id.* at 291.

The *Gebser* standard embodies two important, related principles. First, a school district may not be held liable in damages merely because discrimination occurs in an educational program. The trigger for damages is not the underlying discrimination but the district's *inadequate response* to the discrimination, which then subjects the student to *further* discrimination. *See generally Davis*, 526 U.S. at 644-45, 648 (school districts may be held liable when they respond to harassment in a manner that is clearly unreasonable and that "subjects" the student to "further harassment"); *Gebser*, 524 U.S. 290-91 (explaining that liability is based on the recipient's "official decision" not to remedy discrimination, not the

employee's "independent" discriminatory actions). Under *Gebser*, damages may be avoided "*even if the harm ultimately was not averted*." *Doe v. Dallas Indep. Sch. Dist.*, 220 F.3d 380, 385, 388 (5th Cir. 2000) (citation omitted) (affirming summary judgment because principal's "ineffective response," leading to "tragic" consequences for abused child, was not deliberately indifferent) (emphasis added).

Second, a school district may not be held liable unless it has had a *meaningful opportunity* to respond to the discrimination about which it has been notified. The opportunity for corrective action is central to *Gebser's* holding and is an essential term of the Title IX contract. *Gebser* repeatedly refers to the recipient's "opportunity for voluntary compliance," its "willing[ness] to institute prompt corrective measures," and the "opportunity to rectify any violation." *Gebser*, 524 U.S. at 289-90 (citations omitted). In this case, the district court focused narrowly on whether an appropriate person had authority to take corrective action in some general sense. (ROA.978-980.) The court did not consider whether, in any real sense, the school district had the opportunity to intervene before preventing a multi-million dollar judgment. The district court also effectively redefined the concept of "notice" to include information already known to the perpetrator. As used in *Gebser*, however, "notice" plainly refers to *acquisition* of knowledge of harm caused by others and not to knowledge of one's own conduct received while inflicting harm. *See, e.g.*, *Gebser*, 524 U.S. at 290

(describing "an official *who is advised of a Title IX violation* [and] refuses to take action to bring the recipient into compliance") (emphasis added).

Gebser contemplates that the opportunity for voluntary compliance will take place under conditions that are roughly "comparable" to those in an administrative enforcement setting. *Gebser*, 524 U.S. at 290 ("It would be unsound, we think, for a statute's *express* system of enforcement to require notice to the recipient and an opportunity to come into voluntary compliance while a judicially *implied* system of enforcement permits substantial liability without regard to the recipient's knowledge") (emphasis in the original). At the least, the "appropriate person" should have the ability, means, and opportunity to actually implement corrective action.

With administrative enforcement, the first step is a written notice, which is typically sent to the district superintendent. The allegations are outlined in detail, leaving little room for interpretation about the matters to be resolved. The opportunity for investigation, dialogue, and conciliation may take weeks, months, or even years, and the superintendent invariably will confer with the school board and other district officials regarding the investigation and resolution of the matter within the district. It is the rare case that does not involve the coordination of multiple departments. Thereafter, OCR will determine whether "the school has taken immediate and effective corrective action responsive to the harassment,

including effective actions to end the harassment."[10] If the district agrees to corrective action, the case is over, subject to possible future monitoring for compliance.[11] This approach is used even when violations are found "*because, even if OCR identifies a violation, Title IX requires OCR to attempt to secure voluntary compliance. Thus, because a school will have the opportunity to take reasonable corrective action before OCR issues a formal finding of violation, a school does not risk losing its Federal funding solely because discrimination occurred*."[12]

Nothing in *Gebser* authorizes courts to *diminish* the recipient's opportunity for voluntary compliance merely because damages are at stake rather than loss of federal funds. Here, South San Antonio ISD cannot objectively be viewed as having had a meaningful opportunity to remedy the misconduct when the only person in the entire school district with knowledge of the misconduct was the campus-level administrator who was engaged in the misconduct and was highly motivated to conceal it.

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[10] U.S. Department of Education, Office for Civil Rights, REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES (2001) at 14-15 (hereinafter "2001 Guidance"), *available at* www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf. (last visited 9/20/15).

[11] *Id.*

[12] *Id*. at 15 (emphasis added). In 2013-2014, OCR resolved 90 complaints related to sexual harassment in K-12 and post-secondary schools. *See* U.S. Department of Education, Office for Civil Rights, PROTECTING CIVIL RIGHTS, ADVANCING EQUITY: REPORT TO THE PRESIDENT AND SECRETARY OF EDUCATION FY 2013-2014 at 28 (2015), *available at* www2.ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2013-14.pdf (last visited 9/20/15).

The district court's approach ignores the tragic reality of this offense. The simple fact is that "sexual abuse is conducted in secret making it difficult, if not impossible to detect without being told about it." *Canutillo*, 101 F.3d at 399; *see generally* J. Myers, *Expert Testimony in Child Sexual Abuse Litigation: Consensus and Confusion*, U.C. DAVIS JOURNAL OF JUVENILE LAW AND POLICY at 3, 26-27 (Winter 2010) (explaining that abuse occurs in secret; there are no witnesses; and abusers actively use techniques to maintain the child's silence); C. Larson, *et al*, *Sexual Abuse of Children: Recommendations & Analysis*, THE FUTURE OF CHILDREN, Vol. 4, No. 2, at 7 (Summer/Fall 1994) ("unless secrecy is somehow broken, there is very little that can be done to protect many of the victims"). Detection is complicated by the fact that child sex offenders "are a heterogeneous group with few shared characteristics apart from a predilection for deviant sexual behavior." J. Myers, *et al*, *Expert Testimony in Child Sexual Abuse Litigation*, 68 NEB. L. REV. 1, 142 (1989). Many offenders are socially integrated and are successful leaders in their schools or communities, as evidenced by cases involving clergy, Boy Scout leaders, and coaches. These offenders engage in deep-seated cognitive distortions that enable them to minimize or justify their behavior. *See* U.S. Department of Justice, Center for Sex Offender Management, UNDERSTANDING SEX OFFENDERS: AN INTRODUCTORY CURRICULUM, *available at* http://www.csom.org/train/etiology/3/3_1.htm (last visited 9/25/15). These

individuals are not deterred by the criminal law or school policies and cannot be relied upon to report their own wrongdoing.

In sum, liability under *Gebser* is not permitted unless the recipient has received a meaningful opportunity to take corrective action but has refused that opportunity. When the only person with knowledge of the sexual harassment is the perpetrator, this opportunity realistically does not exist; therefore, liability is precluded as a matter of law. The district court erred in holding to the contrary.

III. Current legal standards advance the policy objectives of Title IX by providing an incentive for schools to offer training programs aimed at the prevention of child sex abuse and harassment. A strict liability standard that permits large damages claims will impair these critical prevention efforts and ultimately will undermine Congress's policy objectives.

During the four decades of Title IX's existence, congressional policy has emphasized prevention as the primary means of advancing the policies embodied by Title IX. Prevention as a congressional policy choice permeates related federal statutes that address child sex abuse and exploitation.[13] The benefits of prevention cannot be gainsaid. During the period from 1992 through 2010, a period marked

[13] *See, e.g.*, U.S. Department of Justice, THE NATIONAL STRATEGY FOR CHILD EXPLOITATION PREVENTION AND INTERDICTION: A REPORT TO CONGRESS at 1 (August 2010) ("[T]he goal of this National strategy is to prevent child sexual exploitation from occurring in the first place…. This strategy will accomplish that goal by efficiently leveraging assets across the federal government in a coordinated manner"); U.S. Department of Health & Human Services, Office on Child Abuse and Neglect, EMERGING PRACTICES IN THE PREVENTION OF CHILD ABUSE AND NEGLECT, at 1 (2003) ("Prevention is a major initiative of the U.S. Department of Health and Human Services"), *available at* www.childwelfare.gov/pubPDFs/emerging_practices_report.pdf (last visited 9/18/15) [hereinafter "EMERGING PRACTICES"].

by numerous advances in child abuse research and training protocols, the nation experienced statistically significant declines in incidents of child sexual abuse.[14] Although prevention itself is costly, it is less costly than the secondary effects associated with investigating and responding to abuse.[15] The liability standard imposed by the district court diverts substantial resources away from these critical prevention efforts and undermines congressional policy.

Without question, child abuse is one of the country's "most serious concerns."[16] In 2012, children's protection agencies nationally received an estimated 3.4 million referrals, 9.3 percent of which involved allegations of sexual abuse.[17] Based on research occurring over the last three decades, federal policy increasingly has stressed collaboration among all levels of government: federal, state, and local.[18]

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[14] U.S. Department of Health & Human Services, Children's Bureau, CHILD MALTREATMENT 2012 at 92 (2012) *available at* http://www.acf.hhs.gov/sites/default/files/cb/cm2012.pdf (last visited 9/24/15) [hereinafter "CHILD MALTREATMENT"].

[15] In a 2012 study sponsored by the Centers for Disease for Control and Prevention, researchers found that the national economic burden of child abuse, including sexual abuse, is $124 billion and thus rivals diabetes and stroke as a serious public health concern. *See* X. Fang, et al, *The Economic Burden of Child Maltreatment in the United States and Implications for Prevention*, CHILD ABUSE & NEGLECT, Vol. 36, p. 161 (Feb. 2012), *available at* www.sciencedirect.com/science/article/pii/S0145213411003140. The study quantified these costs, including the costs associated with law enforcement and criminal justice, medical and mental health, and special education services. The economic burden is "substantial" and weighs heavily in favor of a public policy that favors prevention. *Id*. at 160-161.

[16] CHILD MALTREATMENT at 1.

[17] *Id*. at 5, 20.

[18] *See* EMERGING PRACTICES at 1.

Although school districts are an important partner in the protection of students, neither Title IX nor its legislative history indicates that Congress intended the statute to serve as a vehicle for providing compensation to students who are injured by educators acting under a cloak of secrecy. Unlike Title VII, which "aims centrally to compensate victims of discrimination" through make-whole remedies, Title IX "focuses more on 'protecting' individuals from discriminatory practices carried out by recipients of federal funds" and to prevent recipients from using those funds in a discriminatory manner. *Gebser*, 504 U.S. at 287 and 292 (citations and quotations omitted); *see also Cannon*, 441 U.S. at 704 ("First, Congress wanted to avoid the use of federal resources to support discriminatory practices; second, it wanted to provide individual citizens effective protection against those practices."); 117 CONG. REC. 30399, 30412 (1971) (Comments of Sen. Bayh) ("It does not do any good to pass out hundreds of millions dollars if we do not see that the money is applied equitably to over half our citizens."). At the time of enactment, congressional drafters were focused broadly on practices affecting equal opportunity and access, such as admissions policies. *See Davis*, 526 U.S. at 663 (Kennedy, J., dissenting) (explaining that, when Title IX was first enacted, "the concept of sexual harassment as gender discrimination had not been recognized or considered by the courts").[19]

[19] The legislative record is bereft of references to child sex abuse or sexual

Consistent with Title IX's objective of access to institutions and protection against discriminatory practices, Congress encourages voluntary compliance through the administrative enforcement process. *See* 20 U.S.C § 1682. Toward that end, the Department of Education has focused on the prevention of discrimination by requiring schools to adopt and disseminate anti-discrimination grievance procedures and to appoint Title IX coordinators to manage schools' compliance efforts. *See* 34 C.F.R. §§ 106.08(a), 106.9.

Since the enactment of Title IX, the responsibilities of school districts and other educational institutions have grown exponentially as have their financial obligations. In 1997, the Department of Education issued its first policy guidance on sexual harassment for primary and secondary schools.[20] A revised guidance followed four years later.[21] These advisories presented new recommendations regarding policies, training, and investigations. In 2010, 2011, 2014, and 2015, several years after Michael Alcoser had departed South San Antonio ISD, the Department of Education issued additional advisories or guidance documents with

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harassment. *See generally* J. Todd, *Title IX of the 1972 Education Amendments: Preventing Sex Discrimination in Public Schools*, 53 TEX. L. REV. 103, 105 (Dec. 1974) (noting the "paucity of direct references in the legislative history" to primary and secondary education) (citation omitted); *see also id.* at n. 18 (citation omitted).

[20] *See* U.S. Department of Education, Office for Civil Rights, SEXUAL HARASSMENT GUIDANCE, 62 Fed. Reg. 12039 (1997).

[21] See U.S. Department of Education, Office for Civil Rights, REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES (2001), *available at* http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf.

detailed recommendations for student-on-student harassment, training, curricula, investigation, discipline, and administration.[22] The Department also began using the phrase "sexual violence" in addition to sexual harassment and sexual discrimination to describe the prohibitions of Title IX.[23] The theme that connects these developments is prevention.

Prevention has long been the focus of other child-protection statutes as well. For example, two years after the passage of Title IX, Congress enacted the Child Abuse Prevention and Treatment Act (CAPTA), 42 U.S.C. § 5101, specifically aimed at supporting states in the prevention of child abuse. CAPTA, as amended, authorizes federal funding for grants to states to support prevention, investigation, and handling of cases of child maltreatment, including child sexual abuse.[24] One of CAPTA's most enduring reforms was to require the states, as a condition of receiving federal funds, to implement a state law for mandatory reporting of suspected child abuse or neglect. *See* 42 U.S.C. § 5106a(b)(2)(B). Today, all 50

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[22] U.S. Department of Education, April 4, 2011, Dear Colleague Letter, *available at* http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf; U.S. Department of Education, *Questions and Answers on Title IX and Sexual Violence*, April 29, 2014, *available at* http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf [hereinafter Title IX Q&A]; U.S. Department of Education, April 24, 2015, Dear Colleague Letter, *available at* http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201504-title-ix-coordinators.pdf.; U.S. Department of Education, Oct. 26, 2010, Dear Colleague Letter, *available at* www2.ed.gov/about/offices/ list/ocr/letters/colleague-201010.html.

[23] *See, e.g.*, Title IX Q&A, question J-4.

[24] *See* CHILD MALTREATMENT at 1, 74-75.

states have statutes that mandate the reporting of suspected child abuse and that criminalize the failure to report.[25] *See, e.g.*, TEXAS FAMILY CODE § 261.101.

The implementation of these reporting statutes led to training programs for school employees regarding the signs of child sex abuse and other forms of abuse. Thus, long before the risk of civil liability, the public schools were at the forefront of child protection efforts. Today, although most acts of child sex abuse are perpetrated by the child's family members and friends,[26] school staff predominate as the primary source of reports to law enforcement.[27]

In addition to these federal prevention efforts and recommendations, the states also have imposed their own sex-abuse prevention curricula requirements[28]

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[25] For a list of statutes, see U.S. Department of Health and Human Services, *Mandatory Reporters of Child Abuse and Neglect: Summary of State Laws, available at* www.childwelfare.gov/systemwide/laws_policies/ statutes/mandaall.pdf (last visited 9/19/15).

[26] Most adults who sexually abuse children are family members, parent's partners, and friends of family members. *See generally* U.S. Department of Health & Human Services, Children's Bureau, REPORT TO CONGRESS: FOURTH NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT (NIS-4), at 6-2, 6-5 (2010), *available at* www.acf.hhs.gov/sites/default/files/opre/nis4_report_congress_full_prdf_jan2010.pdf [hereinafter REPORT TO CONGRESS]; CHILD MALTREATMENT at 21-22, 46. For male juvenile victims under the age of 12, 80 percent of sexual assaults are likely to occur in a home. *See* U.S. Department of Justice, Bureau of Justice Statistics, *Sexual Assault of Young Children as Reported to Law Enforcement: Victim, Incident, and Offender Characteristics*, at 6 (July 2000), *available at* www.bjs.gov/content/pub/pdf/saycrle.pdf. Less than one percent of claims involved non-parent child-care providers and professionals. CHILD MALTREATMENT at 46.

[27] REPORT TO CONGRESS at 16, 7-4, 7-8, 9-2; CHILD MALTREATMENT at *xi* and 7.

[28] *See, e.g.*, CONN. GEN. STAT. ANN. § 17a-101q (requiring development of a state-wide sexual abuse and assault awareness and prevention program for use by local and regional boards of education that includes a component for teachers and component for students that includes information on "boundary violations and unwanted forms of touching and contact" and "ways offenders groom or desensitize victims"); ILL. REV. STAT. ch. 105, § 110/3 § 3 (requiring a comprehensive health education program that includes "age-appropriate sexual abuse and assault awareness and prevention education in grades pre-kindergarten through 12"); LA. REV.

and educator and student training standards.[29] The states also require rigorous background checks and criminal history screening for employees.[30] *See, e.g.,* TEX. EDUC. CODE § 22.081-087 (requiring national criminal history review of certified educators). The cost of pre-employment investigations includes paying law enforcement agencies and training human resources personnel to interpret the records. *See* TEX. GOV'T CODE § 411.088 (describing fees charged by the state for criminal history checks); American Bar Ass'n, CENTER ON CHILDREN AND THE LAW, EFFECTIVE SCREENING OF CHILD CARE AND YOUTH SERVICE WORKERS, at 29-32 (1994).

Collectively, these prevention efforts on both the local and federal level show that school districts have taken their responsibilities seriously and are devoting considerable resources to the prevention of child sex abuse and

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STAT. § 17:81 (requiring each public school to provide "age- and grade-appropriate classroom instruction to all students relative to child assault awareness and prevention"); TEX. EDUC. CODE § 38.0041 (requiring each school district to adopt a policy and parent handbook that addresses training and prevention of sexual abuse).

[29] Texas Education Agency, CHILD ABUSE PREVENTION 2014-2014 RESOURCES, available at http://tea.texas.gov/About_TEA/News_and_Multimedia/Correspondence/TAA_Letters/2014-15_Child_Sexual_Abuse_Prevention/ (last visited 9/22/15); VERMONT SEXUAL VIOLENCE PREVENTION TECHNICAL ASSISTANCE GUIDE (2010), *available a*t education.vermont.gov/documents/ educ_ health_ed_TARG.pdf; Virginia Department of Education, PREVENTION STRATEGIES AND PROGRAMS: CHILD ABUSE & NEGLECT, *available at* http://www.doe.virginia.gov/support/prevention/child_abuse/index.shtml (last visited 9/22/15); *see, e.g.*, M. McNeil, "South Carolina Training Aimed at Sex-Abuse Prevention: 10,000 school employees will learn to identify signs, respond in abuse cases," EDUC. WEEK (June 4, 2008).

[30] These criminal history requirements were in effect when Michael Alcoser was hired by South San Antonio ISD. At trial, the school district's former human resources director testified that Alcoser would not have been hired unless he passed a criminal background check and received a "clean certificate" from the State Board of Educator Certification. (*See* Trial Transcript, Vol. II, pp. 204-205.)

harassment. It is one thing for schools to budget for such activities and quite another to expect them to "budget" for an unforeseeable multi-million dollar damages claim based on an employee's secretive acts of sexual misconduct.

The district court's strict-liability approach is untenable because it subjects districts to liability for unlimited damages even when they have fulfilled their Title IX obligations and have "acted entirely reasonably." *Smith v. Metropolitan Sch. Dist.*, 128 F.3d 1014, 1029 (7th Cir. 1997). Large damages claims detract from and impair critical prevention efforts and ultimately will undermine Congress's policy objectives for Title IX.

IV. A strict liability standard would discourage mentoring and other legitimate educational practices which promote academic achievement and which serve as a protective factor against abuse.

One practical consequence of educator training programs has been to help educators identify certain behaviors, however well-meaning, that could give rise to an inference of impropriety. If liability under Title IX were automatic, as required under the district court's reading of *Gebser*, then management of this liability risk would encourage schools to attempt to *further* reduce the personal interactions between educators and students, if not eliminating them altogether, thus turning K-12 schools into austere compounds bereft of the warmth and mentoring that characterizes our best schools. Elimination of personal interactions or relationships between students and educators would be antithetical to long-standing

views on pedagogy and child development. It also ignores the fact that caring connections may serve as a protective factor against abuse.[31]

American history is replete with stories of individuals such as Maya Angelou and Steve Jobs whose lives were positively altered at a young age by thoughtful educators.[32] Congress itself has recognized the benefit of one-on-one mentoring relationships through education grants to schools and other community organizations that work with at-risk youth. *See, e.g.*, 20 U.S.C. § 7140; 20 U.S.C. § 8801(20); 69 FED. REG. 30794 (May 28, 2004). Numerous studies, including a 2013 study sponsored by the Bill and Melinda Gates Foundation, demonstrate that a sustained and supportive relationship with a caring adult is a key developmental

[31] Research has identified "good schools" and "supportive adults outside the family who serve as role models or mentors" as protective factors against abuse. U.S. Department of Health & Human Services, Admin. for Children and Families, RISK AND PROTECTIVE FACTORS FOR CHILD ABUSE AND NEGLECT, at 3 (Feb. 2004), *available at* https://www.childwelfare.gov/pubPDFs/riskprotectivefactors.pdf (visited 9/26/15); *see also* U.S. Department of Health & Human Services, Centers for Disease Control & Prevention, PREVENTING CHILD SEXUAL ABUSE WITHIN YOUTH-SERVING ORGANIZATIONS: GETTING STARTED ON POLICIES AND PROCEDURES, at 2 (2007), *available at* http://www.cdc.gov/violenceprevention/pdf/PreventingChildSexualAbuse-a.pdf (visited 9/15/15).

[32] "Maya Angelou didn't discover poetry until her mentor took her to the tiny library at her school and challenged her to read every book in the room. … Steve Jobs was an incorrigible troublemaker until his fourth grade teacher took him under her wing and convinced him to focus on math instead of mischief." *Remarks of President Barack Obama at a Reception Celebrating National Mentoring Month*, January 2010, U.S. Gov't Printing Office, Administration of Barack Obama, *available at* http://www.gpo.gov/fdsys/pkg/DCPD-201000039/pdf/DCPD-201000039.pdf (last visited 9/26/15).

experience in successful adolescent development and may reduce behavioral problems and produce higher academic achievement.[33]

Although many educational activities take place in groups, students respond to, and occasionally need, different teaching styles or approaches. One-on-one interactions and small groups are used to reach out to struggling students and to provide higher-learning opportunities for high-achieving students. An educator might work one-on-one with a speech-impaired or hearing-impaired student, a music student, or a student who missed several days of school due to illness. One-on-one interactions also occur during counseling meetings, whether personal, academic, or disciplinary. Educators need the flexibility to meet each student's individualized needs. Courts must be wary of liability standards that would impose rigorous controls on education and eliminate personalized teaching, counseling, and mentoring from the public schools. *See generally John R.*, 48 Cal.3d at 451, 769 P. 2d at 957 (strict liability would deter schools "from encouraging, or even authorizing, extracurricular and/or one-on-one contacts between teachers and students" and would negatively impact the educational process); *see also Smith*,

[33] *See generally* C. Herrera, et al, THE ROLE OF RISK: MENTORING EXPERIENCES AND OUTCOMES FOR YOUTH WITH VARYING RISK PROFILES (MDRC 2013), *available at* http://www.mdrc.org/sites/default/files/Role%20of%20Risk_Final-web%20PDF.pdf (last visited 9/26/15); California State Library, California Research Bureau, *Effectiveness of Mentor Programs: Review of the Literature from 1995 to 2000*, at 1-3, 9 (2004), *available at* www.library.ca.gov/crb/01/04/01-004.pdf; A. Ayalon, TEACHERS AS MENTORS: MODELS FOR PROMOTING ACHIEVEMENT WITH DISADVANTAGED AND UNDERREPRESENTED STUDENTS BY CREATING COMMUNITY at 2, 8 (Stylus Publications 2011).

128 F.3d at 1031 (when considering whether to impose strict liability, courts generally consider whether it will give employers an incentive to change their activity; "it should be apparent" that strict liability should not apply under Title IX "because no plausible alteration of the activity creating the liability (educating students) is possible"); *Mary KK v. Jack LL*, 611 N.Y.S.2d 347, 203 A.D. 840 (1994) (describing one-on-one interactions as an "integral part of the educational process").

Current law provides the proper balance between pedagogy and vigilant child protection. Erosion of the *Gebser* standard by allowing strict liability for sexually harassing conduct by school supervisors would adversely impact the educational process and would divert funds away from harassment prevention programs and other school programs. This erosion is not warranted by case law, the statute, or public policy and should be rejected.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted,

THOMPSON & HORTON LLP

By: /s/ Lisa A. Brown

Francisco M. Negrón Jr.
NATIONAL SCHOOL BOARDS ASSOCIATION
1680 Duke St.
Alexandria, Virginia 22314
(703) 838-6722
fnegron@nsba.org

Lisa A. Brown
Janet Little Horton
THOMPSON & HORTON LLP
Phoenix Tower
3200 Southwest Freeway, Suite 2000
Houston, Texas 77027
(713) 554-6741 – telephone
(713) 583-7934 - facsimile
lbrown@thompsonhorton.com
jhorton@thompsonhorton.com

ATTORNEYS FOR AMICI CURIAE NATIONAL SCHOOL BOARDS ASSOCIATION and the TEXAS ASSOCIATION OF SCHOOL BOARDS LEGAL ASSISTANCE FUND

CERTIFICATE OF SERVICE

I hereby certify that, on September 28, 2015, I electronically filed the foregoing brief by using the appellate CM/ECF system which will send notice of the filing to the registered CM/ECF users as listed below:

Brendan K. McBride
McBride Law Firm
425 Soledad St., Suite 620
San Antonio, Texas 78205
brendan.mcbride@att.net

Gregory G. Farre
Jonathan Y. Ellis
Lathan & Watkins LLP
555 Eleventh St., N.W., Suite 1000
Washington, D.C. 20004-1304
gregory.garre@lw.com
jonathan.ellis@lw.com

Meredith P. Walker
Walsh, Gallegos, Trevino,
Russo & Kyle P.C.
105 Decker Ct., Suite 600
Irving, Texas 75062-2799
mwalker@wabsa.com

Donald C. Wood
Walsh, Gallegos, Trevino,
Russo, & Kyle P.C.
One International Centre
100 N.E. Loop 410, Suite 900
San Antonio, Texas 78216-4704
cwood@wabsa.com

Additionally, I certify that I served a copy of this brief via certified mail, return receipt requested to the following attorney who is not a registered CM/ECF user:

Aizar J. Karm
820 S. Main St.
McAllen, Texas 78504

/s/ Lisa A. Brown
Lisa A. Brown

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/s/ Lisa A. Brown
Attorney for Amici Curiae

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